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Mixed migration by sea: different perspectives and the solutions

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WORLD MARITIME UNIVERSITY

Malmö, Sweden

MIXED MIGRATION BY SEA

Different perspectives to view the phenomenon, relief measures and
proposed solutions

By

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South Africa

A dissertation submitted to the World Maritime University in partial
Fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

MARITIME LAW AND POLICY

2016

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me. The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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Author

Ms. Boitumelo Mano

ABSTRACT

Title of the dissertation: **Mixed Migration by Sea: Different Perspectives and the solutions**

Degree: **MSc**

The dissertation is a study of the phenomenon of mixed migration by sea, the different instruments which govern the phenomenon, the enforceability of these instruments, the implications which the phenomenon has and the solutions to migration by sea.

The history of migration is briefly looked at as well as the history of the legal instruments and salient international organizations which were created at the time. The definition of the different terms used to refer to migration by sea are examined, taking into consideration the different perspectives which migration by sea can be viewed from. The different applicable legal instruments are discussed and analysed and their enforceability investigated.

The implications which migration by sea has were explored. The connectivity of implications from one perspective of migration by sea to others is established. The different relief measures and proposed solutions to migration by sea are ascertained.

Experts from different international organisations were interviewed regarding their organisation's involvement with migration by sea. The outcome of the interviews were collated and evaluated to see the execution of roles and application of international law by international organisations.

The findings chapter examines the current state of migration by sea in comparison to historical events, discusses the compliance of some relief measures to international law and the viability of proposed solutions. Numerous recommendations are made regarding migration by sea and the need for future investigation on the subject.

KEYWORDS: Mixed migration by sea, Perspectives, International organisations, Legal instruments, Enforceability, Implications, Solutions

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LIST OF ABBREVIATIONS

DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
EU	European Union
EUNAVFOR MED	European Union Naval Force operation in the southern central Mediterranean
EUROPOL	European Police Office
ICS	International Chamber of Shipping
ILO	International Labour Organization
IMO	International Maritime Organization
Interpol	International Criminal Police Organization
IOM	International Organization for Migration
Migrant Smuggling Protocol	Protocol against the Smuggling of Migrants by Land, Air and Sea (2002)
MSC	Maritime Safety Committee
OHCHR	Office of the United Nations High Commissioner for Human Rights
PICMME	Provisional Intergovernmental Committee for the Movement of Migrants from Europe
Refugee Convention	Convention relating to the Status of Refugees (1951)
SAR Convention	International Convention on Maritime Search and Rescue
SOLAS	International Convention for the Safety of Life at Sea
SRSG	Special Representative of the Secretary General
Trafficking Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
UNCLOS	United Nations Convention on the law of the Sea
UNCTOC/Organised Crime Convention	United Nation Convention against Transnational Organised Crime (2000)
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UNSMIL	United Nations Support Mission in Libya

CHAPTER I

1. Introduction

1.1 Aims and objectives

The aims and objectives of this research were to comprehensively discuss the phenomenon of unsafe mixed migration by sea by breaking down the concept so as to ascertain and explain each component of the definition.

Once the definition of migration by sea was outlined the concept was discussed from different perspectives which are migration by sea as an illegal business, migration by sea as a humanitarian issue and the maritime safety and security aspects of migration by sea in order to outline the effect and extent that different parties are impacted by this trend. The notion of migration by sea being a multifaceted phenomenon was discussed by Mallia in an article where she outlined the different interests which must be balanced when dealing with the phenomenon. She mentioned the human rights interests and state security interests which should be balanced (Mallia, 2013).

The different legal instruments governing the phenomenon of migration by sea were discussed and the interpretation and enforceability thereof critically analysed. The implications of migration by sea were examined and some of the solutions which have been implemented and which are being proposed were outlined.

The objective of the research paper was to analyse the crisis in one paper so as to create a holistic view of the phenomenon, which may be significant for people wishing

to understand what is meant by the concept unsafe mixed migration by sea and how the trend affects more than just the countries which are destination countries for the migrants.

The implications sought were those highlighting the importance that the international community come together, in cooperation and coordination, to reach a solution as neither one state nor international organisations in isolation can resolve the crisis of migration by sea.

1.2 Context of the research work

The context of the research work will be academic. It will be elaborating some of the work reported on migration by sea by experts, international organisations and other interested parties in light of the current migration by sea trends which are experienced in the Mediterranean and Aegean seas; resulting in vast influxes of migrants in the European Union. This matter was considered as a hot topic in the International Maritime Organization which led to a high level meeting being held to discuss the phenomenon and a way to control and resolve it. This research builds on such work to outline developments which have been reached thus far and also aspects which still remain as gaps.

The work was engaged from a substantive rules point of view on matters which govern the different perspectives of migration by sea and will not be looking at procedural aspects which are stipulated in the relevant legal instruments. As such only the rules will be discussed and not the stipulated procedures to implementing these rules.

1.3 Background to the research work

The research was on migration by sea. It defines unsafe mixed migration by sea and illegal/irregular migration by sea which are the terms used to refer to the phenomenon

of migration by sea. The choice of term depends frequently on the aspect which migration by sea is viewed. As the work aimed to comprehensively cover the phenomenon both terms were explained, however the term 'migration by sea' was used in the research as an indication that the work aimed at addressing more than one aspect of migration by sea.

As migration is a vast concept, the research was narrowed into discussions of different perspectives of migration by sea and some of the solution to the phenomenon. As the crisis is still vivid in most European countries, it became vital to discuss some solutions to migration by sea, which, is what is sought by countries currently feeling the effects most.

1.4 Hypothesis and research questions

The research hypothesis for this paper was to test what unsafe mixed migration by sea is, what some of the different perspectives from which to view the phenomenon are, what implications migration by sea has, what relief measures are put in place and what solutions are being proposed.

Answers were sought for the research question of what is mixed migration by sea so as to lay a definitional foundation for the reader and also to clarify that migration is a term by itself and that there are modes of transportation to use when migrating. However, this research was concentrated on the sea used a channel of migrating.

Answers for the research question of what are some of the different perspectives to view migration were sought so as to place the reader in a situation where the complexity and the effects of migration by sea can be clarified, to understand that it is not a single dimensional phenomenon but rather has many considerable sides.

Research questions on the implications of migration by sea are closely tied to the different perspectives there are to viewing the phenomenon. Answers here were sought

to clarify that in each perspective there are implications which tie on to the other perspectives making it a complex situation.

Answers to the research question on the relief measures put in place and the solutions suggested aimed to ascertain some of the different solutions which are applied in the 'field' and those which are on the drawing board. Not only were these answers merely stated but there is commentary on the compatibility of the solution with applicable legal instruments and the extent to which the solutions consider all perspectives and therefore all stakeholders; as a solution which benefits one at the cost of severe consequences to another party will not be a viable solution in the international context.

1.5 Scope, exclusions and conventions of the work

The scope of the study did not extend to a consideration of procedural aspects of regulating migration by sea, as mentioned above, due to the direction which was aimed at in the research design. The research was designed to ascertain substantive rules and not how these rules are to be applied.

As discussed in the literature review to follow in the next chapter, most work in this field has been written concentrating on the substantive rules, rights and obligations enshrined in the legal instruments governing migration by sea with some few writing of the procedural aspects. In this instant attention is directed at the substantive aspect only. Though most of the literature follows a similar direction, I have decided, in light of the crisis which is currently being faced concerning migration by sea in Europe, to write an analysis of the substantive rules to identify if they are adequate to deal with the crisis and to ascertain their interpretation and enforceability, on a journey to finding some solutions which are applied and being proposed. To speak of a solution in a matter as complex and delicate as this, one has to know the substantive rules, obligations and rights which are applicable as a solution cannot be one which is in contravention or in

violation of the said and also keeping in mind that a solution could very well be a re-evaluation of these very rules, obligations and rights.

Due to the nature of the research, the academic convention of the author making reference to herself in the third person would make for intricate writing and be a difficult read. For this reason, after research on the matter I have made a decision that a first person narrative voice would be the best convention to apply.

The interviews were conducted in the universal maritime language of English and as such no translation of the interview transcripts was necessary. The original transcripts are available should there be a need for their submission, they will, however, subsequently be destroyed as per the university's Ethics Committee's requirements.

1.6 Outline of the dissertation

In the second chapter the research starts with stating a review of some of the literature which is available relating to the topic of migration by sea.

The chapter which follows explains in what context migration will be addressed in the rest of the work. With that view, a brief overview of migration over the years is given and the work proceeds to explain the different terms used to refer to migration by sea.

In the three chapters which follow, the work looks at migration by sea in depth by ascertaining and discussing some of the different perspectives from which migration by sea can be viewed, starting with migration as an illegal business in chapter four, followed by the humanitarian perspective in chapter five and finally the maritime safety and security perspective in chapter six. The respective relevant legal instruments which govern these different perspectives were discussed and analysed. Finally the enforceability of the legal instruments was discussed, analysed and critiqued.

In chapter seven the different implications which migration by sea has were discussed to outline how, even though in the research the phenomenon was viewed from different perspectives, in reality one perspective has an implication on the other and so forth. In the same chapter, some of the solutions which are being implemented and those which are being proposed were discussed. The final chapter completes the research by outlining the findings and recommendations.

1.7 Methodology

The chosen research methodology aimed to reveal specific facts which relate to migration by sea. Once the facts were uncovered the methods applied continued on a journey to make the facts discovered understandable.

Understanding of the specific facts will lead to an ability to comprehensively view migration by sea from different perspectives and to evaluate the available legal instruments which currently govern migration by sea and how these instruments are enforced by the international community. This will lead to the discovery of any interpretation discrepancies which may exist.

The context of the research methods applied were mainly substantive and therefore were aimed at the rules governing the chosen aspects of migration by sea and not the written procedure to applying these rules. The academic nature of the research was about developing or building on knowledge of the topic of migration by sea and also suggests how the crisis could be resolved by discussing initiatives which the international community is developing or operating.

The research has no organisational context as it was not undertaken on behalf of my employment management and for this reason there was no influence which had to be considered on the side of my sponsor or the management which I fall under. As such

there were no ethical considerations or approval which was required beyond that of the university's Research Ethics Committee.

Access to the resources required for the research work in the form of books and other written work was highly practicable and readily available. The university's library collection was available and in the event that a specific book was required which is not part of the collection then services were put in place for students to request such a book. The library's online services were also of a good quality as some of the books were eBooks which made access easy from any location. Access to people for interviews was more restricted as all the people targeted for interviews were not located in the same country as the university. Going to all the respective countries, not only required a lot of funds, but it required observance of visa requirements; which required processing time. As there had to be consideration for the schedules of the target group, the allocated time for the completion of the research work was not sufficient; taking into consideration that the responses also required analysis. For these reasons email and skype calls were the applied means to gain access.

With the mentioned factors in mind, initial contact in the form of emails were sent timeously allowing extra time for communication as the situation was not the same as an in person interview which only requires from the interviewee time which spans the length of the interview.

Structured interviews and use of already available data were the chosen methods of data collection. The collection and analysis of data which is already available such as relevant international conventions, books and academic articles written on the conventions and reports compiled by organisations was the ideal method as it answered best what is migration by sea and discussed the legal instruments in the form of conventions which govern migration and other related aspects such as international refugee laws. News articles and clippings offered a view of the enforceability of the instruments as experienced by relevant parties. The interviews offered updated work

towards a solution by interested parties and also assisted as a check point to either confirm or refute particularly what is written in news articles.

The interview questions were structured based on the design of the research work aiming to enquire from relevant personnel in different salient international organisations the position of the respective organisations, the legal instruments which they apply to the migration by sea situation, their view of the enforceability of the relevant legal instruments and their work towards a viable solution. Interviews, which are interactions with people, required ethical approval which was obtained prior to contact with the targeted people. The answers to the interviews gave a view of the work of different organisations which deal with migration and as the targeted people work in organisations which deal with the mentioned different perspectives of migration by sea, the answers give a comprehensive view of migration and how it is being governed.

The data which was collected from the interviews was processed initially in a table form to compare the responses of the different interviewees for ease of identifying any inconsistencies. This was not the same method used in the actual dissertation. In the dissertation it was incorporated in the analysis of findings. All the data which was collected during the interviews was not transcribed, particularly if the response was the same as what had already been covered by available data. Independent judges were unfortunately not used in the data processing part of the research.

CHAPTER II

2 Literature review

The following chapter will be outlining the background literature review which was used in the research work. As this serves as literature review, no analysis of the content will be made. Such analysis will be made in chapters which follow.

The movement of people in migration patterns dates many decades back, however, a more modern approach was followed in this research and for this reason the literature will not be dating back to the origins of migration but rather the origins of the regulation of migration on the international level.

2.1 Literature on the United Nations Convention against Transnational Organised Crime and its Protocols

In Brolan's work of 2002 on the trade of human smuggling and the then fairly new Protocol Against the Smuggling of Migrants by Land, Air and Sea (2002) (Smuggling Protocol) a comment is made that the protocol amounts to "a list of good intentions" where implementation thereof will depend on the will of signatory states. Brolan further states that the principle of non-refoulement, which is incorporated in the protocol as well as in numerous other international instruments, has *jus cogens* status and for this reason its characteristics are those of *jus cogens* norms which are "so compelling, so fundamental, they comprise the highest rules of international law" (Brolan, 2002).

In 2003 Pacurar wrote an article on human smuggling focusing on the criminal aspects of smuggling. The work starts with identifying that prior to the protocol governing migrant smuggling, the act of smuggling was not considered as a single crime but was rather viewed as separate acts which were perpetrated by numbers of people over more than just one territory. The prosecution for smuggling as an act in itself was not possible but was rather a prosecution of those acts which we today consider as acts amounting to or related to smuggling such as document counterfeiting. It is only after smuggling was identified as one of the transnational organised crimes that the United Nations Convention against Organised Crime provided a legal qualification for smuggling that it became possible to prosecute perpetrators for the offence of smuggling of human beings. Pacurar's work further stated that though the migrants could not be held criminally liable for the act of being smuggled, they nonetheless can be held criminally liable for the acts of "procuring or possessing a fraudulent document and attempting, participating as an accomplice, or organising or directing others to the smuggling operation" (Pacurar, 2003).

In 2010 Mallia wrote work which highlighted that the migrants being smuggled by sea comprised of different kinds of migrants, those who were fleeing persecution from their home countries, those who wished to circumvent border controls mostly in search of better economic opportunities (the so called economic migrants) and the potential of terrorists using this mode of transportation to their advantage in order to gain illegal entry to countries of destination, though the common factor amongst the different migrants was that they violated a state's laws by evading control authorities and evading detection at borders in order to enter into the territory of a state in a covert way. Mallia reports how the possibility of terrorists infiltrating states has led to a trend of stricter migration policies and control mechanisms in order to combat terrorism.

Mallia writes how migrant smuggling is considered as the fastest growing transnational crime at the time with growing numbers of affected countries and more complex routes being utilised. Developments in technology were held to have benefits for the business

of smuggling an example being with the creation of fraudulent documentation (Mallia, 2010).

In a more recent academic work on the protocol governing migrant smuggling, Ali writes an analysis of the protocol itself. The 2014 work breaks down the protocol, identifies some gaps and suggests solutions. The first of these gaps identifies issues with the criterion of the structured group which requires that organisations involved in smuggling must consist of three or more persons. Interpretative notes to Article 2(a) of the United Nations Convention on Transnational Organised Crime (UNTOC) were identified to provide a saving clause as it stipulates that “inclusion of a specific number of persons within the concept would not prejudice the rights of States pursuant to Article 34 (3) of the Convention. Such party States have the right to define the concept of an organised criminal group as they please in their criminal law instruments, as long as the outcome aimed at will assist the state in the combat and prevention of migrant smuggling within their territory.

Ali's work further stipulates that even with the mentioned saving clause in Article 2, the effects do not extend to the Smuggling Protocol's provision on cooperation, which means that if the definitional elements are not met then the state cannot benefit from the cooperation of other states as the precondition would not be met. Another identified gap is a situation where the criterion of a structured group is met, however, the border-crossing stage is only carried out by one or two persons within the organised criminal group which means that the state cannot request cooperation measures from other member states as the activities are carried out by a number of persons less than the required criterion. This affects the combat of migrant smuggling as “A State party needs the benefits of the Protocol, particularly those relating to cooperation between States in the field of information and identification, in order to be able to identify an organised criminal group or the remaining members of such a group. In the absence of such cooperation, combating migrant smuggling will generally only target the low-level members of the operation”.

Ali's work in a conclusion stipulates that "The legal features of smuggling organisations have not been considered by the Migrant Smuggling Protocol; the Protocol simply does not include a provision that defines the concept. Nonetheless, a number of these features can be ascertained through the combined reading of Article 4 of the Protocol and Article 2(a) of UNCTOC." Ali suggests that a solution to the gaps presented by the Smuggling Protocol would be a new law (Ali, 2014).

2.2 Literature on the maritime safety and security aspect of migration by sea and refugee rights

The following literature review will reflect on migration by sea from a maritime safety and security perspective with elements of how the application of relevant legal instruments corresponds to refugee rights as afforded by international legal instruments.

In 2007 Kelley wrote work on international refugee protection challenges and opportunities. In this work Kelley analyses whether five years after states reaffirmed their commitment to the international protection regime in 2001 and after they endorsed the Agenda for Protection in 2002 a difference has been made to refugees. In so doing the work highlights whether words were met by actions to ensure access to asylum and sharing of responsibility in this regard.

Kelley's work reports a positive increase in the number of State parties to the Refugee Convention and the 1967 Protocol and an increased recognition of the need to protect those who may not meet the criterion stipulated in the Refugee Convention but are in need of protection for some or other reason as they stand the chance of sustaining serious harm should they be returned to their home countries. The work further highlights that not all was positive as there "continues to be persistent attempts by both industrialised and developing States to limit their protection responsibilities. While the

manifestations of this are varied, they are often motivated by similar concerns. These include economic pressures, security considerations, migration management objectives, racial prejudices, and a reluctance to admit those who are perceived to be unable to integrate.”

What was seen were anti-refugee sentiments which were fuelled by environmental damage which followed the influx of large refugee communities and costs of hosting refugees which caused tension between local communities and refugees. The tension was further fuelled by situations where the conflict which was a push factor for the refugees followed them to the state in which they seek protection; which results in a compromise to the safety of the local communities. Crimes such as trafficking of drugs and humans are seen. Also seen are ill equipped and managed refugee camps. As a result many countries were reported to be wary of accepting refugees if the prospect of their repatriation is doubtful leading to trends of rejections at borders and forced removals which were violations of the principle of non-refoulement (in 2002 “nearly 10,000 refugees were forced to repatriate from Rwanda into unstable areas of the Democratic Republic of the Congo (DRC), while rebel forces in the DRC were reported to be forcing Rwandan refugees and asylum seekers to return to Rwanda”).

Hosting refugees was reported to have benefits too as the refugees are able to contribute skills to their host countries, international humanitarian agencies frequently invest heavily in the construction, rehabilitation and maintenance of infrastructure needed to deliver assistance to the refugees and there is an increased demand in the economy and local products and businesses can flourish from this.

Kelley’s work identified that since developing nations cannot provide for the basic needs of refugees, at least not without some assistance from wealthier states, the situation of refugees will not improve and this will pressure refugees to move further afield to try, even risking their lives in so doing (Kelley, 2007).

Juras Franckx and Sohn's article in 2014 identified that the work done over the past century to codify the law of the sea did not just concentrate on the freedoms granted in the sea or maritime delimitations but also underlines, repeatedly, that:

“The duty to rescue persons in distress at sea has been universally recognized from time immemorial. It is an age-old practice based on moral considerations which predate laws and which no one ever saw fit to challenge. There are no records anywhere of shipmasters prosecuted for failing to rescue.”

However, the intention of lawmakers was directed at typical shipwrecks. This was an easier situation to regulate as the rescued sailors could expect to be repatriated from the rescue vessel's first port of call. However the situation is more complex when asylum-seekers are involved. Disembarkation issues arose as some states refused disembarkation of the asylum-seekers as they felt they were under no obligation to render assistance. This resulted in the rescued persons being the responsibility of the flag state and a trend was seen of captains who chose to bypass crafts in distress (in the South China Sea) due to the fact that rescue operations were seen to result in spending more time and money than what was affordable.

To address the problem the United Nations High Commissioner for Refugees (UNHCR) embarked on vast information campaigns aimed at assuring captains that the price of saving lives is small since safe and quick disembarkation was facilitated and it was also possible to recover some costs such as those incurred for care rendered. A guarantee for resettlement was reported to frequently still be given by the flag state, however this is not always possible, particularly if the vessel is registered under a flag of convenience or the flag state cannot be expected to offer such guarantee in which case the UNHCR will contact countries which have contributed to a pool of resettlement places to obtain the necessary guarantee. However there has been an alarming decrease in the number of countries which contribute to this pool (Juras, 2014).

In 2015 Kirchner, Geler-Noch and Frese wrote about the Guidelines on the Treatment of Persons Rescued at Sea which were created by the International Maritime Organisation (IMO). IMO's guidelines refer to maritime documents such as United Nations Convention on the Law of the Sea (UNCLOS), the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR) and minimal reference is made to the Refugee Convention of 1951 which leads to Kirchner et.al stating that:

“In this context, the differing obligations of the flag state, the coastal state, and the ship's master can lead to situations in which the protection awarded to refugees is less than complete, as happened in the 2001 case of the MV Tampa. The IMO Guidelines seek to prevent such a scenario by requiring flag and coastal states to "have effective arrangements in place for timely assistance to shipmasters in relieving them of persons recovered by ships at sea.” However, these rules are often unenforceable by individual claimants - unlike the European Convention on Human Rights (ECHR).”

Kirchner et.al's research refers to the *Hirsi Jamaa* (*Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R. (2012)) as the “European Court of Human Rights' long overdue reaction to Italy's practice of refoulement against refugees arriving in boats”. In this judgement the court held that Italy was in violation of international human rights in their actions of rejecting African migrants and asylum-seekers on the high seas by returning them to their countries of origin where they faced persecution. Reference is also made to the judgement of the Grand Chamber in *M.S.S.9* which along with the *Hirsi Jamaa* case represents landmark decisions which fight asylum proceedings which are in violation of international human rights norms (Kirchner, et.al., 2015).

The literature review has offered a commentary on conventions which govern migration by sea from a humanitarian and maritime safety and security perspective and also offers some views on the business of migrant smuggling, highlighting reported

developments and the enforceability and application of these legal instruments. The aim was to highlight analysis of the instruments at different time intervals to be able to make commentary in the findings of this research of whether the situation has been improved or still remains the same.

This chapter stated the literature which was reviewed as a basis to the research. It is followed by a chapter which will give a brief background to migration and give definitions for the different terms used to refer to the phenomenon of migration by sea.

CHAPTER III

3. What is migration by sea?

Migration is the movement of people from one country or place to another. It is also the seasonal movement of animals from one area to another. For purposes of this paper it is the movement of people which will be discussed.

Migration by sea is the movement from one country to another using the sea as a channel of transportation. Worth mention is the fact that migration also occurs through the channels of land and air. The focus of this chapter will be on giving a background and definition of migration by sea.

3.1 Migration over the years

Migration is not a new concept in the international realm, nor is it a new phenomenon. In the 1980s, for example, there was mass emigration of Vietnamese people and in the 1990s there were large scale departures of people from countries like Haiti, Albania and Cuba (UNHCR, 2002).

The legal instruments which regulate migration by sea date back to after World War II, when fleeing the effects of war, people took to sea, land or air seeking safe refuge in other countries which were not so badly affected by war. To assist the displaced migrants and regulate future migration, the international community decided to get together to create organisations to assist the migrants at the time and draft legislation

that not only envisaged the right for people to migrate in search of places of safety when fleeing persecution, but also provided for their right to international protection.

One of the organisations which was developed by the international community was the United Nations High Commissioner for Refugees (UNHCR) which was created in 1950 to help the millions of Europeans who had lost their homes or ran away due to World War II ("UNHCR: The UN Refugee Agency," n.d.)

The International Organisation for Migration (IOM), which was then known as the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME) was created in 1951 due to the post World War II chaotic situation and the displaced migrants who needed assistance. It was mandated to render assistance for the resettlement of approximately 11 million migrants in the 1950s ("International Organization for Migration," n.d.).

The numbers of people who embarked on those journeys are reported to be fewer in comparison to the numbers we see today (Edwards, 2016). In 2014 the IOM reported a total of 207,000 people who crossed the Mediterranean Sea. This number increased to over one million migrant arrivals in the Mediterranean in 2015. Already 2016 has seen an arrival of 278,372 migrants by 2nd September ("IMO- Unsafe Mixed Migration by Sea," n.d.).

The numbers of people who either lose their lives or go missing in the process of migrating are equally catastrophically large and on the increase. In the Mediterranean alone in 2014 the reported number was 3,279. In 2015 this number was recorded at 3,770 dead or missing people (this number includes children) and in 2016 the recorded number stood at 3,198 on 7th September ("International Organization for Migration Missing Migrants Project," n.d.).

The numbers mentioned above are only an indication of the situation in the Mediterranean, which is the region with the highest reported cases ("International Organization for Migration Missing Migrants Project," n.d.). When looking at the situation worldwide the total number of reported deaths or missing migrants stood at 5,014 in 2014, 5,426 in 2015 and already the numbers stood at 4,310 on 7th September 2016 ("International Organization for Migration Missing Migrants Project," n.d.).

The vast numbers along with the stretched search and rescue system, strained national resources and unprepared facilities are the main reasons why the movement of migration by sea has caught the international community's attention and has got itself the title of being one of the current hot topics internationally ("UN Agencies Meet to Address Unsafe Mixed Migration by Sea," 2015).

The implications arising from migration by sea stretch far beyond lost lives. National borders are compromised, search and rescue systems are stretched beyond capacity, the shipping industry is affected, the criminal syndicates involved in smuggling are growing stronger, states raise concerns over lack of adequate facilities to deal with the vast numbers of people coming in and humanitarian rights are also compromised in the process.

3.2 Unsafe mixed migration by sea

Unsafe mixed migration by sea is one of the terms used to refer to migration by sea. To fully understand the concept one needs to break it down to develop a comprehensive appreciation of its meaning.

The word unsafe in the term refers to the fact that most migrant vessels are substandard boats, wooden boats, rubber boats, etc., which are not a match for the harsh sea. When weather conditions are bad the boats often give in to the pressure and capsize leaving the migrants to fend for their lives in the water. Most times the migrants

do not even have protective gear on. The word also refers to the fact that most of these boats are often overcrowded to a point that in some situations it leads to asphyxiation.

The word mixed refers to the fact that the migrants on board these boats are mixed, women, children and men. The reasons for migration also vary. Some are fleeing persecution in their countries of origin, some are fleeing instability caused by war, and some are seeking political and economic security and fleeing unemployment problems. These are known as push factors; factors pushing people out of their countries of origin in search of a better life elsewhere.

Most importantly the international status of these migrants is often mixed. Some of them are refugees and as such are entitled to international protection as stipulated in international humanitarian and human rights legislation which will be discussed below. Others are asylum seekers whose applications still need to be processed in order to give them an international status and there are those who some authors consider to be taking advantage of this mode of transportation to gain illegal entry into countries of destination. The latter kind of migrant has the sole aim of avoiding border control measures (Mallia, 2013).

It should also be kept in mind that some of the persons on board could actually be trafficked persons and as trafficked persons they are regulated by different legislation which grants them specific rights and confers specific obligations on signatory states to that legislation. These legislations along with the legislation governing migrant smuggling will be discussed in depth below.

The combination of the circumstances, conditions and statuses of the migrants and that they come together to embark on this dangerous journey makes up the term unsafe mixed migration by sea.

3.3 Irregular/ Illegal migration by sea

Irregular/ illegal migration by sea is another term used to refer to migration by sea. Whether an author or an organisation or state uses the term unsafe mixed migration by sea or irregular migration by sea or illegal migration by sea seems to be dependent on which aspect of migration by sea is being observed as there are many aspects to migration by sea.

The word irregular refers to the fact that the mode of transportation is irregular. Though passenger vessels are a common mode of transportation, the boats used by the migrant smugglers are in no way equivalent to passenger vessels. They risk the lives of the migrants and sometimes the migrants (or their “carriers”) resort to a strategy called ‘sink and seek help’, which means that when they see another vessel approaching they sink their boat so that they may be rescued, knowing that their chances are far better in the rescuing vessel as opposed to their boat. These journeys are irregular and unorthodox.

The word illegal refers to the fact that the smuggling of migrants is an illegal activity according to the Protocol against the Smuggling of Migrants by Land, Sea and Air, which supplements the United Nations Convention against Transnational Organized Crime.

Also it refers to the fact that the migrants, except for the refugees who are protected by international law, may in certain circumstances be embarking on these journeys illegally. Though international humanitarian law provides for the right to international protection in certain circumstances, entering another state without documentation is illegal (“United Nations Office on Drugs and Crime,” n.d.).

As sometimes witnessed, some migrants arrive without documentation, which is problematic as states have the right to protect their borders, especially against terrorism and it becomes a long procedure to process migrants without documentation (“UN

Agencies Meet to Address Unsafe Mixed Migration by Sea," 2015). This clash between the humanitarian right to international protection and the right of states to protect their borders can have adverse consequences to observance of the human rights of the migrants.

This chapter outlined definitions to the different terms used to refer to migration by sea and gave a background to the context in which migration by sea will be referred to in the rest of the work.

CHAPTER IV

4. Illegal business perspective

For years people have been making money from the exploitation of others and the exploitation of systems. Human trafficking and migrant smuggling are just some of the forms of these activities (*Human Trafficking an Overview*, 2008). This following chapter will discuss the legal instrument governing migrant smuggling and human trafficking, more specifically on the aspects of the instrument which make the activities a crime, and the enforceability of this instrument.

4.1 Legal Instrument

The United Nations Convention against Transnational Organised Crime 2000 (hereinafter called The Organised Crime Convention) was opened for signature December 2000 in Palermo, Italy. It is supplemented by three protocols namely: Protocol against the Smuggling of Migrants by Land, Sea and Air, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and Protocol against Illicit Manufacturing of and trafficking in Firearms, Their Parts and Components and Ammunition. Collectively the Protocols are known as the Palermo Protocols ("United Nations Office on Drugs and Crime," n.d.).

The Organised Crime Convention is a direct result of industrialised states' worry that the activities of trafficking and migrant smuggling disturb systems put in place for controlled migration and that these acts aid the bypassing or avoidance of national immigration restrictions put in place (Gallagher, 2001).

The provisions of the Organised Crime Convention apply *mutatis mutandis* to the three Protocols and since it is the main instrument, states cannot ratify any of the Protocols without first ratifying the Organised Crime Convention ("United Nations Office on Drugs and Crime," n.d.).

The purpose of the Organised Crime Convention is to promote cooperation among states in order to combat and prevent transnational crimes more effectively (Art. 1).

According to article 3, the Organised Crime Convention applies to crimes and actions as stipulated in its contents which are transnational in nature and which involve an organised criminal group.

4.2 Enforceability of the legal instrument

The Organised Crime Convention seeks to eradicate "safe havens" for hiding profits or evidence of crimes committed which fall within the ambit of its scope (Gallagher, 2001).

A question arises whether the Organised Crime Convention can be considered to be effective in eradicating "safe havens" when looking at a situation like in Libya where the state is still struggling to stabilize its post conflict democratic political structure causing many problems with law enforcement ("United Nations Support Mission in Libya," n.d.).

The Special Representative of the Secretary General (SRSG) who is leading the United Nations Support Mission in Libya (UNSMIL) mentions in his latest report (statement of 2 March 2016) to the United Nations Security Council that Libya currently has no "effective state institutions" ("United Nations Support Mission in Libya," n.d.), making it the perfect "safe haven" for criminal organisations as seen with the migrant boats coming off the coast of Libya ("Adopting Resolution 2240 (2015), Security Council Authorizes Member States to Intercept Vessels off Libyan Coast Suspected of Migrant Smuggling," 2015).

The matter is so pressing that the Security Council in Resolution 2240 authorised states to intercept vessels coming off the coast of Libya suspected of migrant smuggling, so as to attempt to regulate the flow of migrants from Libya. This authority was given for a period of one year and was given subject to observance of international principles and laws such as the principle of sovereignty ("Adopting Resolution 2240 (2015), Security Council Authorizes Member States to Intercept Vessels off Libyan Coast Suspected of Migrant Smuggling," 2015).

The Organised Crime Convention stipulates in Art. 4(2) that:

“Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”

Due to the principle of sovereignty observed, not only in the Resolution, but also in the Organised Crime Convention itself state parties do not have the authority to exercise any jurisdiction in the territory of another state. As such the Convention does not seem to actually have any power to eradicate “safe havens” in countries experiencing civil instability. In which case consent from such a country is needed for the Convention to be applied in order to achieve its aim of eradicating “safe havens”.

Part of the prerequisites to the application of the Organised Crime Convention is that the transnational activities should involve an organised criminal group. The term “organised criminal group” is defined in Art. 2(a) as:

“(a) “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance

with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;”

A question arises whether a fisherman who solely decides, either persuaded by the financial gain or business, to take advantage of the opportunity, having a boat and ‘customers’, whether his/her acts would fall within the ambit of the Convention. It would seem that the fisherman would first have to join forces with at least two other people, have some sort of structure which exists for a period of time before they could be considered to fall within the scope of this Convention. However as identified by Ali’s work which is mentioned in the literature review a saving clause is found in Article 2(a) which allows for a state to not be bound by explicit mention of numbers in pursuance of the application of Article 34(3) of the Organised Crime Convention (Ali, 2014).

This saving clause, as identified, however does not remedy the gap when it comes to states requesting cooperation as the prerequisite of three or more persons has to be met (Ali, 2014).

4.3 Conclusion

The Organised Crime Convention seems to contain minimal stipulations which are hard obligations (Gallagher, 2001). It remains up to Member States to criminalise and sanction (Art. 6(1)) the activities envisaged in its contents, which might give the impression that it may be a dog without teeth.

The *Global report on trafficking in persons 2014* reported that though more than 90 percent of countries had legislation criminalizing human trafficking; the national legislation does not always comply with the Organised Crime Convention, more specifically the Protocol supplementing this Convention which governs human trafficking. The result of this is very low conviction rates globally with approximately 40 percent of countries reporting less than 10 convictions per year in the period 2010-2012

while 15 percent of 128 countries covered in the report had not recorded a single conviction (UNODC, 2014).

The fact that transnational crimes affect a number of states is an incentive to states to ratify the Organised Crime Convention and ensure that the criminalisation and sanctions in their national law fit the offence. However, as some sources identify, there are still gaps at the national level in the application of this and other related international legislations in terms of prosecution of perpetrators, conviction of perpetrators and appropriate sentences being imposed for contravention (*Human Trafficking an Overview*, 2008).

The Convention serves a very important role in terms of information sharing, training and cross border cooperation which is vital for the combat and prevention of crimes of this nature. It is not possible for one state to eradicate these activities without the cooperation of others. For this purpose the Convention took a big positive step towards eliminating the circumstances which warranted its very existence.

There is still some work to be done to get all states on par with the aims of the Convention and in light of the growing phenomenon of migrant smuggling more gaps are being realised, gaps and interpretation issues which could not have been comprehensively realised at the time of its drafting (Filippo, 2013).

CHAPTER V

5 Humanitarian perspective

When we talk about the humanitarian perspective of migration by sea we are referring mainly to the migrants and their human rights as conveyed by international humanitarian law and human rights law. It is an angle which focuses on how the international humanitarian law governs the phenomenon, not only its governance over rights, but also its governance over obligations which Member States have under the said law.

There are a number of international humanitarian legal instruments which are put in place to deal with migration by sea. The aim of this section is to deal with the salient points of the legal instruments. This in no way implies that the other available and applicable legal instruments are subordinate to the ones which will be discussed in this chapter and as such they should also be equally observed by states and agencies with an interest in migration by sea.

5.1 Legal instruments

Trafficking Protocol

The origins of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children which supplements the Convention against Transnational Organized Crime 2000, (hereinafter called the Trafficking Protocol) can be traced back to 1997 when Argentina was concerned about the issue of trafficking in

minors and the slow development in the negotiation of a Protocol to the Convention on Rights of the Child which at the time was much needed (Gallagher, 2001).

The aim of the Trafficking Protocol, according to Article 2, is to combat and prevent the trafficking of persons, particularly the trafficking of women and children, to protect and help the victims of trafficking and to encourage and aid state parties in cooperating towards the end of combating and preventing trafficking.

The definition of trafficking as stipulated in the Trafficking protocol is in Art. 3(a):

“For the purposes of this Protocol:

(a) “Trafficking in persons” shall mean 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 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;”

This definition clarifies that trafficking is a crime against the person as opposed to being a crime against the state as it is not a prerequisite that the transportation of trafficked persons should be by illegal means which would be a violation of national border control and immigration laws, though in some cases the two do meet. It is reported in the *Global report on trafficking in persons 2014* that most victims of trafficking are trafficked within their countries of origin (exploitation takes place within the victim’s home country in one in three trafficking cases) or within the same region (UNODC, 2014).

The Trafficking Protocol applies to the acts as stipulated therein. Since the Protocol is subordinate to the Organised Crime Convention, its application is, however, limited to international Trafficking which involves organised criminal groups (Art. 4).

Migrant Smuggling Protocol

The initial proposal for a legal instrument dealing with migrant smuggling, the Protocol against the Smuggling of Migrants by Land, Sea and Air which supplements the Convention against Transnational Organised Crime 2000, (hereinafter called the Migrant Smuggling Protocol), was brought by Austria in 1997. Italy at the same time, facing an increasing crisis of migrant smuggling from Albania had submitted a request to the International Maritime Organization (IMO) to resolve the matter. When the Maritime Safety Committee (MSC) of the IMO decided that the matter was outside the scope of the IMO, Italy combined forces with Austria in approaching the Commission on Crime Prevention and Criminal Justice to develop a legal instrument dealing with migrant smuggling within their scope of work targeting transnational organised crimes (Gallagher, 2001).

The purpose of the Migrant Smuggling Protocol is to combat and prevent migrant smuggling, to protect the migrants being smuggled and to encourage international cooperation in combating and preventing migrant smuggling (Art. 2).

The definition of migrant smuggling, as stipulated in Art.3 (a) of the Migrant Smuggling Protocol, is:

“For the purposes of this Protocol:

- (a) “Smuggling of migrants” shall 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;”

From this definition it becomes evident that migrant smuggling is a crime against the state unlike trafficking, which is a crime against the person. As stated in Mallia's work which is discussed in the literature review, migrant smuggling is a contravention of a state's national laws put in place to protect its borders (Mallia, 2010).

The term "financial or other material benefit" was included so as to exclude from the definitional elements those organisations, persons, family members, etc., who would render assistance to the smuggled migrants (Gallagher, 2001).

Just as the case with the Trafficking Protocol, the application of the Migrant Smuggling Protocol is limited to international migrant smuggling which involves organised criminal groups (Art. 4).

5.2 Enforceability of the legal instruments

In terms of protecting trafficked persons, Art. 6(1) of the Trafficking Protocol stipulates that State Parties are to provide protection and assistance to victims of trafficking in persons in appropriate cases to extents possible under their domestic law.

The United Nations Office on Drugs and Crime (UNODC) reported in 2014 that though 90 percent of the countries which they covered had passed new laws or updated their legislation to criminalized trafficking, there are 9 countries which still have no legislation and 18 countries have partial legislation which covers only certain types of exploitation or only protects some victims. The result is more than two billion persons who lack the full protection of the Trafficking Protocol. In August 2014, 84.5 percent of these countries cover most or all forms of trafficking, 10.5 percent have partial cover and 5 percent have not criminalised trafficking with a specific offence. Sub Sahara Africa has the largest number of countries which have partial and no criminalization of trafficking with a specific offence (UNODC, 2014).

The fact that the provision does not explicitly recognize the right of victims to access information and remedies was identified as another weakness of the protection clause of the Trafficking Protocol. This weakness is said to undermine how effective the instrument will be in relation to law enforcement (Gallagher, 2001).

Looking at articles 11-13 of the Trafficking Protocol which deal with border measures, security and control of documents and legitimacy and validity of documents, the emphasis lies very strongly with interception of traffickers as opposed to identifying trafficking victims so as to afford them protection. This part of the Protocol is seen to contain an obligatory nature and not a discretionary nature. This can be seen to imply that border control measures are to be observed more strongly than the (discretionary) measures put in place for the protection of the victims (Gallagher, 2001). This can be seen as contradictory to the full aim which the Trafficking Protocol seeks to achieve.

A saving clause is found in Art. 14(1) which stipulates:

“Nothing in this Protocol shall affect the 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 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”

This clause at least ensures that, even though the Trafficking Protocol places greater emphasis on border control measures, this in no way absolves the State Parties from observance of other existing humanitarian legal instruments. Therefore, principles such as the principle of non refoulement, which means that the victims cannot be returned to a place where their safety is in danger or where they will face persecution, should be observed.

One of these humanitarian legal instruments is the 1951 Convention relating to the Status of Refugees (hereinafter called the Refugee Convention), in which a number of rights are afforded to refugees in order to provide for their protection and it also stipulates the obligations of States to ensure provision of such protection. Most importantly the Refugee Convention defines a refugee in Article 1A (2) as:

“...owing to 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

The Refugee Convention makes provision for the principle of non-refoulement, which is a prohibition of expulsion or return in Art. 33(1) which stipulates that:

“No Contracting State shall expel or return ("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.”

It must be understood that the provision for non-refoulement is not intended to be applied without observance to certain conditions. Hence the principle of non-refoulement is not absolute, there is a restriction which can limit the application of the principle and this is observed in Art. 33(2) of the Refugee Convention which stipulates that:

“The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement

of a particularly serious crime, constitutes a danger to the community of that country.”

This provision is an indication that, in complex situations, legislators have to keep in mind all stakeholders and attempt to draft legislation which does not benefit one stakeholder at the complete disadvantage of another (Mallia, 2013).

As much as international protection of those who seek it is vital, it simply cannot be given absolute priority over all other rights to the point that States are left defenceless and powerless when coming to the protection of their boundaries (Pacurar, 2003).

Such a severe consequence would most likely result in the international instrument not gaining any support and ultimately defeats the purpose of its drafting. It would also leave unregulated a situation which requires legislation to govern it.

The Organised Crime Convention has created a hierarchy where trafficked persons are afforded more protection (there is more financial and administrative burden involved with trafficked persons) than smuggled migrants. This is said to be a reason or persuader to some extent for national authorities to consider all irregular migrants as smuggled migrants as opposed to trafficked persons (Gallagher, 2001).

When looking at the Migrant Smuggling Protocol and particularly the part dealing with smuggling by sea the concentration is on enforcement of the law and little if any attention is given to the causes of migrant smuggling (Gallagher, 2001).

As mentioned above the push factors which exist vary and to have legal instruments such as the Migrant Smuggling Protocol, which do not pay much attention to the causes of migration, can create gaps and prove to be problematic.

An example of this is the gap which exists when it comes to economic migrants. These are people who are migrating for economic reasons, be it from lack of employment opportunities or an economy, which is suffering causing people to seek better financial security or opportunity (Martin, 2005).

Migrants who are from countries which are not experiencing any wars, violence or persecution are considered to be from a “safe country of origin”. This means that in processing their applications, countries determine that the lack of these conditions does not warrant a need for international protection. Their applications are viewed with the presumption that they will not be approved. This results in different accelerated processing and very little right to appeal the outcome (“Q&A: The EU-Turkey Deal on Migration and Refugees,” 2016).

Without the determination of a need for international protection, Art. 18 of the Migrant Smuggling Protocol could be turned to. Art. 18 of the Migrant Smuggling Protocol deals with the return of smuggled migrants, and stipulates that:

“Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.”

For states such as Syria, which are State Parties to the Migrant Smuggling Protocol, this article might not be feasible in terms of them facilitating the return of Syrians taking into consideration the unstable state the State is in. The same could be said for Libya which is also a State Party. With this in mind it would seem the entire burden then rests on the receiving State Parties. Even if these latter State Parties could facilitate the repatriation by themselves, they cannot when observing other humanitarian and human right laws (see Art. 19 of the Migrant Smuggling Protocol) such as the principle of non refoulement as mentioned above.

5.3 Conclusion

From the wording of the Trafficking Protocol and the Migrant Smuggling Protocol it can be observed that smuggled migrants are not entitled to the type of protection which may be afforded to trafficked persons in connection with personal safety and psychological and physical well-being. These rights would be observed for smuggled migrants, in no way intending the exclusion of trafficked persons, by states in accordance with other humanitarian law and international human rights law which give rise to the obligation as the Protocols do not absolve states from such obligations.

Moreover, there are no provisions in terms of the entitlement of smuggled migrants in connection with legal proceedings and remedies against smugglers.

The Migrant Smuggling Protocol in Art.5 importantly exempts the migrants from criminal liability for being smuggled, which was a major step in protecting the victims of smuggling. However article 6(4) of the Protocol stipulates that: "Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law."

This means that the smuggled migrants would not be exempt from any criminal liability emanating from their actions in accordance with the domestic law of the receiving state. Therefore the smuggled migrants could be prosecuted for violation of national immigration laws (Pacurar, 2003).

A major problem arises from the fact that neither the Trafficking Protocol nor the Migrant Smuggling Protocol provides guidance on the differentiation of trafficked persons from smuggled migrants. The distinction between a trafficked person and a smuggled person is undoubtedly vital as the rights afforded differ and so do the

obligations on State Parties. Therefore, guidance on how to distinguish between the two was undoubtedly equally vital (Gallagher, 2001).

In a situation where trafficked persons and smuggled migrants arrive in the same boat it would seem that without any guidance on the distinction both Protocols place the burden of proof on the victims. The Protocols also failed to acknowledge that there may be a link between the offences of trafficking and smuggling when coming to their operation and as such, no provisions dealing with this are incorporated in the Protocols.

This has numerous consequences such as the fact that the victims might not be afforded the rights they are entitled to in terms of the instruments and it also leaves the assessment of who is being smuggled and who is being trafficked up to the national authorities who might be prone to make the determination which will have the least obligations (Gallagher, 2001).

Without a review mechanism or a supervisory body to oversee that the Protocols are applied as intended, it could have consequences, which will undermine the aim and purpose of the instruments. This can also undermine the political commitment which State Parties assign to the Protocols (Martin, 2005).

The Protocols are a major step as, most importantly; they offer definitions of the crimes of trafficking and migrant smuggling which will aid State Parties in drafting their own legislations and know which acts fall within the ambit of the respective definitional elements of the crimes (IOM, 2014).

The Protocols also aid in the much needed move towards greater cooperation and information sharing as well as training to ensure that all states steadfastly hold up their end and that is the only way that the crimes will be effectively eradicated. This, however, requires that all states must pull their weight and a weakness in the chain

would ultimately be a weakness in the entire system (*Human Trafficking an Overview*, 2008).

CHAPTER VI

6 Maritime safety and security perspective

Maritime safety and security is another perspective from which we can view migration by sea. It is a vital objective for the IMO which is the specialised agency of the United Nations concerned with the safety of life at sea, avoidance of loss or damage to property at sea and the protection of the marine environment ("IMO- Unsafe Mixed Migration by Sea," n.d.).

There are instruments which the IMO has developed to help with achieving its aims. Those instruments which are mostly concerned with maritime safety and security connected to migration by sea will be discussed in the following chapter.

6.1 Legal instruments

United Nations Convention on the Law of the Sea

According to the United Nations Convention on the Law of the Sea (hereinafter called UNCLOS), the duty to render assistance is contained in Article 98(1) of UNCLOS which stipulates that:

“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;...”

When looking at the contents of this article we can see that the first part says that the duty to render assistance rests on the master as far as rendering such service does not put serious danger to the ship, the crew or the passengers.

The assessment of what constitutes serious danger is made by the master. As such the master’s priority should first be the safety of his own ship, the crew of the ship and the passengers on the ship. It is only in the absence of any conditions which would constitute serious danger, whether imminent or foreseeable, to the ship, crew or passengers that the duty to render assistance arises (Cacciaguidi-Fahy, 2007).

The obligation in this article is mainly on the States to ensure (by requiring) that masters of ships flying their flag should act in accordance with the provisions contained therein. Customary law is said to have evolved that there is now a clear distinction between the master’s obligation to render assistance and the obligation to rescue which falls on the state (Cacciaguidi-Fahy, 2007).

UNCLOS also creates an obligation on States regarding search and rescue. States have an obligation to establish, operate and maintain these search and rescue services in order to facilitate the search for and the rescue of people in distress at sea. Article 98(2) stipulates that:

“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.”

International Convention for the Safety of Life at Sea (hereinafter called SOLAS)

The obligation to respond to distress messages and the procedure to follow is covered under Chapter V, Regulation 33 of SOLAS. Regulation 33(1) stipulates that:

“The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal 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. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly.”

From this Regulation it is evident that the obligation to render assistance only comes to play in the absence of circumstances which make the master unable to render such assistance or in the absence of circumstances which, according to the master, make the assistance unreasonable or unnecessary.

The assessment of these circumstances or the absence thereof, once again, rests on the master of the ship receiving the distress message. Once the master has made this assessment then, if possible, he/she must inform the relevant authorities of his/her assistance. It is recommended that the master also inform the relevant authorities of his/her inability to render such assistance in the case where that is the result of his/her assessment. The obligation contained in this Regulation is on the master, unlike the obligation contained in UNCLOS, which rests on States.

SOLAS also has a regulation which creates an obligation on States to ensure that the necessary arrangements are made for distress communication and coordination and an obligation to establish, operate and maintain search and rescue facilities. Chapter V, Regulation 7(1) stipulates that:

“Each Contracting Government undertakes to ensure 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, having regard to the density of the seagoing traffic and the navigational dangers, and shall, so far as possible, provide adequate means of locating and rescuing such persons.”

Flag states' obligation to rescue includes the adoption of domestic laws which establish penalties for masters of vessels who do not adhere to their duty to rescue or fail to render assistance (UNCLOS Article 98(1) and SOLAS Chapter V, Regulations 7, 10(a) and 33). Though this obligation is widely accepted, it is often only partially translated into domestic law if at all. For example in Australia, the provision contained in s317A of the Navigation Act 1912 (Cth) does not amount to an absolute obligation and is only partially translated into domestic law. The result is that the duty to render assistance by masters is weakened further by problematic enforcement (Cacciaguidi-Fahy, 2007). This would then perhaps offer a reason why Juras's work which is discussed in the literature review concludes that there has been no report of a shipmaster who has been prosecuted for not rendering assistance (Juras, et.al., 2014).

International Convention on Maritime Search and Rescue

The International Convention on Maritime Search and Rescue (hereinafter called SAR Convention) restates the obligation to set up search and rescue areas and to create,

operate and maintain search and rescue facilities covering their areas of responsibility. This Convention covers these obligations in greater detail when compared with UNCLOS and SOLAS mainly because the main purpose of the Convention is search and rescue.

It also creates an obligation to assist persons in distress at sea regardless of their international status or nationality and an obligation to provide for their initial care and delivery to a place of safety. Paragraph 2.1.10 of the Annex to the SAR Convention stipulates that:

“Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.”

When looking at this stipulation it is evident that rescue personnel do not have discretion when it comes to who they render assistance to when conducting a search and rescue operation. As such they cannot make an assessment of the international status of the person during the rescue operation and then use such knowledge to determine who to render assistance to. Rescue personnel cannot decide to render assistance to persons in distress based on nationality as this would be a contravention of the SAR Convention (UNHCR, 2002).

The Paragraph further stipulates that persons in distress must be rescued regardless of the circumstances in which they are found. This meaning that even when the rescuers, particularly when they are coast guard or security authorities, find the persons in distress in a situation where they are contravening domestic laws they cannot use that as a basis to relinquish their obligation to render assistance where they are in a position to render such assistance (UNHCR, 2002).

Paragraph 1.3.2 of the SAR Convention Annex gives this definition of rescue as: “Rescue- an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety;”

Based on this Paragraph it is evident that a rescue operation is not meant for law enforcement purposes but rather for humanitarian aid. As such the rescued persons, regardless of their status or nationality or the circumstances they are found in should be provided with initial medical care or their other needs should be provided for.

The Paragraph further clarifies that a rescue operation is active until the rescued persons have been delivered to a place of safety. Disembarkation of rescued persons at a place of safety is thus considered as the end of the rescue operation.

6.2 Enforceability of legal the instruments

When analysing the applicable legal instruments which deal with maritime safety and security and how they govern the phenomenon of migration by sea, there are certain application questions which arise.

Firstly the obligation to rescue persons in distress does not exclusively rest on security authorities or authorities who are established for search and rescue purposes. It applies to States and masters of vessels, which include merchant vessels (Juras, et.al., 2014).

It has been seen in recent statistics that more and more merchant vessels are engaging in rescue operations. The International Chamber of Shipping (ICS) estimates that about 40,000 people were rescued by merchant vessels during 2014. It also predicted that this number would be higher in 2015, particularly if no political stability is reached in the Middle East and Africa. Since the beginning of the escalation of the phenomenon of migration by sea around 1,000 merchant vessels have been a part of the operations to rescue migrants ("ICS Annual Review," n.d.) This means that the phenomenon of

migration by sea has implications on the shipping industry too and even though guidelines were released to help merchant vessels in conducting large scale rescue operations, there are still some problems which the shipping industry faces.

Merchant vessels are operating for profit and on a schedule and as such are experiencing losses as a result of having to deviate in order to rescue persons in distress at sea. This has a negative financial effect on shipping and the fact still remains that merchant vessels were not built for such large scale operations and as such are not adequately equipped (Grey, 2016).

Individual vessels are rescuing sometimes as many as 500 distressed people which pose serious ramifications for the rescuing crew's safety and security ("ICS Annual Review," n.d.). Often the crew working on these vessels are not trained for such rescue operations and they comprise of very few personnel.

The vessels often do not have enough space available for the rescued persons. The facilities aboard and its medical and food supplies may not be sufficient to render adequate assistance. Also it often takes days for the vessel to be properly cleaned and disinfected after these rescue operations.

As much as the international shipping industry reconciles to the obligation to render assistance to people who are distressed at sea, the effects of such assistance in light of the current migration crisis faced cannot be left without seeking better solutions, especially since the burden on merchant vessels to conduct these rescue operations is increasing ("ICS Annual Review," n.d.).

As discussed above, a rescue operation is terminated when the rescued persons are delivered at a place of safety. Therefore, any master of a vessel who engages in a rescue operation remains obliged until delivery of the rescued persons to a place of safety. Paragraph 3.1.9 of the SAR Convention Annex covers the situation of rescue

operations conducted by masters of vessels and places an obligation on parties to the Convention to relieve the master of the rescue operation as quickly as possible to minimize the impact which the operation will have on the vessel. The paragraph stipulates that:

“Parties shall coordinate and cooperate 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 these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such coordination and cooperation 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 Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.”

An equivalent provision is stipulated in SOLAS Chapter V Regulation 33.1.1.

Another question which arises in application of the relevant legal instruments is what is a place of safety? Resolution MSC 167(78) of the Maritime Safety Committee, which is a committee of the IMO, defines in Para 6.12 a place of safety as:

“A place of safety (as referred to in the Annex to the 1979 SAR Convention, paragraph 1.3.2) is a location where rescue operations are considered to terminate. It is also a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors’ next or final destination.”

The Resolution, Para 6.14, further stipulates that:

“A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination.”

This Resolution clarified the question of what is considered to be a place of safety. However, even with these clarifications, there still exist some interpretative doubts.

This is observed in the reaction of some sources who question whether places like Turkey meet the definitional elements of a place of safety. Turkey allows disembarkation of people who have been rescued on their shores in accordance with an agreement between the EU and Turkey in November 2015. The concept of a place of safety is also referred to as a “safe third country” or a “safe country of asylum” (“Q&A: The EU-Turkey Deal on Migration and Refugees,” 2016).

In analysing what constitutes a “safe third country”, article 27(1) of the Asylum Procedures Directive stipulates that it is a country which will follow the principle of not threatening asylum seekers’ life and liberty on account of race, nationality, political opinion, religion, etc.; respect the principle of non refoulement; respect the principle of prohibition of removal in violation of the right to freedom from torture and inhuman, cruel or degrading treatment as laid out in international law and follow the principle ensuring the possibility to request refugee status which when granted such person receives protection in accordance with the Geneva Convention. Countries such as the Netherlands, Greece and Slovenia have the corresponding criteria for a safe third country in their national legislation (UNHCR, 2010).

A safe third country is essentially one which could provide effective protection and one which respects non refoulement. When looking at effective protection UNHCR says that

there must be certain human rights guarantees which consist of: “(1) no risk of prosecution, refoulement or torture; (2) no actual risk to a person’s life; (3) prospects exists for a genuine accessible and durable solution; (4) no risk of exposure to arbitrary expulsion and deprivation of liberty, and must have an adequate and dignified means of sustenance; (5) family unity and integrity is preserved; (6) specific protection needs (such as those arising from age and gender) are recognized and respected” (Lambert, 2012).

The situation in Turkey

Initially it can be inferred that Turkey is a place of safety since it has ratified the Refugee Convention and its 1967 Protocol and as such is a country which should observe the regulations of the Convention. However, when looking at whether Turkey has in place provisions for the long term sustainability of adequate standards of living, doubts arise regarding its status as a place of safety.

In 1968 when Turkey approved the amendments made by the 1967 Protocol, it did so with a condition of geographical limitation (Foca, 2011). The declaration made to the 1967 Protocol ("United Nations Treaty Collection," n.d.) reads as follows:

“The instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of article 1 of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe,…”

Turkey is the only country to uphold a geographical limitation which differentiates refugees based on country of origin. This means that the granting of refugee status and the awarding of rights which come with being a refugee is subject to the geographical origin of the person seeking asylum. More specifically put, everyone making an asylum

application in Turkey who is not from a European country will not be wholly recognized as a refugee nor will they be granted asylum. These non-European people will be excluded from the effective protection stipulated in the Refugee Convention and will only be granted temporary asylum (Foca, 2011).

What this geographical limitation actually means in practice is that non-European migrants who have been granted temporary asylum will only enjoy an equal temporary protection which permits them to remain and live in the country, but without the full protection provided for by the Refugee Convention. This includes protections and rights such as the right to lawful wage earning employment as stipulated in Chapter III Article 17 of the Refugee Convention or the right to public education, which is provided for in Chapter IV Article 22 of the Refugee Convention.

As a result, these asylum seekers are faced with a system which does not allow them to pursue lawful employment, children experience barriers when coming to admission into the education system and many are forced to subject themselves to underground labour which exploits them just so they could provide for their families (Afanasieva, 2016).

Even with the new asylum system which was implemented in Turkey in 2014 and which gives provision for the processing of non-Syrian asylum applications to grant them conditional refugee status with the aim of resettling in another country the observations made would question the effectiveness or application of this new system. With numbers such as 64,109 asylum requests and only 459 interviews for determination which were held, with no information on the outcomes of these interviews, on top of the remaining pending requests which still have to go through the interview stage, one can certainly question the effectiveness of this system. Perhaps the explanation can be derived from the fact that the system is not considered to be fully functional yet ("Q&A: The EU-Turkey Deal on Migration and Refugees," 2016).

The situation was reviewed and revised for the better in January 2016 when Turkey permitted Syrians who have temporary asylum to work. This permission was coupled with conditions and limitations. Although this is a positive step, it is one only experienced by Syrians. Other refugees from countries like Iran, Iraq and Afghanistan are not so lucky. These refugees are given less protection and that is after they have passed an unlikely processing of their claims ("Q&A: The EU-Turkey Deal on Migration and Refugees," 2016).

The Human Rights Watch has reported some unsettling occurrences in November 2015 involving Turkish border control measures to deal with the influx of Syrian migrants. According to this report, which emanates from interviews conducted with Syrian migrants in October 2015, most of the Syrians attempting to migrate to Turkey have to do so covertly as in some cases they are met with violence from the Turkish border guards ("Turkey: Syrians Pushed Back at the Border," 2015).

Some of the respective individual stories include six migrants who were forced to return to Syria. Three migrants said that they, along with a dozen others, were pushed back into Syria as they attempted to cross the border. Four Syrians who were returned back reported that they had suffered violence in the form of beating from the Turkish guards. Three migrants revealed that they were intercepted immediately after crossing the border, confined to a military base for the night and sent back to Syria along with hundreds others. There were also those who revealed that they saw Turkish border guards intercepting migrants at the border and they also saw the return of some migrants back into Syria. Turkey has since July 2015 intensified the act of preventing Syrians from crossing the border from Syria to Turkey ("Turkey: Syrians Pushed Back at the Border," 2015).

These are but some of the respective stories told during the interviews. Taking into consideration the fact that the principle of non-refoulement is considered to be customary international refugee law coupled with its restatement under customary

human rights law, Turkey must respect the principle and conduct its border control with observance of and in accordance with the principle. Turkey, however, maintains that they have created a safe zone in Syria and as such could return the Syrian migrants to the said safe zone ("Turkey: Syrians Pushed Back at the Border," 2015).

Whether Turkey's actions are in accordance with the finding in the 2012 *Hirsi Jamaa v Italy* judgement will be based on a comparison of the facts and the content of the judgement. In the judgement the European Court of Human Rights held that Italy's cooperation with the then Libyan government and their push back practices were a violation of the European Convention on Human Rights' prohibition on non-refoulement and that the actions amounted to collective eviction (Frenzen, 2016).

To create a comprehensive view on the situation in Turkey in order to formulate an informed opinion it is paramount that the other side of the coin is also looked at. Turkey is hosting over two million Syrian refugees as of February 2016. This is the biggest refugee population in the world. It is reported that approximately 250,000 of the two million live in one of the 25 government run camps (Durukan, Tumer, & Essiz, 2015).

Turkey has displayed vast generosity when compared to the majority of European Union (EU) member states. Turkey's Prime Minister Ahmet Davutoglu reported recently that since 2011 the state has spent US\$20-25 billion on Syrian refugees who reside outside of the camps and a further estimated US\$10 billion were spent on those refugees who live in the camps. In light of the increasing numbers of refugees currently in the country, the government has clearly reported that it is continuously struggling to provide for the needs of the refugees ("Q&A: The EU-Turkey Deal on Migration and Refugees," 2016).

Despite the assistance which the government is providing to the Syrians who are living under temporary protection (these Syrians have official access to free education for their children and free health care in Turkey), there are still some refugees who are

living in desperately poor conditions, those not being housed in the government camps struggle to find houses to live in. Approximately 400,000 children are out of school because they need to work to earn an income to provide for their families or they cannot afford stationery needed at school or the transportation to go to school. There are also some who stay away from school because of social problems like bullying. The obstacles faced are also bureaucratic in nature where Syrians struggle to access education or medical care if they move from the city they were registered in ("Q&A: The EU-Turkey Deal on Migration and Refugees," 2016).

The situation is much worse for non-Syrian refugees who enjoy very few economic and social rights in Turkey. This leads them to resort to availing themselves of informal, underpaid and unsafe work, which is exploitative in nature (ECHO, 2016).

With problems like these and a vastly growing population of refugees Turkey cannot take the responsibility alone – European Union states should also share the burden, particularly that of the costs incurred. To this end it remains to be seen if the promised €3 billion aid package would help solve some of these problems.

The EU has entered into the agreement with Turkey despite the fact that Turkey's geographical limitation is not in accordance with EU laws and it leads to violations of human rights. In its Directive 2013/32/EU ("Directive 2013/ 32 / EU of the European Parliament and of the Council," 2013) EU law stipulates that the concept of a safe third country, as enshrined in article 39 2(a) is:

“A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;”

The aim of this agreement was to regulate the flow of migration to Europe by decreasing the attraction of the usage of the Aegean Sea and to render assistance to Greece, which was severely struggling to deal with the migrants who were arriving on Greek shores.

The gist of the agreement is that Greece will return to Turkey migrants who arrive on Greek shores but do not make an application for asylum or whose application for asylum is not accepted. The agreement is coupled with a one-for-one clause which holds that for every Syrian who is returned to Turkey the EU will absorb another Syrian who is registered officially at the camps set up in Turkey. This is meant to encourage the usage of controlled migration channels as opposed to the dangerous usage of the Aegean Sea to Greece (Leivada, 2016).

The agreement allows for asylum applications to be made (although most of them are rarely even processed), but there is overwhelming doubt whether this deal is in fact in line with international humanitarian and international human rights law, particularly the Refugee Convention. This will be the question when analysing the mass deportation from Greece to Turkey which is envisaged and the forced return of Syrians, Iraqis and Afghans to their countries of nationality, the same country they fled from because of lack of safety (Leivada, 2016).

With Turkey being considered as a “safe third country” it means that Greece can, against this fact decide that applications for asylum are not to be admitted. However, whether Turkey can in fact be considered as a “safe third country” is not only doubtful to experts and human rights groups, but the doubt exists also among European Union members. Several of them refused a proposal for the EU to recognize, collectively, Turkey as a “safe third country”. This was because of the human rights concerns which some of the states had. Even Greece, in its bill to regulate the process for asylum, did not recognize Turkey as a safe third country (Leivada, 2016).

Greece's views on the legality of the agreement is further evident in a recent appeal finding where a Syrian national, who applied for asylum after the agreement had been enforced, successfully appealed his return to Turkey. In this appeal, the Athens appeal committee overturned their previous decision which initially considered Turkey to be a safe third country. The finding was based on the grounds that Turkey does not give to refugees the full protection which is stipulated and required by the Refugee Convention because of their geographical limitation. The committee further ruled that Turkey does not guarantee the principle of non-refoulement in light of the occurrences where asylum seekers are forcefully returned to their countries of nationality where they face persecution, human right violations and where the safety of their lives is not guaranteed or protected ("Greek Decision Highlights Fundamental Flaws in EU-Turkey Refugee Deal," 2016).

Deputy Europe Director at Amnesty International, Gauri van Gulik says that the decision of the appeals committee reveals the roots of why the EU-Turkey deal was flawed from the onset. She says that based on the situation in Turkey where refugees are not granted full protection, Turkey is in fact not a safe place for refugees. Until Turkey grants full protection to refugees and puts an end to the current violations, migrants should not be returned there from Greece. Europe should, however, still uphold its end of the deal by absorbing refugees for resettlement from Turkey and it should also work on making the situation for refugees in Greece better ("Greek Decision Highlights Fundamental Flaws in EU-Turkey Refugee Deal," 2016).

Although the decision by the committee could be appealed, it at least eliminates the risk for Syrian nationals of being deported by force to Turkey. This might just be the case for the approximately 100 other cases which are still pending before the appeals committee ("Greek Decision Highlights Fundamental Flaws in EU-Turkey Refugee Deal," 2016).

The decision by the appeals committee puts the EU-Turkey agreement in an even more questionable light, or rather confirms what many have been saying all along, that

Turkey is not a safe third country. It also opens the door to many other appeals and could result in sudden and vast changes in migration flows as the over two million Syrian refugees in Turkey rightfully leave Turkey seeking a safe place which will guarantee international protection. In this scenario it would seem that if the decision is indeed upheld, then the EU would be better off assisting Turkey to improve the situation of refugees there or face more influxes of refugees, those in Turkey and the new ones still coming from other countries of nationality.

Whether the decision will be upheld or overturned and its effects remain to be seen, while lawyers in Turkey are reporting human rights violations and unlawful practices by the staff working at irregular migrant centres (Ulusoy, 2016).

Until then perhaps if the EU is forced to return to the drawing board and could look at solving the problem by actually addressing the root cause of the migration flows since the agreement, as is the case with many instruments regulating or attempting to regulate the phenomenon of migration by sea, does not cover or deal with any of the causes of the problematic flows of migration by sea (Leivada, 2016).

The discussion on the situation in Turkey highlights an important fact that, though migration by sea may be viewed from different perspectives, the implications overlap. In observance of Paragraph 3.1.9 of the SAR Convention Annex and SOLAS Chapter V Regulation 33.1.1 which are maritime safety and security instruments, the action of states could very well have implications on the humanitarian perspective of migration by sea, as seen in the situation in Turkey.

6.3 Conclusion

Analysis of UNCLOS reveals that a master's obligation to rescue persons in distress is not strictly an absolute obligation as the master is not required or expected to undertake the rescue operation if doing so will endanger the safety of the ship, the safety of the

crew or the safety of passengers. The obligation to respond to distress signals does not only rest on the master but also rests on the flag state which must ensure that a master to a vessel flying its flag observes the obligation to respond to distress signals by requesting the master to do so. Under UNCLOS states further have an obligation to establish, operate and maintain search and rescue facilities.

Analysis of SOLAS reveals that a similar obligation is placed on the master of a vessel though some differences exist when coming to the wording of the obligation under UNCLOS and the obligation under SOLAS.

SOLAS, just as UNCLOS, makes provision for a master to make an assessment before proceeding with a search and rescue operation. However, unlike UNCLOS which explicitly states that the master is exempt from the obligation if an element endangering safety exists, SOLAS does not make an explicit mention of safety but rather stipulates that if the master of the vessel is 'unable' to conduct the search and rescue then he should record this in the vessel's log book.

The wording of the Regulation under SOLAS gives the impression that the master's obligation can be exempted by more than just safety reasons. This is evident in the further wording of the Regulation which stipulates that 'in special circumstances...considers it unreasonable or unnecessary...' Compared to UNCLOS it could be considered that SOLAS gives a master more judgement freedom which is not confined to safety reasons and the obligation seems to be on the master respectively as no mention is made of the flag state in the Regulation, as is the case under UNCLOS.

SOLAS, however, has further requirements for a master to inform the ship requiring assistance and maybe the search and rescue authorities when conducting the search and rescue operation, another requirement being to record in the vessel's log book an inability to conduct a search and rescue operation and lastly a recommendation to

inform the search and rescue authorities when the vessel will be unable to conduct the search and rescue operation.

These obligations placed on masters of vessels do not just refer to those vessels solely engaged in search and rescue, state's security or military vessels. They refer to vessels engaged in commercial shipping as well. For this reason merchant vessels are also affected by migration by sea.

SOLAS also places some obligations on states. Under SOLAS states are obliged to facilitate distress communication and coordination and to establish, operate and maintain search and rescue facilities.

The SAR Convention covers search and rescue in greater detail as compared to UNCLOS and SOLAS. Under the SAR Convention states are similarly obliged to establish, operate and maintain search and rescue facilities within their area of responsibility. Analysis of the three Conventions reveals overlaps and similarities on certain main concept which is a positive revelation for uniformity and consistency in the international community.

The SAR Convention further broadens into some humanitarian aspects as it stipulates that assistance should be rendered to all ships and persons in distress regardless of the individuals' international status or nationality. The assistance also comprises of an obligation to provide for the rescued persons' initial care and an obligation to deliver them to a place of safety. A place of safety can be on another vessel such as state vessels which are specifically dispatched for search and rescue purposes or military vessels. This means that a place of safety need not necessarily be on land but rather be a place where the rescued person's basic needs will be catered for.

Though the lack of a definition for a place of safety was rectified by the Resolution MSC 167(78) of the Maritime Safety Committee, analysis of the application of legal

instruments revealed interpretation doubts and inconsistencies particularly the consideration of Turkey as a place of safety by the European Union.

The EU-Turkey refugee deal has been criticised by human rights groups and Amnesty International as Turkey's asylum policies are not consistent with relevant international humanitarian and refugee conventions. The geographical limitation which is stated in Turkey's declaration when signing the Refugee Convention and Protocol and the lack of long term solutions for asylum seekers to be able to sustain a decent life are some of the reasons that Turkey was said to not be a place of safety by these organisations and why the EU-Turkey deal has been heavily criticised by the same.

Analysis of the legal instruments which govern and regulate the maritime safety and security perspective may not have revealed any existing gaps, however, inconsistencies and doubts arise when analysing the interpretation and application of the instruments in some aspects.

CHAPTER VII

7. Implications, relief measures and solutions to migration by sea

The preceding chapters dealt with the phenomenon of migration by describing it and analysing the applicable legal instruments, this chapter will look at the implications of migration by sea, relief measures which are implemented to deal with these implications and some of the proposed solutions to resolve the crisis.

7.1 Implications of migration by sea

The implications of migration by sea extend into many aspects. They are not merely humanitarian but flow into the different perspectives as described above. All the perspectives have implications which affect other perspectives.

As an illegal business, migrant smugglers often are involved in other crimes such as human trafficking which is a crime against the trafficked person. For this reason it has implications on the humanitarian perspective.

In February 2016 European Police Office (EUROPOL) reported that there is an increase in women and children migrants which are arriving in the EU in 2016 compared to 2015. Of those minors, considerable numbers are arriving in the EU without a parent or any adult who is responsible for them. Alarming, unaccompanied minors who arrive in many EU states disappear from reception or asylum centres which are set up in those states. Investigations into people criminal smuggling networks revealed that the criminal activities did not just stop at smuggling but were connected to

labour exploitation. Arriving migrants, who were smuggled by these criminal networks, are forced to work in restaurants owned by members of the criminal syndicate. As these activities continue, the number of migrants who are vulnerable to sexual and labour exploitation is on the increase ("Migrant Smuggling in the EU," 2016).

As a humanitarian issue migration by sea has implications on the security of a state. This is not to imply that humanitarian aid itself creates security concerns. In observing its humanitarian obligations a state may be rendering itself vulnerable to acts which will pose a threat to the security of the state.

In the same report EUROPOL reported that the vast numbers of migrants in the EU have created a concern for the infiltration of terrorists and violent extremists into the EU who will gain entry by abusing the current migration crisis. It is reported that in 2015 EU law enforcement officials identified isolated cases which involved terrorists using the migration routes. It is also believed that two of the perpetrators involved in the attacks in Paris on 13 November 2015 gained entry into the EU under the guise of being migrants. In 2015 there has been an increase in violent attacks which target migrants in centres and other accommodation. There have been public disorder and reported arson incidents which were reported in some EU states which include Germany, Sweden, France, Netherlands, United Kingdom and Greece ("Migrant Smuggling in the EU," 2016).

As an illegal business migration by sea has implications on a state's security as smuggling in itself is a crime against the state. The activities of the criminal syndicates are mostly to undermine legal systems put in place by states, whether these are migration or other national systems. The activities are also connected to other crimes such as document counterfeiting, property crimes and drug trafficking. The frustration of these systems often leads to security threats for concerned states.

EUROPOL's report mentions an increase in forged documents used by migrants whom they receive. The criminal syndicates also target corrupt border control officials; offer them bribes to facilitate the smuggling. Naval or military officials and consulate and embassy staff are also targeted to either release or facilitate immigration applications respectively and to provide passports and visas ("Migrant Smuggling in the EU," 2016).

Migration by sea has implications on maritime safety and security too, whether viewed from the illegal business perspective or humanitarian perspective or both. Search and rescue systems are being stretched to the extreme as vast numbers of migrants have to be rescued at sea. Not only is this costly, particularly for reception states, but it results in situations where rescue vessels might find they are ill equipped and unable to rescue all persons. This does not just have humanitarian ramifications in terms of the lost migrants but also scars the rescue personnel emotionally to have to witness people drowning and dead bodies floating in the water.

As mentioned in previous chapters the shipping industry is also affected as such migration by sea also has implications in that aspect.

7.2 Relief measures and some solutions to migration by sea

There are relief measures which are put in place to deal with the implications of migration by sea. The roles of salient international organisations, non-governmental and governmental organisations will be discussed, as well as how these organisations have executed their roles to implement these relief measures. Some solutions which these organisations propose will also be discussed.

7.2.1 United Nations agencies' responses

IOM is a specialised inter-governmental organisation which is committed to the notion that organised and humane migration benefits not only the migrants but society as a

whole. As the international organisation which leads migration, IOM, together with other international partners, assists with meeting the challenges faced with the management of migration, enhances the understanding of issues associated with migration, boosts economic and social development through migration and sustains the well-being and human dignity of migrants ("International Organization for Migration," n.d.).

To achieve this IOM has developed the IOM Migration Crisis Operational Framework throughout 2012 as an operational, institution-wide and practical tool to schematize and expand the manner in which IOM assists Member States and partners to prepare for and respond to a crisis which may arise due to migration. IOM has also established campaigns to show the developments which come with migration and has started the Missing Migrants Project which is a database to share the latest data on migrant arrivals, missing migrants and fatalities worldwide ("International Organization for Migration," n.d.).

The Office of the United Nations High Commissioner for Human Rights (OHCHR) as the main United Nations office, which is mandated to protect and promote human rights for all, has developed the Committee on Migration Workers to monitor the protection of rights of migrant workers and the rights of their family members. The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families is a body which comprises of experts who are independent and monitor how the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families is implemented by State Parties. OHCHR does this by requiring State Parties to submit regular reports on implementation to the Committee as an obligation. Any concerns and recommendations arising from the reports will then be addressed to the concerned State Party. The Committee can also hear individual complaints about violations ("Office of the United Nations High Commissioner for Human Rights , " n.d.).

The International Labour Organization (ILO) is a United Nations agency which brings governments, employers and employee representatives together, making it a tripartite

agency, to establish labour standards, develop programmes and policies to promote decent work for all. According to ILO, the migration process faces complex challenges in terms of governance, the protection of migrant workers, the linkage of migration and development and international cooperation. For this reason, ILO works to create policies aimed at enhancing the benefits of labour migration ("International Labour Organization," n.d.).

ILO is also involved in the 2030 Agenda for Sustainable Development which aims to provide a strong link between migration and decent work in the eighth Sustainable Development Goal on promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all ("International Labour Organization," n.d.).

ILO has developed initiatives and projects to help it achieve its goals, such as the Fair Recruitment Initiative, which was launched in response to the challenges of fraudulent and abusive recruitment practices which were affecting migrant workers. The aims of the initiative are to help prevent human trafficking and forced labour, protect the rights of workers including migrant workers and enhance development results and reduce the costs of labour migration. The governments of the United Kingdom, United States and Canada are currently supporting this initiative. Another example is the currently active global project called Integrated Programme on Fair Recruitment which looks to promote fair recruitment across specific migration passages in the Middle East, South Asia and North Africa ("International Labour Organization," n.d.).

The UNHCR's Asylum and Migration Unit comprises of expert staff which works to address identified challenges which are encountered, to help regional teams to implement refugee protection measures and provide legal and policy advice to operations run by UNHCR with the aim of remedying protection gaps which exist. The Unit is dedicated to protecting the people involved in mixed migration movements and

at sea in 2016 as well as working to protect those displaced from trafficking and other forms of abuse and violence ("UNHCR: The UN Refugee Agency," n.d.).

The UNHCR launched a 10-Point Plan of Action on Refugee Protection and Mixed Migration in 2006 to highlight major areas (those with most concern being the Mediterranean basin, Central America and the Caribbean, Gulf of Aden, the Balkans and South East Asia) where action is required to address mixed migration in countries of origin, transit and destination to help these countries to respond to mixed migration in a way which is protection sensitive ("UNHCR: The UN Refugee Agency," n.d.).

The UNODC is the guardian of the Organised Crime Convention and its Protocols and its primary goal regarding the combat of migrant smuggling is to promote global adherence to the Migrant Smuggling Protocol and to assist states to implement the Protocol effectively; by helping states to bring their legislation in line with the Protocol and help the states to develop an effective criminal justice response to the smuggling of migrants. States in West and North Africa, for example, are assisted through UNODC's Impact Programme ("United Nations Office on Drugs and Crime," n.d.).

The UNODC developed The Model Law against the Smuggling of Migrants to achieve the above mentioned goals, particularly the goal of assisting with the implementing of the Migrant Smuggling Protocol. It has also, together with Europol, Interpol (International Criminal Police Organization) and funding from the EU, elaborated basic training modules on preventing and combating migrant smuggling. A Toolkit to Combat Smuggling of Migrants has been developed to assist states with implementing the Migrant Smuggling Protocol by demonstrating examples of innovative responses to addressing migrant smuggling. UNODC also holds Training Workshops for prosecutors to help them with investigating and prosecuting migrant smuggling, an example being the workshop which was held for 25 Egyptian prosecutors in 2011. The UNODC has other projects and publications which aim to gain full understanding of migration flows ("United Nations Office on Drugs and Crime," n.d.).

IMO called for focus to be placed on dealing with migration by sea through more safe and regular pathways. Besides the documents which were developed to provide guidance for shipmasters and governments, an information sharing platform has been established by IMO, IOM and UNODC to better understand migration by sea ("IMO-Unsafe Mixed Migration by Sea," n.d.).

7.2.2 International, governmental and non-governmental organisation's responses

Along with the United Nations agencies, there are other international, non-governmental and governmental organisations which are involved with relief measures regarding migration by sea.

Some examples being the rescue vessel Topaz Responder, which has on board Migration Offshore Aid Station crew members and was reported to have saved 352 people on 12 July 2016. The European Union Naval Force operation in the southern central Mediterranean (EUNAVFOR MED) operation Sophia has saved over 20 000 people since its launch. Médecins Sans Frontières/Doctors without Borders also launched search and rescue operations in 2015 operating in the central Mediterranean and have rescued over 25 000 people since ("Current Awareness Bulletin July 2016," 2016).

Other initiatives such as the search and rescue Sea Watch initiative have also been established. Navies such as the Irish LÉ James Joyce Naval Services have started humanitarian operations in the Mediterranean ("Current Awareness Bulletin July 2016," 2016).

The African Union is also working on solutions to the migration problem focusing on the African continent. On a short-term basis cooperation of Member States to silence guns,

finding solutions to political problems and creating peace in the continent in line with the pledge by Member States to end hostilities in the continent by 2020 has been identified as a solution which will address push factors causing people to migrate from Africa. Dr Mustapha Sidiki Kaloko who is the African Union commissioner for social affairs identifies that as economic opportunities is another major push factor, creating economic opportunities coupled with comprehensive education facilities and closing loopholes will be a long-term solution to this push factor. In his words:

"If we make this continent suitable for everybody, maybe the number of people moving across Mediterranean Sea to Europe might decrease. This means; diversifying our economy, industrialisation, increasing productivity and jobs, good health services, good education and good infrastructure on the continent. These are long-term solutions to migration," (Tashobya, 2016).

Dr Kaloko has also mentioned how free movement within the African continent for Africans could reduce migration levels to Europe. For this reason Member States are encouraged to follow in the footsteps of Rwanda and Mauritius by allowing visa free movement of Africans into their countries. This is also expected to yield economic benefits as it would encourage trade (Sisay, 2016).

CHAPTER VIII

8. Findings and recommendations

This chapter will outline the findings of the research and make some recommendations relating to migration by sea and future research.

8.1 Findings

The terms used when referring to migration by sea depends on the perspective from which it is viewed. If migration by sea is viewed as a maritime security risk then the phenomenon would be termed illegal migration by sea and if viewed from a humanitarian perspective then it would be termed unsafe migration by sea.

Although there have been some developments regarding the legal instruments, there are some gaps in terms of substantive rules such as the case of economic migrants and there are challenges experienced when it comes to implementation.

Even with the provided description of a place of safety there are implementation gaps, as seen with the Turkey controversy and there exists gaps when it comes to jurisdiction for disembarkation purposes.

The challenges faced with implementation are also visible when looking at the statistics of prosecuted human traffickers in comparison to the prevalence of the offences. There is a shortage of data regarding prosecution of migrant smugglers which is a gap that should be closed to assess implementation of applicable legal instruments.

With time, however, and the awareness programs and initiatives to help states with implementation of the legal instruments, the situation could be changed for the better. The success will depend on political will, cooperation and coordination as transnational crimes are complex in nature and cannot be curtailed by single states.

The results of the interviews comprise of responses from Peter Hinchliffe who is the Secretary General of ICS, Chris Trelawny who is the Special Advisor to the Secretary-General of IMO, Gervais Appave who is the Special Policy Adviser to the Director General of the IOM and Morgane Nicot who is the Crime Prevention and Criminal Justice Officer in the Human Trafficking and Migrant Smuggling Section of the Organised Crime and Illicit Trafficking Branch in the UNODC.

Though the response rate was poor in comparison to the number of recruitment emails sent resulting in a deprivation of the cover of a first-hand perspective from the different international organisations, it, however, does not upset a comprehensive cover of the topic as secondary sources were available and used.

Mr Hinchliffe mentioned that the primary instruments dealt with in the execution of his organization's role regarding migration by sea are UNCLOS, SOLAS and the SAR Manual, Mr Trelawny mentioned SOLAS, the SAR Convention, the International Convention on Salvage 1989 and the Convention on Facilitation of International Maritime Traffic 1965, Mr Appave mentioned that the legal references are extensive and are inclusive of numerous instruments with a regional or bilateral scope and declarations, statements and action plans which are non-binding but have influenced the actions of states, while Ms Nicot mentioned UNCTOC and its Protocols, particularly the Migrant Smuggling Protocol and Trafficking Protocol, Refugee Convention, UNCLOS and human rights instruments (B. Mano O., Personal communication, July 11, 2016, July 14, 2016, August 31, 2016, September, 2016).

The responses to an enquiry of whether the applicable legal instruments used by the respondents were sufficient to deal with the phenomenon varied with many comments made on implementation challenges.

Mr Hinchliffe mentioned that the instruments are working, however, the solution to their success lies with correct implementation while Mr Trelawny mentioned that the instruments were not sufficient as they were not designed to deal with migration by sea. Mr Appave mentioned that though the “tool box is not empty” there exists implementation challenges and Ms Nicot mentioned that there is no single instrument which comprehensively deals with migrants which means a number of instruments had to be read together making dealing with migrants complex (B. Mano O., Personal communication, July 11, 2016, July 14, 2016, August 31, 2016, September, 2016).

When asked whether the applicable instruments were properly applied, Mr Hinchliffe responded by stating that Flag states and ships were properly applying the instruments, however, doubt exists when concerning application by Coastal states, particularly relating to provision of adequate resources as per their obligation under the SAR Convention, while Mr Trelawny stated that the instruments were properly applied. Mr Appave mentioned that there exists implementation challenges concerning the balance of commitments under international law, national security concerns and implications on resources, while Ms Nicot mentioned that most states react on one front meaning there is no comprehensive approach and went further to mention that the Migrant Smuggling Protocol was under implemented (B. Mano O., Personal communication, July 11, 2016, July 14, 2016, August 31, 2016, September, 2016).

As the research has discussed the implications of migration by sea and how multifaceted they are, the respondents were asked about their respective organization’s approach to the conflict between maritime security rights and humanitarian rights arising from migration by sea. Mr Hinchliffe responded by stating that though there is always a risk in embarking an unknown person on board a vessel, the need to rescue

and care for persons at risk of drowning at sea far outweigh the security risk, while Mr Trelawny stated that there is no conflict per se as both rights have to be managed. Mr Appave mentioned that “Reconciling the respective exigencies of humanitarian and security rights is one of the most difficult policy challenges in the field of international migration”, that it is ultimately up to states to manage this and that IOM intervenes to improve the safety of migration by sea through the development of instruments to provide guidance, etc., while Ms Nicot mentioned that the UNODC arranges regional workshops which highlight that ultimately life comes first (B. Mano O., Personal communication, July 11, 2016, July 14, 2016, August 31, 2016, September, 2016).

Responding to a question regarding the gaps which the respective organizations have identified regarding the regulation of migration by sea Mr Hinchliffe responded by stating that there is a gap when coming to providing a humanitarian response to the migration problem in the eastern and central Mediterranean while Mr Trelawny mentioned that the ultimate solution lies with addressing ‘push’ factors which, though not the obligation of IMO, the organization is working together with other agencies and bodies to promote coordination. Mr Appave mentioned that there is no easy access to a remedy for some migrants in need of protection, such as those migrants fleeing natural disasters, and there is a need for better coordinated operations to counter smuggling, while Ms Nicot mentioned that there is a gap concerning jurisdiction for disembarkation purposes and responsibility sharing (B. Mano O., Personal communication, July 11, 2016, July 14, 2016, August 31, 2016, September, 2016).

8.2 Recommendations

Focus in terms of migration crisis management should be directed at ferry services to control and regulate migratory flows better. Not only will this observe international human rights in terms of the right to international protection, it will reduce the number of people who find the business of smuggling migrants attractive or find it to be their only option diminishing the demand for the illegal services, the number of lives lost at sea

would be reduced vastly, search and rescue services would not be under strain and states would have better control over the influx of migrants coming to their shores.

An assisted pathway is a notion spoken of even at IMO as a possible solution and was mentioned by some of the respondents. This will also address the concern of states that terrorists and extremists would take advantage of the current migrant crisis. Controlled processes will ensure that infiltration by terrorists or the prospect thereof decreases.

On a long term basis, sustainable solutions to push factors should be created, implemented and sustained, along with the continuation of awareness initiatives and capacity development programs to assist states with the implementation of the legal instruments, as an instrument becomes futile if it is not coupled with effective implementation. Cooperation, coordination and burden sharing should be encouraged more.

Identified gaps in the legal instruments should be addressed to create comprehensive and effective legal instruments. To create a better understanding of the migration crisis, further work could be devoted to data collection.

Regarding further research, as the scope of the current research was limited to international instruments with only minimal mention of regional agreements or national legislation, further research is needed on the applicable regional agreements and national legislation to analyse their compatibility with the international instruments.

Finally further research and study is needed on the procedural rules in the Organised Crime Convention and the challenges faced regarding the effective implementation of these rules in dealing with crimes that are transnational in nature.

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