

**WHEN MIGRANTS MAKE PERILOUS SEA CROSSINGS:
THE CAUSAL ROLE OF INTERNATIONAL LAW**

*By Ralph Wilde**

When the fate of migrants at sea is discussed, it is common for the implementation of international law to be invoked as a remedy. The present paper interrogates some of the assumptions about the value of international law that lie behind this. What is at stake in viewing international law as a solution to current challenges relating to migrants at sea?

First of all, it is important to acknowledge how the law sometimes plays a major role in preventing migrants from obtaining protection from human rights abuses. Most fundamentally, the law does this by allowing other states, where protection might be forthcoming, to control their borders, both at their side of these borders, and outside this, at ports of exit—whether directly, through the extraterritorial posting of immigration officials, or indirectly, via the operation of legal sanctions against carriers. So, one reason why people pay smugglers significant amounts of money to travel on unseaworthy vessels is because they are legally prohibited, via these visa restrictions and carrier sanctions, from taking the safer and, usually, much cheaper options of regular sea vessels and flights.

This is where the term “illegal migrant,” much hated by refugee advocates—no person should be labelled “illegal”—reflects the general international legal proposition that a state has a right to control its borders, and individuals who cross such borders in contravention of this are, by international legal definition, “illegal migrants.” The term is helpful in reminding us that international law is directly involved in determining the dangerous and expensive nature of sea crossings.

It might be said, then, that certain state entitlements in international law are very much part of the problem. But there are, of course, other areas of law being invoked as the solution—notably, refugee law and human rights law. Refugee advocates and many international lawyers more generally are calling for states to comply with their obligations here.¹ It is suggested that if compliance happened, things would improve. Indeed, perhaps even the operation of the general legal entitlements of states to control their borders might be somehow modified if these other rules were followed.

The main relevant substantive obligation is that of *non-refoulement*, the requirement not to send someone back to face human rights abuse, which exists expressly in the refugee and

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¹ I should declare I was involved, along with Başak Çali, Cathryn Costello, and Guy Goodwin Gill, in drafting and organizing the signatures for a letter, signed by over nine hundred international lawyers, coming out of the 2015 European Society of International Law conference in Oslo, conveying a message of this type. See Open Letter to the Peoples of Europe, the European Union, EU Member States and Their Representatives on the Justice and Home Affairs Council (Sept. 22, 2015), available at <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2015/09/open-letter1.pdf>.

torture conventions, and has been read into other, general human rights instruments. Here it is instructive to consider what is not covered by the obligation.

In the first place, the obligation only applies once individuals have managed to reach or cross the border of the state's territory, or, at least as far as the obligation in human rights law is concerned, if they fall within the control of that state exercised extraterritorially. States can therefore try to prevent this obligation from arising through the operation of the legal arrangements of carrier sanctions and visa restrictions.

In the second place, once individuals are outside the state where they suffered or feared human rights abuse, and are in the territory or under the extraterritorial control of another state, then as far as the *non-refoulement* obligation is concerned, they have no right to move on to another state where the material conditions are better. Thus, people who have escaped Syria and are in camps in Lebanon and Turkey, or have managed to cross over to Greece, have no general right based on this obligation to move further, as many wish. By the same token, there is no requirement here on the part of other states to allow these people to travel to their countries to be given protection there.

An exception to this, insofar as it is still being honored and may survive in the future, is within the Schengen area of the European Union, where there is free movement of people between countries. The Schengen arrangement is the reason why, until borders began to be closed, migrants who had taken the so-called "Balkan route" between Greece and Croatia or Hungary, and wanted to move further north and west, for example to Germany, were potentially able to do so. Even here, though, the law allows for extraordinary suspensions, with the reintroduction of border controls, something which was done by EU states.²

Moreover, to take advantage of this arrangement even when it was in operation, refugees who managed to get to Greece by sea had to initially make a further irregular journey without any legal entitlement, either through the non-Schengen EU countries of Bulgaria and Romania, or the non-EU former Yugoslav states.

More generally, outside these arrangements there is no right of movement to and across borders which could be exercised in order to be able to make asylum claims beyond initial destinations of escape. There is no general right to travel, for the purposes of obtaining refugee protection, into the Schengen zone, or indeed the European Union generally, from outside it, for example from Turkey to Greece or from Libya to Italy. Hence the perilous requirement of an irregular sea crossing.

Also worth noting is the EU system of common asylum law, which under the Dublin Regulation, seeks to ensure that individuals entitled to protection are normally given it in the first EU state they enter. Other EU states are generally entitled to send such individuals back to that first state. Thus, even when Schengen free movement is in normal operation, individuals who have managed to move because of it can be sent back to their original state of entry.

The combined effect of the normal operation of these legal provisions, both generally, and within the European Union, is to ensure that the responsibility for hosting individuals fleeing human rights abuses falls disproportionately on a minority of states. Moreover, these states are typically the least able, in material terms, to discharge their legal duty.

² *Schengen: Controversial EU Free Movement Deal Explained*, BBC NEWS (Apr. 24, 2016), at <http://www.bbc.co.uk/news/world-europe-13194723>.

Despite what some in Europe imagine in terms of the numbers, even now, of refugees in that continent, most people fleeing across borders to escape human rights abuses move from one developing country to another.³

The law provides a means for refugees to be compelled to stay in these developing countries, by enabling more economically advantaged states to prevent regular means of travel to their territories via carrier sanctions and visa restrictions. Moreover, these states are, by virtue of their advantageous position, able to maximize the benefits of the prevention possibilities, by leveraging their economic significance to the airline and shipping industries when seeking to impose and implement carrier sanctions.

Necessarily, the only way of challenging this unequal legal system of refugee protection is either through individuals deciding to move illegally—and dangerously—or states choosing to waive their legal privileges, or go beyond their limited legal obligations. In other words, there has to be a departure from law, either through violation, in the case of refugees, or by doing things the law does not require, in the case of states.

The disproportionate regime of refugee protection globally feeds into, and is replicated by, the system in Europe: the law forces refugees from and travelling through Libya, and from Syria, to resort to the irregular and dangerous sea crossings that, even if successful, leave them in the poorer southern European countries of Italy and Greece, and then keeps them there, absent exceptional measures such as further irregular migration into the rest of Europe.

A further important feature of this system is that states exercising their legal entitlement to keep refugees out are not subject to a legal requirement to provide assistance to those other states who, because of these *non-entrée* actions, are faced with a disproportionate responsibility to host refugees.

Developed states may choose to waive their legal privileges and/or to act beyond what is required by international law. Germany initially decided to suspend its Dublin entitlements and accept refugees already present elsewhere in the European Union. Other European states decided to accept the direct transfer of certain refugees from the camps in Lebanon and Turkey, and to provide funding to improve the material conditions in those camps, sometimes explaining these measures as ways of preventing the need for individuals to make the perilous sea crossing.

More broadly, it is instructive to consider how the Office of the UN High Commission for Refugees (UNHCR), which is usually given the task of running refugee camps in developing countries, is funded. In the main, this is not through the general UN budget but, rather, through annual rounds of pledges from, and special appeals to, developed countries. In this context, we might understand the work of the agency running refugee camps as a means of richer countries assisting those developing states in which the camps are located. More broadly, we might view this as an alternative means of securing the welfare of the individuals in the camps, compared to the option of such individuals having a legal right to travel to wealthier countries to secure asylum there.

It might be said, then, that the legally-enabled policy of keeping most refugees out of developed countries can be compatible with the protection of these refugees, if complemented by the provision of material assistance to refugee camps, and mitigated by exceptional arrangements allowing in some refugees.

³ According to the Office of the UN High Commissioner for Refugees: “Developing regions hosted 86 percent of the world’s refugees under UNHCR’s mandate.” See UN High Commissioner for Refugees, *Global Trends: Forced Displacement in 2015 (2016)*, at <http://www.unhcr.org/576408cd7.pdf>.

This argument has to reckon with the fact that the complementary protection arrangements are ultimately discretionary. This creates the possibility that they will be modest, arbitrary, and distorted by considerations other than the needs of the individuals concerned.

This possibility has indeed been realized in fact. The German government's decision to be more welcoming than it was legally required to be, already atypical when compared with most other European states, is no longer as popular in the country as it once was. The decision by certain other European states to take some Syrian refugees direct from the camps has involved a relatively limited number of people.

More broadly, the way UNHCR financing is configured, precariously dependent on the annual decisions of donor states, leaves the organization vulnerable to the charge that this has distorted the policies of the organization to suit the wishes of donor states to contain refugees—"warehousing" them outside the developed world.⁴

In this and other refugee assistance, we see Organisation for Economic Co-operation and Development (OECD) states sometimes using existing international development budgets, thereby reducing general aid provision, and thus potentially worsening the material conditions in the developing world which contribute to forced migration in the first place. What is posited as a remedy to a problem in one area comes at the expense of efforts in another area that actually addresses part of the cause of the problem in the first area.

This also enables OECD states to double dip in the discourse of international humanitarianism: they use the same resources to claim to be both meeting their aid targets—including the figure 0.7 percent of GDP that has been invoked for some time in international law—and providing supposedly "extra" assistance to deal with the exceptional current migration situation.

To conclude: when considering the fate of migrants at sea, we have to face up to how international law may be, at best, incapable of making much of a positive difference, and, at worst, partly determinative of the broader structural factors that mediate the decisions people make to take such dangerous actions.

⁴ See, e.g., U.S. Committee for Refugees and Immigrants, *Statement Calling for Solutions to End the Warehousing of Refugees* (June 2005), available at http://www.anafe.org/IMG/pdf/appel_europeen_lance_par_u.s.ve.pdf (I should declare I am a signatory to this statement).