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# Legal and practical issues raised by the movement of people across the Mediterranean

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The movement of people is a phenomenon we must learn to live with and to manage as best we can in the interests of all. Among other matters, this will require states dealing with each other on a basis of equity and equality, rather than outmoded and unrealistic expectations of sovereign entitlement.

‘Irregular migration’ is largely a product of the late twentieth century, reflecting the desire of certain states to impose (their) order on the movement of people across borders. ‘Irregular migration’ is, currently at least, little represented in international law. The irregular migrant, like the regular migrant, is not defined by international law other than by reference to his or her common humanity. Nor does international law prescribe what states shall do (as opposed to what they may not do), when confronting this product of their own idiosyncratic view of the migrant on the move. More particularly, there is a solid legal framework governing the actions of states in and outside their territory which

is not supplanted by the fact that control of migration – the core decisions about entry, residence and removal – falls within the sovereign competence of the state.

However, traditional unilateralist assumptions regarding state competence have proven inadequate as a basis for dealing with today’s humanitarian issues and have closed off thinking about new, urgently needed approaches. Today, there is a new reality, the product of a dynamic in relations between states that has been generated in part by globalisation and in part by inescapable facts – for example, the fact that migration cannot be ‘managed’ unilaterally, let alone turned

off. The persistent illusion of an absolute, exclusionary state competence remains a matter of concern because it tends to frame and direct national legislation and policies in ways that are inimical to international cooperation and, not infrequently, contemptuous of human rights.

International law is always there, even though some states may seek to displace it, to build the notion of 'irregular' status into some sort of foundational reason or excuse for denying to one particular group the rights to which we are all entitled by virtue of our common humanity. A gap nonetheless remains between acceptance of a human rights-based approach and the reality for today's migrants, and it will need to be bridged by way of effective implementation of the applicable law. The framework of international law and obligation implies more than the passive avoidance of direct harm, and demands an active protection role – one in which responsible states are obliged to ensure that those over whom they do or may be expected to exercise jurisdiction and control are effectively protected as a consequence.

### Rescue at sea

The European States' special legal responsibilities in the Mediterranean – if only because they assert the right to control passage – call for a coherent approach to rescue at sea and interception coupled directly to disembarkation in a place of safety, with appropriate care and assistance premised on the protection of rights. In principle, a starting point for disembarkation could be flag-state responsibility in the case of rescue or interception by a state's naval or equivalent vessels. But although this would be a beginning, that must not be allowed to result in gross disparities between states lest they be disinclined to commit resources to the safety of life at sea. States committed to search and rescue in the Mediterranean fulfil a community responsibility, and a formula for equitable sharing is called for which, while securing prompt disembarkation, then leads on to land-based assistance, processing and solutions. Disembarkation in a place of

safety is essential but it cannot be the end of the story.

Nor can flag-state responsibility be applied to merchant vessels. What is needed here, as experience with the Indo-China refugee crisis demonstrated, is an internationally agreed and administered scheme or pool of disembarkation guarantees, together with provision for compensating ships' owners for at least some of the costs incurred when ships' masters fulfil their international legal duties of rescue.

If those intercepted or rescued at sea are not disembarked in European space, then effective, open and internationally supervised agreements will be essential to ensure their landing and accommodation in a place of safety, their treatment and protection in accordance with applicable international and European standards, and a solution appropriate to individual circumstances, such as asylum, resettlement, facilitated third-country migration or return in safety and dignity to countries of origin. Indefinite detention of refugees, asylum seekers and migrants in sub-optimal conditions ought never to be on Europe's agenda.

The apparently contradictory pull of obligations relating to interception and rescue at sea or combatting smugglers and traffickers on the one hand and of human rights on the other might seem to compromise protection. States' responsibilities are certainly not part of a seamless web of rights and obligations when it comes to seaborne migration but some things are clear. A state minded to take action, as it should, against smuggling and trafficking already has duties towards the victims. A state which elects to intercept boats believed to be carrying irregular migrants likewise has protection obligations, irrespective of the legality of any particular interception.

This means bridging, in law and practice, the migration/refugee protection gap and it means a readiness on the part of the EU and its Member States to integrate their own human rights and fundamental values into truly cooperative relations with transit and other affected states.

## A European Migration and Protection Agency

The EU needs to turn outwards and be prepared to engage with countries of transit on a basis of equality and equity, rather than just instrumentally in pursuit of narrow regional interests and 'sovereign entitlements'. Among other things, what is needed, as a matter of logic and coherence, is a European refugee status built on Member States' international obligations and supplemented with the broad community benefits of EU law, including freedom of movement. A European Protection Agency competent for refugees and migrants in need of protection would be a good start, for many issues are common to both.

All Member States are party to the 1951 Convention and 1967 Protocol relating to the Status of Refugees, and all are bound by the same obligations and the same legal understanding of the refugee. Given that they have all agreed to treat refugees in the same way, to recognise the same rights and to accord the same benefits, national refugee status determination systems are redundant. The EU demands – I am shortening the argument – a simple European response, in which Europe's refugees enjoy a European asylum and European protection, and the rights and benefits accorded by European law. Meanwhile, good policy, if not strictly logic, argues equally for a common obligation-based approach, not just to refugee status determination but also to resettlement, rescue at sea and protection at large.

If the EU can sign treaties, then in theory it could replace individual Member States as party to the regime of protection organised under the 1951 Convention

and the 1967 Protocol; or if it does not replace them, it could exercise their competences by way of delegation.

Current proposals for dealing with irregular migration merely seek to prevent migrants and refugees from reaching Europe, essentially by moving border control further and further outwards, 'fighting' the traffickers, destroying the boats, building fences and, we suppose, 'preventing' illegal migration. In thinking medium- and long-term, attention must also focus on assistance to states of transit, many of which are facing new challenges in the management of migration but without the infrastructural capacity to accommodate, assist, protect and process non-nationals on the move. The EU has taken initiatives with outside states but too often they are oriented to control alone (in the EU's interest), with no regard to the wider, international dimensions.

The linkages between the regional dimensions of this crisis and the refugees now benefiting from asylum in Turkey, Jordan, Lebanon and Egypt are clear, and if coherent effective responses are not forthcoming, further onward movement is inevitable. Only by engaging across the full spectrum of interests can we make a start to what will and must be a generations-long project of protection and opportunity, but also in realising human potential both at home and abroad, in bringing working and workable alternatives to those whom desperation drives to risk all.

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Calais, France, November 2015.