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The challenge of mixed migration by sea

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While ‘boat people’ are often fleeing a situation of crisis, they share their mode of travel with many types of migrants. Much more needs to be done to respond to irregular maritime migration in a way which protects fundamental rights and respects human dignity but the political will for this appears to be lacking.

Contemporary irregular migration is mostly ‘mixed’, meaning that it consists of flows of people who are on the move for different reasons but who share the same routes, modes of travel and vessels. They cross land and sea borders without authorisation, frequently with the help of people smugglers. IOM and UNHCR point out that mixed flows can include refugees, asylum seekers and others with specific needs, such as trafficked persons, stateless persons and unaccompanied or separated children, as well as other irregular migrants. The groups are not mutually exclusive, however, as people often have more than one reason for leaving home. Also, the term ‘other irregular migrants’ fails to capture the extent to which mixed flows include people who have left home because they were directly affected or threatened by a humanitarian crisis – including one resulting from climate change – and need some type of protection, even if they do not qualify as refugees.

Mixed migration is not a new phenomenon. What has changed is its scope and complexity, and the way countries of destination react to it. The proliferation of causes, the involvement of criminal enterprises, security concerns and the sheer number of people on the move have led states to intensify their efforts to fight irregular migration, often applying blanket measures without any screening for protection needs. Where screening does take place, it generally serves only to identify refugees, carrying the risk of delegitimising those who do not qualify as refugees, and having a negative impact on how such persons are treated.

Although governments are wary of accepting additional protection obligations beyond

those pertaining to refugees, organisations working in the field of asylum and migration have started to look more closely at the profile of migrants and at their protection needs, including those which arise in the course of the journey as well as those resulting from conditions in the migrants’ countries of origin.

The particular challenge of boat migration

Boat people, like other migrants, are driven by a variety of push factors: from economic deprivation to political repression, from civil war to the chaotic aftermath of revolutionary change, from sudden-onset natural disaster to the slower effects of climate change.

States increasingly see the ‘high seas’ as an area to which they can extend their border control measures, and are tempted by a variety of extraterritorial actions to prevent unauthorised arrivals. Some states argue that their international legal responsibilities do not apply when they act outside their territory or territorial waters, essentially creating a zone where the rights of migrants are not protected – and where it is difficult to monitor the actions of states.

As governments have intensified their efforts to combat irregular migration, people smugglers and migrants have resorted to ever more dangerous routes and means of transport. The result is situations bearing little resemblance to what the architects of the international law of the sea had in mind when they codified the duty to render assistance to persons in distress at sea.¹

The duty to render assistance is a basic tenet of seafaring. Traditionally it was assumed that persons rescued at sea would be fishermen or other seafarers who could be deposited

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at the next port of call, from where they would return to their home countries. But disagreements about disembarkation of Vietnamese boat people emerged in the 1970s and 1980s, generating considerable regional and international tension, and foreshadowing problems in the Mediterranean region and elsewhere decades later.

By its very nature, the rescue of migrants at sea would seem to lend itself to international cooperation, since both rescuing and coastal states may find themselves with jurisdiction over migrants essentially by chance. The lack of political will to resolve questions concerning rescue and disembarkation, even within a regional context, is disturbing. The reluctance of states to make progress on these issues not only reflects their unwillingness to be saddled with responsibility for refugees, but is linked to the fact that migrant vessels frequently also carry individuals not in need of protection, or fleeing risks not covered by the refugee definition. Without agreement on how to respond to people on the move who cannot be returned to their countries of origin, whether for practical or protection-related reasons, states will continue to be wary.

Interception and state responsibility

Interception at sea invariably results in lower levels of protection of fundamental rights than would have been available had the migrants been allowed to continue to their destination. From the perspective of states, however, it is an appealing instrument both because it prevents arrivals and because it takes place beyond public view. International law is not well developed with regard to interception. However, there is a broad consensus that states are bound by their international human rights obligations wherever they assert their jurisdiction, including outside their territory or territorial waters and indeed the European Court of Human Rights has asserted that states must take affirmative measures to ensure that intercepted migrants have access to protection.²

Even in the absence of empirical evidence that the possibility of being intercepted affects



Spanish coastguards off the island of Tenerife in the Canaries intercept a fishing boat carrying African migrants.

the 'tipping point' at which people decide to leave their country, states act on the basis of a belief that it is a valuable deterrent. For many years, the US has intercepted Cubans, Haitians, Dominicans and others in the Caribbean, and refused to allow intercepted persons, including those demonstrated to be refugees, to enter its territory. To avoid the obligations which would flow from the label 'refugee', it calls these persons 'protected migrants'. Australia, too, has gone to great lengths to avoid bringing intercepted persons to its territory where they would benefit from Australian legal protections. Both countries have taken intercepted persons to offshore facilities where conditions have been criticised as inadequate, and where independent monitoring has been very difficult.

States thwarted UNHCR efforts to issue Guidelines on interception, but the agency did issue a Protection Policy Paper on interception and extraterritorial processing,

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which sets out some standards for reception – based on international human rights law – applicable to all new arrivals, not only those who seek protection as refugees. Reception arrangements must address basic needs and be consistent with the right to an adequate standard of living; culturally appropriate meals, access to communication devices, space, privacy and security are required; detention must be used only if necessary, reasonable, proportionate and non-discriminatory. People with special needs (women, children, victims of torture and trauma) merit specific assistance.³

As the movement to define and secure the rights of persons who do not qualify as refugees but are fleeing other risks gathers steam, interception and offshore processing are likely to become even more attractive to states determined to limit their obligations.

Conclusion

Boat migration is a complex phenomenon, involving the intersection of several bodies

of international law and thorny questions of jurisdiction. It affects countries of origin, of transit and of destination in all regions of the world. Despite its prevalence, states have so far failed to demonstrate the political will to work out an internationally accepted response which would both respect the sovereign right of states to control their borders and protect the human rights and human dignity of the boat people. Instead, states experiment with ad hoc responses, with the balance between protection and control shifting as a function of domestic and external factors.

Irregular migration by sea almost always represents a response to a crisis. It seems set to continue, as the drivers of migration multiply, other migration options are foreclosed and the steady intensification of migration control measures pushes migrants and people smugglers to take ever greater risks. Indeed, the very mode of travel frequently constitutes a humanitarian crisis, as evidenced by regular reports of tragedies at sea.

Inter-state agreements are needed in order to guarantee rescue at sea and safe disembarkation, as well as arrangements for reception and screening. States which practise interception at sea need to be held accountable for the protection of migrants' rights, and organisations should be wary of participating in or otherwise lending their imprimatur to ad hoc measures which undermine state responsibility. There is no doubt that the mixed nature of the flows creates a real challenge, with states and international organisations only in the early stages of discussions about how to identify and respond to protection needs beyond those of refugees.

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1. UN Convention on the Law of the Sea 1982, Article 98
2. *Hirsi Jamaa and Others v. Italy*, Application 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012.
3. 'Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations With Respect to Extraterritorial Processing', UNHCR Protection Policy Paper (2010).