marsafenet

NETwork of experts on the legal aspects of MARitime SAFEty and security

COST ACTION IS1105

MIGRATION AT SEA

INTERNATIONAL LAW PERSPECTIVES AND REGIONAL APPROACHES

Edited by
Ana Nikodinovska Krstevska
Borka Tushevska Gavrilovikj

cost
EUROPEAN COOPERATION IN SCIENCE AND TECHNOLOGY

GIANNINI EDITORE
2016

marsafenet

NETwork of experts on the legal aspects
of MARitime SAFEty and security

COST ACTION IS1105

MIGRATION AT SEA

INTERNATIONAL LAW PERSPECTIVES AND REGIONAL APPROACHES

Edited by

Ana Nikodinovska Krstevska
Borka Tushevska Gavrilovikj

GIANNINI EDITORE
MARCH 2016

Title
Migration at sea. International Law Perspectives and Regional Approaches

Editors
Ana Nikodinovska Krstevska
Borka Tushevska Gravrilovikj

Proofreading
Marija Madzar

Suggested reference
This ebook may be cited as Ana Nikodinovska Krstevska and Borka Tushevska Gavrilovikj (eds), Migration at sea. International Law Perspectives and Regional Approaches, Giannini Editore, Napoli, 2016.
ebook available at http://www.marsafenet.org/

ISBN 978-88-7431-818-6

Publisher
GIANNINI EDITORE
Via Cisterna dell'Olio 6/B | 80134 Napoli
Napoli, Italia

March, 2016

MIGRATION AT SEA

INTERNATIONAL LAW PERSPECTIVES AND REGIONAL APPROACHES

COST ACTION IS1105

This publication is based upon work from COST Action IS 1105, supported by COST (European Cooperation in Science and Technology)

MARSAFENET - the acronym for NETwork of experts on the legal aspects of MARitime SAFEty and security - aims to bring together experts in international law of the sea in order to increase the knowledge on maritime security and safety and to develop a common conceptual and methodological framework with the goal of contributing to fill the legal gaps and of transforming scientific results into feasible solutions. The network is intended to foster the identification and exploitation of synergies between EU policies on maritime safety and security. In terms of societal implications, it is aimed at facilitating the detection of solutions for old and new issues and criticalities, that may be implemented within the public realm (decision-makers, international institutions, international and national tribunals, EU institutions, etc.) and within the private sector (shipping sector, civil society, NGOs, etc.).

This Cost Action takes an in-depth look at current urgent maritime matters focusing on four main issues, shipping and marine environmental protection, new developments of economic activities at sea, international maritime security and border surveillance and, finally, protection of fragile and semi-enclosed seas.

MARSAFENET is currently composed of more than 80 legal experts from 23 different countries.

More information about COST Action IS1105 is available at www.marsafenet.org.

The Grant Holder of the Cost Action IS1105 is the INSTITUTE FOR INTERNATIONAL LEGAL STUDIES (ISGI). The Institute for International Legal Studies is a scientific organ of the National Research Council of Italy (CNR), founded as a Centre in 1986 in cooperation with the Italian Society for International Organization (SIGI). Key areas of activity include also training and expert consultancy in cooperation with national and International institutions such as the Ministry of Foreign Affairs and the Ministry of Welfare, Health and Social Policies, the Asser Institute of the Hague, ESA, UNIDROIT and UNESCO.

More information about ISGI is available at www.isgi.cnr.it.

EUROPEAN COOPERATION
IN SCIENCE AND TECHNOLOGY

COST (European Cooperation in Science and Technology) is a pan-European intergovernmental framework. Its mission is to enable break-through scientific and technological developments leading to new concepts and products and thereby contribute to strengthening Europe's research and innovation capacities.

It allows researchers, engineers and scholars to jointly develop their own ideas and take new initiatives across all fields of science and technology, while promoting multi- and interdisciplinary approaches. COST aims at fostering a better integration of less research intensive countries to the knowledge hubs of the European Research Area.

The COST Association, an International not-for-profit Association under Belgian Law, integrates all management, governing and administrative functions necessary for the operation of the framework. The COST Association has currently 36 Member Countries.

More information about COST is available at http://www.cost.eu

COST is supported by the EU Framework Programme Horizon 2020

Goce Delchev University in Shtip was established in 2007. It is a state university, ranked second on the list of state universities in Republic of Macedonia. It comprises 12 faculties from social, natural, formal and applied sciences, and 3 academies. It organizes three cycles of education and it has around 20.000 students. The diplomas of Goce Delchev University in Shtip are internationally recognized and are competitive in the international labor market. The website of the university is www.ugd.edu.mk.

Achieve your life goal! Recognize Your Future!

EDITORS

ANA NIKODINOVSKA KRSTEVSKA is assistant-professor in International Law and European Foreign Policy at tht Faculty of Law, Goce Delchev University – Shtip, and she is Head of the Department of International Relations and European Law. She holds a bachalor's degree in International and Diplomatic Relations at the University of Naples 'l'Orientale', master's degree in Sustainable Development at the University of Bologna, and a Ph.D degree in Studies for European Integration with accent on European Foreign Policy at Ss Cyril and Methodius University in Skopje. Her work is focused on raising awareness about the significance and importance of Law of the Sea in Land Locked States. Her current research is related to the concept of sustainable development in terms of legal, political and social development.

BORKA TUSHEVSKA GAVRILOVIKJ is assistant-professor of Contract law, Commercial law, International Commercial Contracts and European Business Law at the Faculty of Law, Goce Delchev University– Shtip. She is Head of the Department of Business Law. Her Ph.D dissertation is in the area of transport law and freight forwarding. She has experience with several short study visits, such as the stay at Transport Research Institute at Napier University in Edinburg. Her current research is related to the port state control in international trade and international trade policy in correlation with the concept of sustainable development.

SCIENTIFIC COMMITTEE

TABLE OF CONTENTS

FOREWORD

Gemma Andreone[1]

For many years now, television news broadcasts and newspapers throughout Europe and the world have flooded us with stories of grave losses of human lives at sea, particularly in the Mediterranean. It is a startling consideration that we can become sated, and hardened even to the most catastrophic news stories of shipwrecks which involve children, women, young and elderly migrants fleeing from countries at their last gasp as a consequence of war, poverty, or absence of democratic values and principles.

Those of us who live in the west, and particularly in Europe, who in the last decades have seen a marked increase in the number of asylum seekers and irregular migrants, are at risk of growing accustomed to living with the reality of this tragedy which repeats itself daily in the Mediterranean. But the migration continues relentlessly.

Two great questions hang imperatively over these events: the first regards the relationship of the western countries, and in particular the countries of the European Union, to the phenomenon of migration, which is constantly on the increase, but apparently unstoppable in the context of the international stage today. Second, greater thought must be given to marine areas, insofar as these have become the theatre for a veritable international extermination of peoples coming from the most tried continents and countries.

These two questions, in many cases intersecting and overlapping, call for an analysis from a legal standpoint, taking into consideration the constant updating of applicable norms, relevant national and international practice, and the ceaseless actions, both international and regional, which attempt to face situations of emergency, as well as to find longer term solutions to the problems of migration.

The international Conference which was held in Macedonia on 6th October 2015, excellently organized by professor Ana Nikodinovska Krstevska

[1] Gemma Andreone is Senior Research Associate of International Law, Institute for International Legal Studies of the Italian National Research Council; Chair of the Cost Action IS1105 Marsafenet; Treasurer and Council Member of the International Association of the Law of the Sea.

and professor Borka Tushevska Gavrilovikj, in the context of the Cost Action IS1105 Marsafenet, provided an important opportunity to discuss these questions, not only among academics, but also with stakeholders directly involved in the reception of migrants, or in the rescue of human life at sea. Furthermore, the participation of NGOs and persons from Macedonia dealing with overland migration from Asia toward Europe enriched the discussion with information and points of view which proved most useful for the piecing together of legal problems arising from migration, from not only an international, but also a national and regional perspective.

The present volume comprises the written version of some of the interventions presented at the Conference. They touch upon the salient points of the discussions, and regard the comparison of prospects within international law and the regional approaches recently adopted. Their aim is to make a contribution to the legal literature currently available, and to offer many points for reflection, from the complexity of the legal picture on the subject of migration as a whole, and the responsibility of states in the matter of rescue at sea, to the main questions relating to problems of security inherent in migration in the Balkans. Many other aspects are also considered beyond the legal, arising from this, including an analysis of some specific and critical humanitarian points intrinsic to the phenomenon of migration, and in particular of the current emergency of asylum seeking refugees.

The organizers of the Conference, the editors of this volume, have not only achieved a good result from the scientific point of view, but have also allowed the inclusion, alongside the international legal analysis, of some salient points from other disciplines and non-academic approaches, which have resulted in a solid and ample contribution to the treatment of the subject.

Gemma Andreone

ILLEGAL MIGRATION: LEGAL CHALLENGES AND PERSPECTIVES IN INTERNATIONAL LAW

Elda Belja[1] and Simon Manduca[2]

I. Introduction; II. Provisions in UNCLOS; II. The Migrant Smuggling Protocol; III. The IMO's responses; IV. Conclusion

I. Introduction[3]

Migrant smuggling is considered a maritime security threat which, due to the particular human element involved, has become a prominent global issue. For a very long time, migrants have turned to the sea to escape war torn zones, poverty, humanitarian crisis, political instability, and racial or religious discrimination. The recent conflicts in different parts of the world have seen thousands of people fleeing their countries in the hope of reaching a place with a better standard of living. The latest reports from the coast off Turkey have however demonstrated once again the serious threat this organized crime poses. Migrants are transported on unseaworthy vessels (often small fishing boats with extremely poor safety conditions which are severely overcrowded), in atrocious conditions, without adequate provisions, on long voyages which result in many fatalities every year. Reports note that 2015 is likely to have been the deadliest year for migrants escaping violence and poverty in the Middle East and North Africa by sea.

Governments have responded to this phenomenon with stricter border controls, forcing migrants to make use of criminal organizations to secure access to their desired country of destination. The abuse of the desperate need of

---

[1] Elda Belja is Lecturer in International Maritime Law at the IMO International Maritime Law Institute, Malta.

[2] Dr. Simon Manduca is Associate member at Camillieri, Delia, Randon and Associates.

[3] This article reflects the presentation delivered on 6 October 2015 for the purpose of the MARSAFENET Conference organized in Ohrid on Migrations at Sea: International Law Perspectives and Regional Approaches.

migrants to leave their country of origin has turned migrant smuggling into a very profitable business with professional smugglers charging exorbitant fees for their services. The suppression of this crime therefore necessitates a global approach as every State is affected, especially since the potential for criminals to make use of migrant smuggling networks cannot be ignored. It is for these reasons that the international community has sought to respond to this threat through various means, including the use of a number of multilateral and bilateral initiatives.

This article will analyse these initiatives with the aim of providing an understanding of the legal challenges posed by this crime and, considering the recent developments, what could be the way forward for its suppression. To this end, a review of the relevant provisions of the United Nations Convention of the Law of the Sea (UNCLOS) will be provided. This review will be followed by an analysis of the key provisions of the main international instrument which deals in a comprehensive manner with this matter - the Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol) supplementing the United Nations Convention against Transnational Organized Crime (CATOC). The Protocol is of great relevance both for the regulatory framework it provides as well as for its recognition of the human element central to these offences. (It must be remembered that the subject of crime are people and not commodities, and therefore any response unavoidably incorporates considerations of human rights, humanitarian law and refugee law). The Protocol, as Mallia notes[4] also presents a regime which works within the recognized system provided by the UNCLOS – avoiding problems of flag State exclusivity on the high seas, not by challenging the general principles of the law of the sea but rather, by working within their parameters. The International Maritime Organization's response will also be discussed briefly.

I. Provisions in UNCLOS

Although migrant smuggling is not specifically addressed in UNCLOS, Klein comments that migrant smuggling may be catered for within Article 19(2)(g) where passage is considered to be prejudicial to the peace and good order of a State, and therefore non-innocent, in the case of a ship being engaged in the 'the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State'.[5]

[4] Mallia, Patricia; Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creating of a Co-operative Framework, Martinus Nijhoff Publishers, Leiden, The Netherlands, 2010, p.127.

[5] Klein, Natalie; Maritime Security and the Law of the Sea, Oxford University Press, the United Kingdom, 2011, p.313. See however Gallagher, Anne and David, Fiona; The International Law of

Likewise, a State may also be able to exercise criminal jurisdiction[6] over the smuggling of migrants under Article 27 which states that:

> The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
>
> (a) if the consequences of the crime extend to the coastal State;
>
> (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
>
> (c) […]; or
>
> (d) […].

Therefore, due to the consequences of the offence of migrant smuggling possibly extending to the coastal State or disturbing the peace of the country or the good order of the territorial sea, criminal jurisdiction may be exercised.

Any infringement of immigration laws which takes place in the territory or territorial sea of a Coastal State may be punished[7] or prevented[8] in its contiguous zone in accordance with Article 33(1).

On the high seas[9] a vessel is subject to the flag State's exclusive jurisdiction. However, this is not an absolute rule from which no derogation is permitted. There are certain instances where interference with the principle of *mare liberum* is permissible in order to suppress unlawful or undesirable activities on the high seas.[10] There are various terms which are used to denote a physical interference with a vessel on the high seas. These include interdiction, interception and in UNCLOS the right of visit.

Migrant Smuggling, Cambridge University Press, Cambridge, 2014 pp.234-235 who argue that 'The reference in the Chapeau of Article 19(2) of UNCLOS to "engag[ing] in any of the following activities" indicates that some "activity" is indeed required, such that mere passage, without more, would not amount to prejudice to the State. Thus, the mere carriage of smuggled migrants by a vessel passing through the territorial waters, destined for a third State, would not, of itself, render the passage non-innocent.'

[6] This may be done through the right of hot pursuit. This is an accepted exception to flag State jurisdiction which acknowledges the coastal State's right to protect its interests and exercise enforcement jurisdiction in its territorial waters and is allowed to continue the hot pursuit on the high seas.

[7] It would be normally the case of outgoing ships.

[8] Any actions of prevention however will not amount to a right of arrest; such actions will be limited to inspections and warnings. See Gallagher, Anne and David, Fiona, *op.cit.*, pp.240-241.

[9] Considering that the coastal State enjoys rights in the Exclusive Economic Zone which are not related to the issue of migrant smuggling, such zone is not discussed as the regime of the High Seas would apply.

[10] Guilfoyle, Douglas; Shipping Interdiction and the Law of the Sea, Cambridge University Press, Cambridge, 2009, p.4.

Whatever term used, the only exception found in UNCLOS to the rule of non-interference is the right of visit. The Convention does not specifically mention *en nomine* interception or interdiction, but these will fall under the general rubric of the right of visit.[11]

It is noteworthy that Article 110 of UNCLOS does not specifically cater for the right of visit on the high seas in the case of migrant smuggling. However, since the migrants are often found on vessels which are not registered and usually do not sail under a flag, these vessels may be considered stateless vessels for the purposes of Article 110, thus extrapolating this ground to include vessels engaged in migrant smuggling and allowing the right of visit. There is no explanation in the Convention however on what actions could follow such visit. Most regrettably the same ambiguity is also reflected in Article 8(7) of the Migrant Smuggling Protocol which will be discussed next.

II. The Migrant Smuggling Protocol

The primary legal instrument addressing the threat of migrant smuggling by sea is the Migrant Smuggling Protocol. The genesis of the Migrant Smuggling Protocol may be traced to the IMO, which in 1997 noted, following a proposal made by Italy that it was outside the scope of the Organization to deal with the trafficking of migrants by sea, leading to the issue being developed as a Protocol under the umbrella of transnational organized crime.

This is not an independent treaty but is a Protocol to CATOC adopted on 15 November 2000. The Convention, which is the key international law treaty dealing with transnational organized crime, is supplemented by three Protocols dealing with human trafficking, migrant smuggling and the trafficking of firearms;[12] however to become a Party to any of them, a State must first become a Party to the main Convention.[13] A State Party to CATOC is not bound by any of its Protocols unless it becomes a Party to the Protocol in accordance with the provisions thereof.[14] The Protocols and the Convention should be interpreted together taking into account the purpose of the specific Protocol.[15]

---

[11] Papastavridis, Efthymios; The Interception of Vessels on the High Seas. Contemporary Challenges to the Legal order of the Oceans, Hart Publishing, Oxford, 2013, p.61.

[12] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; The Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol); and The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

[13] CATOC, Article 37(2).

[14] CATOC, Article 37 (3).

[15] CATOC, Article 37 (4). See also Article 1(1) of the Migrant Smuggling Protocol.

The Convention and Protocols are thus complimentary, with several of the provisions of the Convention applying *mutatis mutandis* to the Protocols.[16] All State Parties agree to take various measures to combat transnational organized crime, ranging from criminalization of certain crimes in domestic law, to cooperation in enforcement, extradition and mutual legal assistance among others.[17]

The CATOC and the Migrant Smuggling Protocol therefore set out the necessary international cooperation for the suppression and criminalization of illegal migrant movement across international borders.

The Migrant Smuggling Protocol is designed to set up the appropriate legal framework in order to combat the ever growing crime of migrant smuggling being committed by criminal groups, while stressing the importance of safeguarding the smuggled persons and their human rights. This need to treat the migrants in a humane manner and with all their inherent rights is stressed in the Preamble to the Protocol.

The Protocol in not novel in structure, and generally follows the pattern found in other existing international jurisdictional frameworks, by providing a comprehensive structure, requiring the criminalization and punishment of particular acts and subjecting State Parties to a range of measures including extradition, cooperation, the giving of information and mutual legal assistance.[18] However, as noted by Mallia, the acknowledgment of the link of this crime to organized criminal activity, as well as the importance given to the rights and safeguards of the migrants due to the particular human element involved in this threat, distinguish this Protocol from other legal instruments in maritime security law.[19] This is all neatly summarized in the statement of purpose of the Protocol found in Article 2 which states that '[t]he purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.'

The Protocol defines in Article 3 the smuggling of migrants as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'. It is interesting to note that in the Interpretive Notes, the terms 'financial or other material benefit' in the definition are deemed to include activities of organized criminal groups, but to exclude activities for humanitarian reasons or where support is provided based on family ties.[20]

---

16 See Migrant Smuggling Protocol, Article 1(2).

17 Kraska, James, Pedrozo, Raul; International Maritime Security Law, Martinus Nijhoff Publishers, 2013, pp. 660-661.

18 Mallia, Patricia, *op. cit.*, p 116.

19 Ibid., p. 117.

20 UN Doc A/55/383/Add.1 para. 88.

The Protocol provides for direct application only to:

> ...the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.[21]

This, hence, would seem to exclude ad hoc or small-scale operations which do not involve an *organized criminal group* or which are not *transnational in nature*. It is important however to recall Article 34 (2) of CATOC which clearly stipulates that 'offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group…'. It is also relevant to point out that other offences established under the Protocol, such as facilitating illegal stay or production of fraudulent travel documents, could easily take place within a single State and thus lack any element of transnationality.

An innovative provision, in line with the main aim of the Protocol, is established in Article 5 which excludes criminal liability for the migrant purely for endeavouring to be smuggled. This is, however, not a general exclusion from liability for the migrants as they may still be held liable for other criminal offences under the domestic law of a State Party which they may have committed during their voyage.[22] This is explicitly stated in Article 6(4) which allows State Parties to take measures against any person who commits an offence against its domestic laws.

Article 6 provides a list of mandatory criminal offences which must be adopted into State Parties legislation. The Interpretive Notes explain that with regard to this article the offences should be considered as being part of activities undertaken by organized criminal groups.[23] When committed intentionally and with the aim of obtaining in any manner a financial or material benefit the following are to be considered as criminal offences:

> (a) The smuggling of migrants;
> (b) When committed for the purpose of enabling the smuggling of migrants:
> (i) Producing a fraudulent travel or identity document;

[21] Migrant Smuggling Protocol, Article 4.
[22] Mallia, Patricia; op.cit., p.118.
[23] UN Doc A/55/383/Add.1 Para. 92.

> (ii) Procuring, providing or possessing such a document;
> (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.[24]

The Protocol also obliges State Parties to criminalize inchoate offences related to those in Article 6(1), such as the attempting to commit an offence,[25] participating as an accomplice,[26] or inciting others to commit an offence[27] listed therein. Article 6 also introduces the concept of aggravated offences. The Legislative Guide for the Implementation of CATOC and its Protocols notes that, 'Without adding further offences, States parties are also required to incorporate into some of the offences established in accordance with the Protocol specific circumstances that would ensure that cases in which they have occurred are taken more seriously. The obligation is fully mandatory for all offences except those of participating as an accomplice and organizing or directing others to commit offences, which are made subject to the basic concepts of the legal system of the implementing State party.'[28] Legislators are required to recognize as aggravated offences those that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or that entail inhuman or degrading treatment, including for exploitation, of such migrants.[29]

The consequences of finding an offence as 'aggravated' will depend on the legal system of the State criminalizing the offence. As noted in the Legislative Guide for the Implementation of CATOC and its Protocols 'this could take the form of either complete parallel offences, such as aggravated smuggling, or of provisions that require the courts to consider longer or more severe sentences where the aggravating conditions are present and the accused have been convicted of one or more of the basic offences established in accordance with the Protocol. The fundamental obligation is to ensure that, where the aggravating circumstances are present, offenders are subjected to at least the risk of harsher punishments.'[30]

---

[24] Migrant Smuggling Protocol, Article 6(1).

[25] Migrant Smuggling Protocol, Article 6(2)(a). This offence is established 'Subject to the basic concepts' of the legal system of the State as not all legal systems incorporate the concept of criminal attempts. See Legislative Guide for the Implementation of the CATOC and its Protocols at paras 44 and 51.

[26] Migrant Smuggling Protocol, Article 6(2)(b).

[27] Migrant Smuggling Protocol, Article 6(2)(c).

[28] See Legislative Guide for the Implementation of the CATOC and its Protocols at para 45.

[29] Migrant Smuggling Protocol, Article 6(3)(a) and (b).

[30] See Legislative Guide for the Implementation of the CATOC and its Protocols at para 46.

Most regrettably the Protocol does not make any reference to the penalties to be imposed. The final text of the Protocol did not include a provision which would require State Parties to make the commission of Article 6 offences 'liable to sanctions that take into account the grave nature of the offence', leaving the matter to be regulated by Article 11(1) of CATOC. Gallagher and David argue that perhaps 'it can be assumed that as such provision was already included in the Convention [31], its repetition in the Protocol was considered unnecessary.'[32]

Considering that there are provisions of CATOC which apply *mutatis mutandis* to the Protocol, States are also obliged to take further legislative measures regarding the offences established under the Protocol.[33] These measures include, *inter alia*, the obligation to criminalize the laundering of the proceeds of migrant smuggling;[34] ensure migrant smuggling offences are given broad jurisdictional application;[35] ensure a long statute of limitations period for migrant smuggling offences;[36] criminalize obstruction of justice;[37] protect victims and witnesses from potential retaliation or intimidation;[38] take appropriate measures to encourage those involved in migrant smuggling to cooperate with or assist national authorities,[39] etc.

Part II of the Protocol specifically addresses the smuggling of migrants by sea. It provides for a legal mechanism to gain consent for boarding and requires States in Article 7 to 'cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.'

Although not stated in the Protocol, the Interpretive Notes state that the *travaux preparatoires* should indicate that none of the measures contemplated in Part II of the Protocol may be taken in the territorial sea of any State without express permission or authorization.[40] Flag State authorization is also required on the high seas.[41] Any action taken must aid in the prevention of migrant smuggling by sea and be based on the vessel actually endeavouring to commit the crime of migrant smuggling. The Legislative Guide for the Implementation of the CATOC and its Protocols importantly notes that the establishment of jurisdiction

31 Referring to CATOC, Article 11(1).
32 Gallagher, Anne and David, Fiona, *op.cit.,* p. 52.
33 Ibid., pp. 52-53.
34 CATOC, Article 6.
35 CATOC, Article 15.
36 CATOC, Article 11(5).
37 CATOC, Article 23.
38 CATOC, Articles 24 and 25.
39 CATOC, Article 26.
40 UN Doc A/55/383/Add.1 Para. 98.
41 Mallia, Patricia; *op.cit.*, p.120.

over smuggling by sea is a prerequisite for the effective implementation of the section on migrant smuggling by sea.[42]

Article 8 sets out the regime for permissible boarding and inspection. Although this Protocol does not enter into the same level of detail as that found in the counterpart provisions in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Mallia notes that this is not to be considered a limitation due to the use of the words 'inter alia' in Article 8(2) indicating that the list is not exhaustive, and that other measures may be authorized.[43]

If a flag State has reasonable grounds to believe that a vessel flying its flag, claiming its registry without authorization or is without nationality and is engaged in the smuggling of migrants by sea, Article 8(1) allows the flag State to request the assistance of other State Parties in order to prevent the use of the vessel for migrant smuggling. State Parties are under an obligation to give such assistance as is possible within their means.

Article 8(2) permits a State Party which has reasonable grounds to suspect that a vessel flying the flag of another State Party is engaged[44] in migrant smuggling by sea, to request confirmation of registry, and upon confirmation request authorization to take appropriate measures necessary. These may 'inter alia' include authorization from the flag State **to board and search the vessel**, and if evidence of migrant smuggling by sea is found, to **take any suitable actions necessary** with respect to the vessel, the cargo and the people on board. Any results from measures that are taken following this authorization must be promptly notified to the flag State.[45]

An unfortunate omission in the final Protocol is a definition section of what is a permissible State action as was proposed in Article I of the 1997 Italian proposal for a Multilateral Convention to Combat Illegal Migration by Sea.[46] This Article defines the following basic steps of permissible enforcement jurisdiction:

> a. Verifying the vessels right to fly its flag; the vessel may be requested to give information on its nationality and the nationality of its crew, its port of departure and its destination;

---

42 Legislative Guide for the Implementation of the CATOC and its Protocols at para 60 (i).

43 Mallia, Patricia; *op.cit.*, p.124.

44 The term 'engaged' in this provision should be interpreted widely according to the Interpretive Notes in order to cater for both direct and indirect use of vessels involved in migrant smuggling, without however including a vessel which has rescued migrants being smuggled by another vessel. See UN Doc A/55/383/Add.1 Para. 100.

45 Migrant Smuggling Protocol, Article 8(3).

46 LEG 76/11/1 (1 August 1997) as cited in Mallia, Patrcia, *op.cit.*, pp. 115-116.

> b. Stopping the vessel: the vessel may be ordered to stop or to change course and reduce speed appropriately, following the procedures mentioned in subparagraph a) above, so that a team of inspectors may board the vessel to ascertain the truth of the information communicated and whether any migrants are on board.
> c. On board visit: when the vessel is stopped or has changed course as ordered and at the speed ordered, the aforementioned inspection team shall board the vessel to carry out the necessary verification of documents and inspections, in order to ascertain whether the vessel is involved in the trafficking of migrants;
> d. Diversion: if the vessel refuses to permit an on-board visit or if the on-board visit inspection reveals that irregularities are being committed, the vessel shall be ordered to go back to the port of departure or to divert to the nearest port of a contracting party, designated according to art L, and the state of which the migrants are nationals shall be informed of the outcome of the on-board visit. If the vessel fails to comply with such order, it shall be escorted to the prescribed destination.

As Mallia explains, '[…] clear description of what is permitted and what each method of control consists of would be of great use in providing certainty, especially when one considers the dearth of information in this area.'[47]

State Parties must respond to any request for a confirmation of registry, a determination if the vessel is entitled to fly its flag, or any authorization requested by another State Party expeditiously according to Article 8(4).

Article 8(5) retains the principle of exclusive flag State jurisdiction while endeavouring to facilitate cooperation between the requesting State and the flag State. It grants the flag State the right to subject any authorization given to conditions which must be mutually agreed, including conditions relating to responsibility and the extent of the authorization. However the provision goes on to state that:

> A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

[47] Mallia, Patricia; *op.cit.*, p.116.

The phrase 'consistent with Article 7 of this Protocol,' in Article 8(5) is specifically mentioned and Mallia opines that while in theory authorization for any action may be refused, any refusal that amounts to a lack of cooperation would contradict the obligation to cooperate in the suppression of migrant smuggling by sea found in Article 7.[48]

An appropriate competent authority to respond to any of the abovementioned request must also be established by the State Parties and this authority must be notified to all other State Parties within one month by the Secretary-General.[49]

Article 8(7) allows any State Party that reasonably suspects that a ship without nationality or one assimilated to be without nationality, and engaged in migrant smuggling by sea, to be boarded and searched and to take all appropriate measures following confirmation of migrant smuggling. This is in conformity with Articles 92(2) and 110 of UNCLOS.[50]

It is interesting to note that the Legislative Guide for the Implementation of the CATOC and its Protocols at para 95 suggests that 'In addition and although not a requirement under the Convention or the Protocol, States parties may wish also to establish their jurisdiction over vessels on the high seas flying the flag of another State party as well as over those without nationality, as this will ensure the proper functioning of the measures provided for under part II of the Protocol.' Mallia explains that the provision of the Protocol regarding jurisdiction on high seas over stateless vessels is in sharp contrast with the proposal of Italy which allowed a State to act only 'when the vessel is "undoubtedly" bound for the State's coasts or if the vessels is "armed or governed or manned by its nationals".'[51] In her opinion, such shift indicates that migrant smuggling is now viewed as a crime which affects the security of States generally and is therefore an exception to the established rule that a State must rely on some basis of jurisdiction when exercising enforcement jurisdiction in international waters.[52] The Protocol also omitted any reference to a territorial link which would have entitled a State Party to take action were the vessel to enter its territorial waters or if she was reasonably suspected to be bound for the State Party's territorial waters.[53]

Specific safeguard provisions are found in Article 9 of the Protocol and require the boarding State to ensure the humane treatment and safety of persons aboard and that any measures taken are environmentally sound.[54] Article 9(1) states that when any of the measures are taken pursuant to Article 8, the State Party shall:

---

48 Ibid., p. 124.
49 Migrant Smuggling Protocol, Article 8(6).
50 Kraska, James and Pedrozo, Raul *op.cit.*, p.665.
51 Mallia, Patricia, op.cit., p.114.
52 Ibidem.
53 Ibid., p.116.
54 Guilfoyle, Douglas; *op.cit.*, p.185.

> (a) Ensure the safety and humane treatment of the persons on board;
> (b) Take due account of the need not to endanger the security of the vessel or its cargo;
> (c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;
> (d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

In the case of any loss or damage that occurs during any measure undertaken under Article 8, Article 9(2) provides that if this is proved to be unfounded, liability for compensation will be due, excluding however a scenario where the vessel has committed any act which may justify the actions of the other State Party.

Article 9(3) goes on to ensure that any measure taken shall not interfere with or affect:

> (a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
> (b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

In this way the boarding procedure remains in conformity with the international law of the sea and preserves the general principle of the primacy of flag State authority.

As with all other boarding regimes, the boarding and any other measures taken pursuant to Article 8 are limited to warships or military aircraft, or other ships or aircraft that are authorized and clearly marked as being on Government service.[55]

Part III of the Migrant Smuggling Protocol deals with the issues of prevention, cooperation and other measures. It implements several necessary support provisions including provisions related to information,[56] border measures,[57] security and control of documents,[58] legitimacy and validity of

[55] Migrant Smuggling Protocol, Article 9(4).
[56] Migrant Smuggling Protocol, Article 10.
[57] Migrant Smuggling Protocol, Article 11.
[58] Migrant Smuggling Protocol, Article 12.

documents,[59] training and technical cooperation,[60] as well as considering the conclusion of bilateral and regional arrangements to combat migrant smuggling by sea,[61] among others.

Article 15 importantly obliges State Parties to take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 is a criminal offence.[62]

Two innovative articles are found in this Part which are specific to this threat. These are Article 16 dealing with the protection of migrants, and Article 18 dealing with the return of migrants.

State Parties are obliged by Article 16 to take all required measures to preserve and protect the rights of the smuggled migrants, with particular emphasis on their 'right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.' State Parties are also required to take measures to protect smuggled migrants from 'violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.'[63] Assistance should be provided to those whose lives or safety are endangered from smuggling[64] and in respect of detained smuggled migrants, States must ensure prompt notification to and communication with consular officers. It must also be noted that although human rights obligations do arise, the migrants may also enjoy further protection under Refugee Law.[65]

Article 18 refers to an agreement to 'facilitate and accept, without undue or reasonable delay'[66] the return of migrants to their State of origin, of which they are either nationals or permanent residents, when the migrants have been interdicted in a transit or destination State.[67]

Once a request for a return is made, the apparent State of origin must verify if the migrant is actually its national without delay.[68] In the case where the migrant is found to be a national of a State Party, and is without proper documentation, the Protocol obliges the State of origin to issue such documents as may be necessary in order to facilitate the return.[69] An obligation is also placed on all State Parties to ensure the safety and dignity of the migrants and to proceed with the return in a systematic manner.[70]

---

59 Migrant Smuggling Protocol, Article 13.
60 Migrant Smuggling Protocol, Article 14.
61 Migrant Smuggling Protocol, Article 17.
62 Migrant Smuggling Protocol, Article 15.
63 Migrant Smuggling Protocol, Article 16 (2).
64 Migrant Smuggling Protocol, Article 16 (3).
65 Mallia, Patricia; *op.cit.*, p.14.
66 Migrant Smuggling Protocol, Article 18(1).
67 Kraska, James and Pedrozo, Raul *op.cit.*, p.666.
68 Migrant Smuggling Protocol, Article 18(3).
69 Migrant Smuggling Protocol, Article 18(4).
70 Migrant Smuggling Protocol, Article 18(5).

Article 18(8) also specifies that this Article will not affect any other bilateral or multilateral arrangements which may be in place regarding the return of migrants. The main difficulty with this provision is that migrants often do not have any proper documentation thus making identification and return particularly problematic.

III. The IMO's response

The IMO has long been involved in the suppression of migrant smuggling by sea. A number of incidents in the 1990s may be considered as the catalysts which drove the IMO to address the issue of migrant smuggling by sea.[71] The IMO primarily focused on this from the perspective of improving the safety of life at sea. The 1993 *M/V Golden Venture* incident, involving a Honduran-registered cargo ship running aground off the New York coast, while having 300 Chinese migrants aboard, stressed the hazardous conditions related to the smuggling of migrants by sea.[72] The IMO Assembly's response, just a few months after the incident, was to adopt Resolution A.773(18) entitled Enhancement of the Safety of Life at Sea by the Prevention and Suppression of Unsafe Practices Associated with the Smuggling of Aliens by Ships, establishing a cooperative framework to prevent maritime migrant smuggling catastrophes.[73] Through said resolution, IMO noted with great concern that numerous incidents involving vessels engaged in migrant smuggling have seriously endangered life at sea as a result of sickness, disease and fatalities that have occurred. For these reasons, Government were called upon, as a matter of urgency, to co-operate to supress unsafe practices associated with migrant smuggling.

Another incident in 1996 showed that work still needed to be done. This involved the *M/V Yioham*, another Honduran-registered vessel, which was overloaded and collided with a small boat that was leaving Marsaxlokk, Malta on its way to take the 283 illegal Asian migrants on their last leg of their long journey to Italy. The collision resulted in the death of the migrants on board who all drowned. The grave incident highlighted once again the abundant use of sub-standard vessels for migrant smuggling by sea. Once again the IMO responded and adopted Resolution A.867(20)497[74] in response to this tragedy in 1997. This Resolution acknowledged that the issue of migrant smuggling should be considered a crucial aspect of the safety of life at sea and that the use of sub-

[71] Kraska, James and Pedrozo, Raul *op.cit.*, p.666.
[72] Ibid., p.667.
[73] Ibid.
[74] IMO Doc. A.867(20), Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea adopted on 27 November 1997.

standard vessels to transport migrants had resulted in 'heavy loss of life'.[75] The Resolution is important as it recommended that the IMO Secretary-General should ensure that the Organization participates in the development of a convention or other instrument intended to combat the trafficking or transport of migrants by sea and to bring said Resolution and any other work of the Organization on the matter to the attention of the United Nations and other relevant organizations and that IMO should recommend the adoption of an international instrument intended to combat the trafficking or transport of migrants by sea.

The continued concerns of the Organization were also addressed in 1998 by the IMO Maritime Safety Committee which eventually led to the adoption of IMO Circular MSC/Circ.896, Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea.[76] These non-binding measures, addressing unsafe practices pertaining to migrant smuggling by sea, were adopted as an interim measure[77] anticipating the imminent entry into force of the Migrant Smuggling Protocol in 2000.

This Circular was subsequently amended in 2001,[78] where its stated purpose is to 'promote awareness and co-operation among Contracting Governments… so that they may address more efficiently unsafe practices associated with the trafficking and transport of migrants by sea which have an international dimension'.[79]

Following the *Tampa* incident in 2001 the IMO again responded. The *Tampa* incident, where an Indonesian boat, with 433 people on board was in distress, received assistance from the Norwegian merchant ship Tampa. Upon requesting permission to enter the closest port from the site of rescue to disembark the people rescued, permission was denied by the Australian Government.[80] The IMO Assembly responded by adopting Resolution A.920(22) entitled Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, recommending the review of procedures regarding the safeguarding of rescued persons, regardless of nationality, and encouraging coastal States to deal with such persons satisfactorily in order to prevent incidents like the *Tampa* reoccurring.[81]

---

[75] Kraska, James and Pedrozo, Raul *op.cit.*, p.668.

[76] IMO Doc. MSC/Circ.896, Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea adopted on 16 December 1998.

[77] Roach Ashley J, 'Initiatives to enhance maritime security at sea', (2004) 28 Marine Policy, p. 43.

[78] IMO Doc. MSC/Circ.896/Rev.1, Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, 12 June 2001.

[79] Ibid., para 3.

[80] 'The State of the World's Refugees 2006 –Chapter 2 Safeguarding asylum: Box 2.3 The Tampa Affair: interception and rescue at sea' (UNHCR, 19 April 2006) at http://www.unhcr.org/4444d3c320.html.

[81] 'Trafficking or transport of illegal migrants by sea / Persons rescued at sea' at http://www.imo.org/OurWork/Facilitation/IllegalMigrants/Pages/Default.aspx.

The Assembly requested the review of the existing international conventions and IMO instruments to identify any 'existing gaps, inconsistencies, ambiguities, vagueness or other inadequacies'[82] and to take any appropriate action necessary to ensure that any survivors of distress incidents are given appropriate assistance, vessels that have assisted such persons are able to take them to a place of safety and all survivors, regardless of their status, are treated humanely.

This eventually led to the 2004 amendments, where the Maritime Safety Committee adopted amendments to the Safety of Life at Sea Convention and the International Convention on Maritime Search and Rescue (SAR Convention) as well as adopting a set of Guidelines[83] on the Treatment of Persons Rescued at Sea. The purpose of these Guidelines is 'to provide guidance to Governments and to shipmasters with regard to humanitarian obligations and obligations under the relevant international law relating to treatment of persons rescued at sea',[84] thereby aiding them in their understanding of the necessary obligations that must be undertake under international law.

Both Conventions oblige either the ship and flag States or coastal States respectfully to render assistance to persons in distress at sea.[85] These amendments focused on the *lacunae* that existed in these Conventions regarding the disembarkation of people rescued at sea, and the duty to take them to a place of safety,[86] therefore, catering for these *lacunae* by obliging the ships Master, or the coastal State to deliver the persons rescued to a place of safety. The term place of safety, although not defined, was described in the Guidelines as being:

> …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.[87]

A possible issue may arise with the obligations contained in the amendments to the aforementioned Conventions to provide a place of safety as this does not, however, mean that the State responsible for the Search and Rescue

---

82 IMO Assembly Resolution A.920(22), Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, Annex 1.

83 IMO Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea adopted on 20 May 2004.

84 Ibid., Annex 1.1.

85 Mallia, Patricia; *op.cit.*, p.132.

86 Ibid., p.129.

87 IMO Resolution MSC.167(78), *op.cit.*, para. 6.12.

region is automatically obliged to disembark the persons rescued in its own area. Therefore incidents such as the *Tampa* may not necessarily be satisfactorily addressed.[88] This may also be seen in the 2009 *Pinar* incident, where the Turkish Merchant vessel *Pinar*, following the rescue of 153 migrants off Lampedusa, was refused entry into Italian territorial waters on the premise that the migrants were rescued in Malta's Search and Rescue zone.[89] These incidents are numerous in the Mediterranean. Another case in point was the 2013 *M/V Salamis* incident, where the Turkish tanker, en route from Libya to Syracuse, rescued 102 migrants. Following this, the vessel was denied entry into Malta's territorial waters, Malta claiming that the tanker should have returned to Libya, and not Malta, as this was the closest safe port. After two days of being anchored at sea outside Maltese territorial waters, the migrants were ultimately accepted by Italy on humanitarian grounds.

IV. Conclusion

The threat of migrant smuggling by sea is constantly growing. Social and economic considerations will persist in encouraging irregular migration to continue, aided by strong incentives of profit for organized criminal groups to continue the smuggling trade. Many lives are therefore at risk every day, hence necessitating that Governments take effective action to combat this threat.[90] The human element involved in this crime cannot be ignored and the need to respect the humanity and dignity of the persons smuggled is of paramount importance.

The legal framework set out above attempts to effectively address this ever-changing threat by adapting as necessary to fill any legislative *lacunae*[91] and to give appropriate guidance to flag States, Governments and shipmasters. The Migrant Smuggling Protocol and IMO initiatives successfully fill the legislative

[88] United Nations Office on Drugs and Crime Issue Paper, 'Combating Transnational Organized Crime Committed at Sea' at 22-23.

[89] Ibid., at 23.

[90] Kraska, James and Pedrozo, Raul *op.cit.*, p.689.

[91] It is noteworthy that at the time of the preparation of this presentation, the European Commission had expressed its intention to make proposals to improve the existing EU legal framework which is composed of Directive 2002/90/EC establishing a common definition of the offense of facilitation of unauthorized entry, transit and residence, and Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence to tackle migrant smuggling in an attempt to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalization of those who provide humanitarian assistance to migrants in distress. See COM (2015) 285 issued in Brussels on 27 May 2015 at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/eu_action_plan_against_migrant_smuggling_en.pdf
on the European Action Plan against Migrant Smuggling (2015-2020).

gap left in UNCLOS which does not directly address the issue. This has been done by introducing enforcement procedures which build on previous experience, notably the case of the suppression of drug trafficking, and remaining in line with the general provisions of UNCLOS.[92] The above instruments thus build a sturdy platform from which this maritime security threat may be suppressed. The Migrant Smuggling Protocol is also important as it simultaneously provides States with an effective enforcement mechanism to combat this threat while still emphasizing the rights of the persons involved owing to the unique nature of this crime.

This area of maritime security law, however, cannot remain static and must continue to evolve as the crime does. Cooperation amongst all those involved, in order to ensure a coordinated, effective effort is in place, remains of utmost importance in order to attempt to respond to this maritime security threat. The IMO has successfully reacted to incidents which have occurred over the years in order to prevent repetitions and further ensure the protection of the safety of lives at sea, irrespective of who the persons are. International multilateral and bilateral efforts must continue to be made in the area of migrant smuggling by sea to ensure an appropriate response may be taken to this critical challenge.

[92] Mallia, Patricia; *op.cit.*, p.127.

THE FORGOTTEN RESPONSIBILITIES OF THE FLAG STATE TO SAVE PEOPLE AT SEA

Efthymios D. Papastavridis[1]

I. Introduction; II. The Legal Regime of Rescue-at-Sea and the Obligations of the Flag State; III. International Responsibility Arising from Failure to Rescue Lives at Sea; IV. Concluding Remarks: A Way Forward

I. Introduction

Only in January 2016 there had been 403 people dead or missing in the Mediterranean Sea, according to the UN Office of the High Commissioner for Refugees (UNHCR).[2] In 2015, 3772 people perished their lives in these waters.[3] All these tragic deadly sea incidents mark the significance and urgency of the problem of migration by sea. Indeed, thousands of people nowadays often undertake very perilous journeys, putting their lives into serious danger in order to flee from their country of origin, especially from Syria, Eritrea or Iraq. And they flee by whatever means possible, including overcrowded and unseaworthy vessels. Such vessels are often at risk of sinking and indeed many do sink, with the result that thousands of lives are lost every year.

The challenges in the Mediterranean are mirrored in other regions. For example, according to a Report of the Office of the United Nations High Commissioner for Refugees (UNHCR) of 17 October 2014 on the situation in Yemen, 'there has been a sharp increase this year [2014] in the number of migrants and asylum-seekers losing their lives in attempts to get to Yemen, mainly from the Horn of Africa, with more deaths at sea in 2014 than in the last three years

[1] Efthymios D. Papastravridis is a Part-time Lecturer in Public International Law, Democritus University of Thrace and Research Fellow, Academy of Athens, papastavridis@academyofathens.gr.

[2] See at <http://data.unhcr.org/mediterranean/regional.php> (accessed on 9 February 2016).

[3] See at <http://missingmigrants.iom.int/sites/default/files/Mediterranean_Update_29_January_2016_0.pdf> (accessed on 9 February 2016).

combined… bring the yearly tally for 2014 to 215, exceeding the combined total for 2011, 2012 and 2013 of 179'.[4] Equally serious is the problem in the Asia-Pacific region. While there is no 'boat crisis' on the scale seen in Indochina in the 1970s and 1980s, the maritime migration movements remain considerable.[5]

States and the international community have not remained idle; yet, the response is more tailored towards averting the 'threat' posed by maritime migration to their 'territorial integrity' rather than saving these people's lives. It is worrisome that the need to save the lives of the contemporary 'boat people' is underestimated. Even the aftermath of the shocking death of more than 700 people in mid-April 2015,[6] the EU's response has not been comprehensive and satisfactory, having decided only the increase of the resources and of the operational area of the existing FRONTEX-coordinated operations in the region[7] as well as the launch of EUNAVFOR MED,-later renamed as *Operation Sophia*- an EU naval operation designed primarily to fight smuggling of migrants in the central Mediterranean and only incidentally to save lives at sea.[8]

Besides this unfortunate inaction of the relevant stakeholders on the policy level, there are also certain gaps in the legal framework. Suffice to note that while there is a clear duty of the master to provide assistance in case of vessels or persons in distress at sea, there is no equally clear obligation on the part of the flag States or the coastal State to accept the rescued persons in their territory.[9] This unwillingness of the coastal states to allow disembarkation, in conjunction with the costs incurred through uncertainty and delay, which fall entirely on the ship-owner, put the masters of the rescuing vessels in a predicament. As a consequence, many ships have ignored distress calls, leading to significant loss of life.[10]

---

[4] See UNHCR, '2014 becomes the deadliest year at sea off Yemen', News Stories (17 October 2014) at <http://www.unhcr.org/544103b06.html>

[5] Reportedly, in 2012 Australia received 17,202 asylum seekers by boat, its highest annual number. See Janet Phillips and Harriet Spinks, 'Boat arrivals in Australia since 1976' (Research Paper, Australian Parliamentary Library, updated 23 July 2013) 22, as cited in J. Mc Adam, 'Australia and Asylum Seekers', 25 *International Journal of Refugee Law* (2013), 435, at 445.

[6] See e.g. the Guardian*, '700 Migrants feared dead in Mediterranean shipwreck'* (19 April 2015) at <http://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet>

[7] See Conclusions of the Special Meeting of the EU Council of 23 April 2015 at <http://www.consilium.europa.eu/en/meetings/european-council/2015/04/23/> and also <http://frontex.europa.eu/news/frontex-expands-its-joint-operation-triton-udpbHP>

[8] See further information at <http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf> (accessed on 29 January 2016).

[9] In the words of J. Pugash, 'the master of the ship is obliged to rescue those in peril on the sea, but no state is bound to accept those rescued', see *id* 'The Dilemma of the Sea Refugee', 18 *Harvard Journal of International Law* (1977), p. 578.

[10] See E. Willheim, '*M.V. Tampa*: The Australian Response', 15 *International Journal of Refugee Law* (2003), 159, at 168.

It is however this exact duty of the shipmasters to render assistance at sea that is the key for minimizing the immense number of deaths at sea. Rather than downplaying the obligations of the flag States of private vessels and instead crying out for more duties on the part of the coastal States and the EU or even NATO,[11] it is our submission that the flag State's role is vital in this regard and there is the urgent need to be reinvigorated. Thus, in the present contribution, we will first discuss the obligations of the flag State under international law, both the law of the sea and the human rights law in respect of rescue-at-sea and then will address how flag States of both private and state vessels do incur responsibility for violation of the rules of international law, when they fail to save lives at sea. Finally, there will be some propositions with respect to how the flag State's duties can be more adequately met.

II. The Legal Regime of Rescue-at-Sea and the Obligations of the Flag State

1. The Law of the Sea Framework

The duty to assist persons in distress at sea is a long-established rule of customary international law. It extends to both other vessels and coastal States in the vicinity, and all persons, including irregular maritime migrants, remain protected. The duty to rescue has been codified in the UN Convention on the Law of the Sea (LOSC).[12] LOSC prescribes relevant duties for both the flag and the coastal States. With regard to flag States, article 98 (1) of LOSC provides 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 … to render assistance to any person found at sea in danger of being lost … and to proceed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may be reasonably be expected of him.'

The first pertinent question in this context is what qualifies as 'distress'. At the outset, 'distress' is not defined by LOSC; yet the term 'distress phase' has been defined in paragraph 1.3.13 of the Annex of the 1979 International Convention on Maritime Search and Rescue (SAR Convention) as 'a situation

[11] There have been reports for a more active role of NATO in assisting Turkey in controlling its borders and saving people at sea; see at <http://www.reuters.com/article/us-mideast-crisis-syria-migrants-nato-idUSKCN0VH1IL> (accessed on 10 February 2016).

[12] See: United Nations Convention on the Law of the Sea, 1833 *UNTS* 397, entered into force 16 November 1994; as at 7 January 2015, LOSC has 167 parties, including the EC: <http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea> (accessed on 9 February 2016) [hereinafter: LOSC].

wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by *grave and imminent danger* and requires immediate assistance'. Further clarifications have been provided in relevant jurisprudence. For example, in the *Eleanor case* it was held that distress must entail urgency, but that 'there need not be immediate physical necessity'.[13] In the words of the US Supreme Court, the test of distress is that the circumstances would produce in "the mind of a skillful mariner, a well-grounded apprehension of the loss of the vessel and cargo or of the lives of the crew".[14]

In the EU context, the 2010 European Council Decision, which was subsequently annulled by the Court of Justice of the EU, indicated that the existence of a situation of distress should not be determined exclusively on the basis of an actual request for assistance. A number of objective factors, such as the seaworthiness of the vessel, the number of passengers on board, the availability of supplies, the presence of qualified crew and navigation equipment, the prevailing weather and sea conditions, as well as the presence of particularly vulnerable, injured, or deceased persons, should be taken into account.[15] Interestingly, Regulation 656/2014 on FRONTEX operations at sea reiterates these factors.[16]

The next question and the more important for the present purposes, i.e. for determining when States would be responsible for failing to save lives at sea, is what is the content and nature of the obligations under the LOSC. From a face reading of article 98(1) of LOSC, it is apparent that the responsibility to rescue and provide assistance rests initially with the master of the rescuing ship and entails the duty to deliver the rescued people to a place of safety. The obligation incumbent upon the master is without qualification and no distinction must be made according to the legal status of the persons to be rescued.[17] The only

[13] *The Eleanor case* (1809) 165 English Reports p. 1068. See also R. Barnes, 'The International Law of the Sea and Migration Control', in V. Mitsilegas & B. Ryan (eds.)*, Extraterritorial Immigration Control* (The Hague: Brill, 2010), 103, at 135.

[14] See *The New York* [1818] 3 Wheaton 59 at 68; compare *The Rebecca* (1929) 4 Reports of In3ternational Arbitral Awards 444 at 447–8.

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

[16] See Article 9 (f) of Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L 189/93.

[17] See e.g. article 11 of the 1910 International Convention for the Unification of Certain Rules Relating to Assistance and Salvage at Sea.

exception is the extent to which it would be unreasonable to render assistance. Accordingly, if the vessel is too far away, the rescue vessel is ill-equipped to render assistance or other vessels are more readily available to render assistance, then the master may not be required to render assistance.

With respect to the obligations of the flag State as such, every flag State must require the master of a ship, whether a State or private ship flying the State's flag, to proceed with all possible speed to the rescue of persons in distress, when informed of their need for assistance. This obligation of the flag State is essentially an obligation of result, in the sense that the flag State has to achieve a certain result, i.e. to provide for the duty in question in its domestic legislation. Article 98 (1) is non-self-executing and requires implementing legislation to acquire the force of law.[18] Besides this, there is no other obligation of result, such as an obligation to guarantee that the people in distress will be saved.[19]

In addition, the flag State is under a 'due diligence' obligation to monitor whether the masters of vessels flying its flag discharge these duties.[20] The due diligence obligations of flag States were discussed in length in the ITLOS Advisory Opinion of 2 April 2015 *on the Request of the Sub-Regional Fisheries Commission*, in which the Tribunal acknowledged that the flag States are under such obligations in relation to Illegal, Unregulated and Unreported Fishing (IUU Fishing) within the EEZ of third States.[21] It can tenably be supported that these duties apply *mutatis mutandis* in relation to the rescue obligations of the flag States under article 98 (1) of LOSC. Such duties involve an obligation not only to adopt appropriate national "rules and measures", but also to exercise "a certain level of vigilance in their enforcement", including exercising "administrative control" over relevant "public and private operators".[22]

---

[18] For example, Barnes reports that 'in the UK the master has a duty, upon receiving a distress signal, to proceed to their assistance, unless he is unable…Failure to do so is a criminal offence'; see *id,* 'Refugee Law at Sea', 53 *International and Comparative Law Quarterly* (2004), 47, at 50 (fn 12).

[19] The classification of obligations, for example between obligations of result and obligations of conduct in international law, can be traced back to Roberto Ago's term as a Special Rapporteur of the International Law Commission, on the topic of State Responsibility, see Sixth Report on State Responsibility by Mr Ago, Special Rapporteur, Yearbook of the International Law Commission (vol II, Part One 1967) 4, 20. See also Jean Combacau, 'Obligations de résultat et obligations de comportement: quelques questions et pas de réponse' in Mélanges offerts à Paul Reuter, Le droit international: unité et diversité (Pedone 1981), 181.

[20] See generally on the obligations of flag States Y. Takei, 'Assessing Flag State Performance in Legal Terms: Clarifications of the Margin of Discretion', 28 *International Journal of Marine and Coastal Law* (2013), 97-133.

[21] ITLOS, Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Case No. 21 Advisory Opinion of 2 April 2015; at paras. 16-141.

[22] ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, ICJ Reports 2010, para. 197.

On the one hand, in case of public vessels, it would be easier to establish the responsibility of the flag State for any omission to discharge this duty of due diligence. Due to the chain of command and control in public vessels, specifically warships and coastguard vessels usually involved in search and rescue operations, the flag State will be immediately and directly reported of the relevant incidents and thus the failure to investigate them further would, arguably, establish their responsibility in.

On the other, in the case of private vessels, the flag State is not directly responsible for the actions of a master who neglects his duty, but may nonetheless incur international responsibility for not acting with due diligence and enquire into such incidents. Yet, the question that may reasonably be posed is *how* the flag State is supposed to know about these incidents. This is possible insofar as the shipmaster observes the duty to record any reason for failing to render assistance. Indeed, according to Chapter V, Regulation 33 of the 1974 Safety of Life at Sea Convention (SOLAS),[23] which complements the LOSC, the master is required 'to enter in the log-book the reason for failing to proceed to the assistance of the persons in distress … [and] to inform the appropriate search and rescue service accordingly'.[24] This registration would allow the flag State to enquire into whether the master did discharge his or her duties and if not, to impose penalties according to its domestic legislation.[25]

With regard to coastal States, even though it is not within the ambit of the present contribution, article 98 (2) of LOSC stipulates:
'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 neighboring States for this purpose'

On the face of this provision, it is evident that LOSC postulates a general obligation on the part of coastal States to maintain search and rescue services as well as a general obligation of cooperation with other States to this end. The search and rescue regime under LOSC is complemented by the SOLAS Convention and the 1979 International Convention on Maritime Search and Rescue (SAR Convention).[26] The SAR Convention aims to create an international system for

[23] See International Convention for the Safety of Life at Sea, adopted 1 November 1974, entered into force 25 May 1980 (1184 *U.N.T.S.* No. 278); as at 20 January 2016 SOLAS had 162 contracting States; see at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202016.pdf> (accessed on 9 February 2016).

[24] SOLAS, Chapter V, Regulation 33 (1).

[25] See fn 24.

[26] See International Convention on Maritime Search and Rescue, adopted 27 April 1979, entered into force 22 June 1985, (1405 *UNTS* No. 23489); as at 5 June 2015 SAR Convention had 105 contracting States, see at <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx> (last accessed 8 July 2015) [hereinafter: SAR Convention]

coordinating rescue operations and guaranteeing their efficiency and safety. Contracting States are obliged to provide SAR services in the area under their responsibility and are invited to regulate and coordinate operations and rescue services in the maritime zone designated in the agreement.[27]

In May 2004, in the wake of the infamous *Tampa* incident[28] and the initiatives that it fuelled,[29]the SAR and SOLAS Conventions were amended to impose additional obligations upon the State parties, including an obligation on States to "cooperate and coordinate" to ensure that ships' masters are allowed to disembark rescued persons to a place of safety:[30] As recognized by the IMO Maritime Safety Committee, the intent of the amendments is to ensure that a place of safety is provided within a reasonable time. The primary responsibility to provide a place of safety or to ensure that a place of safety is provided rests with the Government responsible for the SAR region in which the survivors were recovered.[31]

The term 'place of safety' is defined neither by the SOLAS nor by the SAR Convention. The 2004 IMO *Guidelines on the Treatment of Persons Rescued at Sea*, define a 'place of safety' as any 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'.[32] Whilst these guidelines are not themselves binding, they provide an important means for interpreting the obligations set forth in LOSC, SOLAS and the SAR Convention, since they may be considered

[27] See also SOLAS Chapter V, Regulation 7 and S. Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict? 25 *International Journal of Marine and Coastal Law* (2010), 523, at 524.

[28] In August 2001, in response to an Australian-coordinated search and rescue operation, the Norwegian *MV Tampa* rescued 433 asylum seekers from a sinking Indonesian flagged vessel 75 nautical miles off the Australian coast. When the Tampa began heading towards the Australian port of Christmas Island, the Australian authorities intercepted the vessel before entering; see the relevant discussion in C.M. Bostock, 'The International Legal Obligation Owed to the Asylum-Seekers on the M. V. *Tampa*', 14 *International Journal of Refugee Law* (2002), 279.

[29] See *inter alia* IMO Assembly Resolution on the Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, 22nd session, Agenda Item No. 8, IMO Assembly Res. A.920(22), November 2001 and UNHCR, 'Note on International Protection', 53rd session, UN doc.A/AC.96/965 (11 Sept. 2002).

[30] Amendments to SOLAS Chapter V, Regulation 33: IMO, MSC Res 153 (78), MSC Doc. 78/26. add.1, Annex 5 (20 May 2004). The amendments entered into force 1 January 2006. They are binding upon all parties to the SOLAS and SAR Conventions, but for Malta, which opted out and thus it is not bound; see IMO, Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions, at p. 42; available at <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202014.pdf>

[31] See Article 4.1-1 of SOLAS and the Annex of SAR, paragraph 3.1.9.

[32] Resolution MSC. 167(78), adopted 20 May 2004; available at <http://docs.imo.org.>

as subsequent practice under article 31 (3) (a) of the Vienna Convention on the Law of Treaties (1969).[33]

However, the aforementioned obligations do not explicitly stipulate that the State responsible for the SAR zone is obliged to disembark the survivors in its own territory. In other words, the formal treaty law does not oblige a coastal State to allow disembarkation on its own territory when it has not been possible to do so elsewhere. This has been criticized as the major shortcoming of the treaty regime.[34] As a matter of policy this has as a consequence that the vessels rescuing migrants at sea do not have clear and foreseeable guidelines as to where are supposed to disembark these persons, as this would depend on the ad hoc cooperation of the competent coastal States. This amounts to a very significant impediment or disincentive for the main 'users' of the oceans, i.e. the private mariners,[35] to discharge their traditional humanitarian duty.

2. Human Rights Law

Obligations upon States concerning persons in distress at sea may arise, not only from the law of the sea, but also from international human rights law. In the context of rescue at sea, the human right of most immediate concern is the right to life, enshrined, amongst others, in article 2 of the European Convention on Human Rights (ECHR)[36] and article 6 of the International Covenant on Civil and Political Rights (ICCPR).[37] As held by the European Court of Human Rights in *Osman v United Kingdom* (1999), article 2 requires states not only to refrain

[33] See article 31 (3) (b) of Vienna Convention on the Law of Treaties (1969) (opened for signature 23 May 1969), 1155 UNTS 331 [hereinafter referred to as VCLT]. See also H Fox, 'Article 31(3) (A) and (B) of the Vienna Convention and the "Kasikili/Sedudu Island" case', in M Fitzmaurice et al (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden: Nijhoff, 2010) 59.

[34] See further discussion in E. Papastavridis, We Saved them. Now What?: The Unresolved Question of Disembarkation of Rescued Persons at Sea', in J.M. Sobrino Heradia (ed.), *The contribution of the United Nations Conference of the Law of the See to good governance of the oceans and seas*, 2 Vols., (Napoli: Editoriale Scientifica, 2014), pp. 615-635

[35] On the term 'users of the seas' see E. Roucounas, 'Effectiveness of International Law for the Users of the Seas' in Jorge Cardona Llorens (ed.), *Cursos euromediterráneos bancaja de derecho internacional,* Vol. 8, (Valencia, 2009), 855-922.

[36] 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law' See article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950, 213 *UNTS* 221 (ECHR).

[37] 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'; see Article 6 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 *UNTS* 171 (ICCPR).

from causing death, but also to take positive measures to protect the lives of individuals within their jurisdiction.[38]

Thus, flag States involved in rescue operations have to take all necessary measures to protect the lives of individuals in distress, provided, of course, that they are within their jurisdiction. Extraterritorial jurisdiction has been established for activities occurring on the high seas in a number of cases[39], yet the exact scope of human rights treaties in relation to various situations of extraterritorial action remains contested.[40] In the present milieu, it is questioned whether the master of the vessel rescuing migrants on the high seas are bound by human rights obligations, even though these acts do not take place in their territory. In other words, at which point are the persons in distress considered as subject to the jurisdiction of the States concerned?

Having in mind the prerequisite of authority and control as discussed both in the international case-law and theory, the following comments are in order: First, as regards flag States, it is doubtless that these persons brought onboard would come under the jurisdiction of the flag State of the rescuing State vessel.[41] Human rights jurisdiction has also been established in cases where migrants do not come on board the rescuing vessel, but where there is a certain interference with the navigation of their vessel by a State vessel, like a coastguard vessel, in the context of immigration control.[42] Arguably, from the moment that the coastguard vessel exercises such 'de facto control' over the navigation of a vessel carrying migrants, the latter persons come within the respective flag State's extraterritorial jurisdiction.

On the contrary, the situation is different where rescue operations are conducted by private vessels. In such cases, a jurisdictional link between the rescued persons and the flag State can only be established where the master is given specific instructions from the competent authorities of the flag State as to how it should proceed with the persons concerned and acts accordingly. In that

---

[38] See *Osman v United Kingdom* Application No. 87/1997/871/1083, Grand Chamber Judgment of 28 October 1998, 29 *EHRR* 245. See also on the positive obligation dimension of this right *Furdík v. Slovakia* (Admissibility decision), Application no. 42994/05, 2 December 2008 and *Kemaloglu v. Turkey*, Application no. 19986/06, 10 April 2012.

[39] See *inter alia Hirsi Jamaa ao v Italy* App. no 27765/09 (ECtHR, Grand Chamber Judgment of 23 February 2012)*and Medvedyev et al. v. France,* judgment of 29 March 2010 (Grand Chamber, Application No. 3394/03).

[40] See *inter alia Hirsi Jamaa ao v Italy* App. no 27765/09 (ECtHR, Grand Chamber Judgment of 23 February 2012)*and Medvedyev et al. v. France,* judgment of 29 March 2010 (Grand Chamber, Application No. 3394/03).

[41] See *Hirsi Jamaa ao v Italy,* case, para. 81 and*Medvedyev et al. v. France,* para 67

[42] For cases of interception of vessels and the right to life see ECtHR, *Xhavara and Others v Italy and Albania* (Application No 39473/98), Admissibility Decision of 11 January 2001;Judgment of 3 May 2009 as well as UN Committee against Torture, *Sonko v. Spain* (Comm. No. 368/2010), Decision of 20 February 2012

case, arguably, the master becomes a de facto organ of the flag State under article 8 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), through which the flag State exercises jurisdiction over these persons.[43]

II. International Responsibility Arising from Failure to Rescue Lives at Sea

Having discussed the international obligations applicable to rescue-at-sea, it is time to scrutinise the responsibility of flag States. Following the structure of Article 2 of the ARSIWA, I will examine both the element of the attribution of wrongful acts to the States and the element of breach of the relevant obligations.

Starting with States and the rules for the attribution of conduct, articles 4-11 of the ARSIWA set forth the conditions under which conduct is attributed to the state for the purposes of determining its international responsibility.[44] In the present milieu, the conduct that should, in principle, be attributed to a State would be the non-rescue of persons in distress on the part of the flag State. Assuming that such conduct has occurred, the existence of a wrongful act would be contingent upon the attribution of the conduct in question to the State concerned.

With regard to the element of breach of international obligations, 'there is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it…'.[45] Nonetheless, as the International Law Commission explains, '[i]n determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc'.[46] In the present case, the primary obligations of States under LOSC, the relevant IMO Conventions and customary international law have been adequately determined

[43] See article 8 of ILC Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Official Records; 56th Session, Supp. No. 10 at UN. Doc A/56/10; at 31 [hereinafter: ARSIWA]; http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. See also on persons acting on state 'instructions' J. Crawford, State Responsibility, The General Part (Cambridge: Cambridge University Press, 2014), 144-146.

[44] See *ASR Commentary*, at 38. On the issue of attribution see *inter alia* L. Condorelli, 'The Rules of Attribution: General Considerations' in J. Crawford *et al.* (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 221.

[45] *ASR Commentary,* at 54.

[46] *Ibid.*

and construed in the previous section. Therefore, the following enquiry will focus on whether the attribution of the conduct in question to either the flag or the coastal State establishes an internationally wrongful act and thus the international responsibility of these States.

As regards the requisite element of attribution to the flag State, the fact that a vessel flying the flag of a particular State has failed to render assistance to persons in distress at sea could be attributable to the latter State in a number of cases. On the one hand, if the vessel in question is a warship or other duly designated State vessel, the master, with which the pertinent duty lies, is a *de jure* organ of a State and thus his or her conduct is attributable to the flag State pursuant to article 4 of ARSIWA.[47] This does not mean however that in each and every case this omission would entail the responsibility of the flag State, as this omission must also amount to a violation of article 98 (1) of LOSC and the concomitant due diligence obligation of the flag State as well as a violation of the right to life under human rights law. On the other hand, if the vessel in question is private, the attribution to the flag State is not so obvious, in the sense that the master of the vessel is not a *de jure* organ of the State. However, there are other rules of attribution, which might be applicable here.

Pursuant to article 5 of ARSIWA:

'[t]he conduct of a person or entity which is not an organ of the State under article 4, but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'.

Hypothetically, should the flag State have explicitly authorised the master of the vessel to exercise 'elements of governmental authority' in this regard, then the conduct of the non-rescue of migrants could be attributed to the State. Indeed, flag States often empower masters with certain public powers, such as the power to arrest on board the vessel.[48] However, it is the view of the author that such delegation of authority cannot exist in respect of rescue-at-sea. And the reason is not that the criterion of 'empowerment by law' is not met: quite to contrary, flag States do provide in their domestic legislation for the duty of the master to perform search and rescue activities; this is not a prerogative of the flag States, but, as said, their obligation pursuant to article 98 (1) of LOSC.

---

[47] On the question of responsibility of flag States for acts or omissions of their state vessels, see P. Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Leiden: Martinus Nijhoff, 2010), 105.

[48] See e.g. Section 105 of the UK Merchant Shipping Act, 1995: 'The master of any United Kingdom ship may cause any person on board the ship to be put under restraint if and for so long as it appears to him necessary or expedient in the interest of safety or for the preservation of good order or discipline on board the ship'; available at <http://www.legislation.gov.uk/ukpga/1995/21/section/105>

The reason is simply that there is no delegation of 'elements of governmental authority'. According to the International Law Commission:
'[t]he justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, *the conduct of an entity must accordingly concern governmental activity* and not other private or commercial activity in which the entity may engage'.[49]
Evidently, rendering assistance to persons in distress at sea constitutes neither 'governmental activity', nor 'private or commercial activity', albeit a traditional maritime and 'humanitarian' duty *par excellence*, which, under international law, falls upon the master of any vessel to discharge. Accordingly, the conduct of private vessels should not, in principle, be attributed to the flag State according to article 5 of ARSIWA.

However, under article 8 of ARSIWA,
'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[50]

On the face of this provision, it can tenably be argued that should the flag State instruct the master of the vessel flying its flag to turn a blind eye to persons in distress at sea and the master comply with this instruction, this omission would be attributable to the flag state.

On the other hand, even if the conduct of the master of the private vessel is considered to be attributable to the flag State, this does not *ipso facto* entail that the latter incurs international responsibility. The conduct in question must also give rise to a breach of the relevant international obligation, pursuant to article 2 of ASR. Accordingly, it might be the case that the vessel in question did not proceed to the rescue of the persons in distress, because it was unable or considered it unnecessary, yet it informed the rescue authorities pursuant to the relevant regulations.[51] This would not amount to a breach of the obligations of the flag State.

In any case, the flag States involved may incur responsibility not for the failure to assist the persons at sea, but for not exercising the due diligence obligation provided for in articles 98 (1) of the LOSC and the SOLAS Convention.

[49] ARSIWA Commentary, at 43 (emphasis added).
[50] See ASR Commentary, at 47. On 'de facto organs' of States see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, 26 February 2007, para. 404 *et seq.*
[51] See Regulation 33, Chapter V of the SOLAS Convention

Thus, if there is a pattern of incidents of private vessels ignoring people in distress without registering 'in the log-book the reason for failing to proceed to the assistance of the persons in distress' or informing 'the appropriate search and rescue service accordingly' and the flag State remains idle, then there are good reasons to assert that the flag state has breached its due diligence obligations under the LOSC and the SOLAS Convention.

As regards the responsibility for violations of human rights law, it is contended that very exceptionally, and only in the case that the flag States had been informed about the boat in distress and had instructed their vessels not to render assistance, would the persons have been within the 'jurisdiction' of those States. In such a case, the master may be considered as a '*de facto* organ' in under article 8 of ARSWA and thus the failure to render assistance can be been attributed to the flag State. Consequently, the responsibility of the latter for the violation of the right to life might have arisen. Nevertheless, it is not the usual practice for commercial shipping to inform flag State authorities in respect of such matters nor for flag states authorities to instruct private vessels to ignore the obligation to render assistance.

At this juncture, it is instructive to consider the left-to-die incident of March 2011. According to the available information, the boat in distress had been initially assisted by a military helicopter (there have been reports that it was Italian[52]) while it had encountered two fishing boats, one flying an Italian flag and the other a Tunisian flag, neither of which rendered assistance.[53] In addition, three warships allegedly were in the vicinity: the Spanish frigate *Méndez Núñez* (11 miles away), the Italian *ITS Borsini* (37 miles away)[54] and a French vessel.[55] None of them assisted the boat people.

In applying the rules on State responsibility, we can make a number of assertions. First of all, as regards the military helicopter, its presence and the initial assistance provided to the persons in distress brought about the result that these persons were under the *personal* control, and, hence, under the jurisdiction of the State of the registry of the helicopter. The omission to provide any further assistance was clearly attributed to that State, and constituted a breach of the positive obligation set forth by the right to life under article 2 of ECHR and article 6 of ICCPR. In addition, the state of registry of the helicopter may also incur responsibility for the lack of cooperation with other naval and aerial assets in the region so as to provide the assistance required to the persons in distress.

Secondly, with respect to the other military vessels, it seems difficult to sustain the argument that the flag States of the *Méndez Núñez* and the *ITS Borsini*

[52] See PACE Report, at para 28.
[53] See *ibid,* at paras 36-38.
[54] See *ibid*, at para 8.
[55] *Ibid*, at paras 85-57

had exercised any kind of 'control' over the persons on the boat so as to bring about the relevant human rights obligations. A distress call to all vessels in a wide area does not establish 'jurisdiction' of all flag States over the persons concerned. Nor, it can be said that the non-assistance as such infringed the applicable rules of the law of the sea. The only obligation of the flag States concerned was to discharge *a posteriori* their duty of due diligence, as analyzed above, which, however, presupposes the awareness of the incident and the reasons of the failure assist. In view of the location of these two warships and their parallel mandate under *Operation Unified Protector* in Libya, but more importantly, the lack of definite knowledge whether they indeed received the distress signal it is difficult to make such claim.

However, the situation is different in relation to the other probably French- military- vessel: allegedly, this vessel had visual contact with the 'boat people', it was aware of the situation, namely that people, amongst them, children, had already died, and, nonetheless, it did not provide assistance.[56] Arguably, the visual contact and the awareness of the situation triggered its obligation to provide assistance in accordance with the law of the sea; the failure to do so and the lack of any reporting to the responsible Rescue Coordination Center as well as, allegedly, the lack of any act in due diligence of the flag State of the warship may bring about the latter's responsibility for not abiding by the pertinent rules under the law of the sea.

As per any human rights violation, firstly, it must be established that the 'boat people' were under the jurisdiction of the (unknown) flag State of the military vessel. This would require the extension of the 'personal control' model to the extent that any such encounter would bring about the 'positive obligation' to ensure the right to life in keeping with the *Osman v. Uk* case-law of the European Court of Human Rights.[57] Even though this argument might appear far-fetched in other contexts and not in accordance, for example, with the premise that positive obligations require certain control over a specific territory,[58] it is submitted that due to the nature of the high seas as an area over which only the flag State may exercise jurisdiction under international law,[59] it is inevitable that this jurisdiction would extent to such distress situations. This is also the *raison d'être* of article 98 (1) of LOSC, which explicitly calls for the assertion of such jurisdiction on the high seas on the part of the flag States. In other words, it is the jurisdiction that flag States are called to exercise on the high seas, including the jurisdiction to exercise due diligence control over their vessels, that informs also

[56] *Ibid*, at paras. 41-43.

[57] See above n 37 and accompanying text.

[58] See M. Milanovic, above n 39.

[59] See article 92 of LOSC. On the nature of the high seas see E. Papastavridis 'The Right of Visit on the High Seas in a Theoretical Perspective: *Mare Liberum v. Mare Clausum* Revisited', 24 *Leiden Journal of International Law* (2011), 45, at 52-53.

the extent of their 'jurisdictional reach' in the same area for the purposes of the application of human rights treaties.

Consequently, it is the view of the author that in the context of the present enquiry, the 'boat people' in distress may come within the jurisdiction of the flag State of the warship, which is aware of their situation and has the due diligence obligation or a 'best efforts' obligation to secure their lives. Needless to say, any failure to assist them is directly attributed to the flag State, since they are state organs, and may amount to a breach of article 2 of ECHR or article 6 of ICCPR.

Thirdly, as to the responsibility of the flag States of the private vessels, that, allegedly, failed to render assistance, it is submitted that the omission as such cannot be attributed to the respective States, *in casu*, Italy, Tunisia and Cyprus and thus no responsibility for a violation of the right to life can be incurred. Only the lack of due diligence *ex post facto* by the said States may give rise to their responsibility for the violation of article 98 (1) of LOSC and the SOLAS Convention.

III. Concluding Remarks: A Way Forward

The recent incidents in the Mediterranean Sea as well as the current ones in the Aegean Sea reveal the inadequacies, the lack of resources or even the inertia of a number of actors (States, international organizations, private mariners) to rescue people in distress at sea. Indeed, an incredible number of silent tragedies occur every year in the Mediterranean. Nevertheless, the main efforts of the States concerned are directed towards securing their borders rather than saving people's lives. Even in the aftermath of the more recent death of more than 700 people in the central Mediterranean (April 2015), States and the international community do not seem to be ready to seriously address this scourge.[60]

The present enquiry focused on the issue of responsibility of flag States that may arise from the failure to save lives-at-sea. As it has become apparent from the discussion of the responsibility questions in cases of non-rescue at sea, many States 'share' the international responsibility for not meeting their obligations in this regard. Even though the legal framework is not perfectly adequate, this is no excuse for this inertia of all the relevant 'stakeholders'. It is sad but true that the 'dark side of globalization is manifesting itself in the seas and coasts of the Mediterranean.

[60] On the reactions to the EU Council Conclusions see inter alia Cathryn Costello and Mariagiulia Giuffré, Drowning Refugees, Migrants, and Shame at Sea: The EU's Response' Parts 1 and 2 (27 April 2015); available at <http://ohrh.law.ox.ac.uk/drowning-refugees-migrants-and-shame-at-sea-the-eus-response-part-i/> and <http://ohrh.law.ox.ac.uk/drowning-refugees-migrants-and-shame-at-sea-the-eu-response-part-ii/ >

To counter this, the key rests with the private mariners and their flag States. Truly, there has been a plethora of private stakeholders, be it in individual cases or in a more organized fashion[61] that have rendered assistance to people at sea and keep doing so. Nevertheless, this does not suffice; since the sad reality is that very often private mariners turn a blind eye to situations of distress, while their flag States fail to exercise any monitoring of these omissions. However, their role is crucial as the number of private vessels traversing the seas is far more than this of the state vessels, even if all were to be deployed in rescue operations in the Mediterranean Sea. How then will they be more actively involved in such operations?

As it was contended above, the most significant reason for the inertia of the private mariners is the lack of clarity as to the place of disembarkation of the rescued persons. It is thus imperative to assure the mariners that when they discharge their duty of rescue at sea, they will be able to disembark the persons concerned in a place of safety as swiftly as possible. This is also explicitly stipulated in Article 4.1-1 of SOLAS:

'Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with *minimum further deviation from the ship's intended voyage*, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea'.[62]

This would be feasible if the coastal States in whose SAR zone the rescue took place do cooperate directly with the master of the rescuing vessel or with its flag State as to the place of disembarkation. Additionally, it is proposed that each coastal State could have *ex ante* designated ports of disembarkation of rescued migrants analogous to places of refuge for ships in need of assistance due to accidents.[63] Thus the vessels concerned would be certain that their voyage will not be overly delayed, since they would know where exactly to go in cases of rescue-at-sea to disembark the rescued people. The latter would serve as an incentive to private mariners to fully discharge their humanitarian duties.

Having said that, it should be underscored that the flag States do have an obligation of due diligence in relation to the rescue duties of the Masters of vessels flying their flags as well as an obligation of cooperation with other States,

[61] See e.g. the commendable concentrated efforts of Migrants Offshore Aid Station (MOAS) at <https://www.moas.eu/mitigating-death-and-inspiring-action-at-the-worlds-deadliest-border-moas-saves-10000-lives-during-its-first-year/>

[62] See supra n. 22 (emphasis added).

[63] IMO, Resolution A.949(23), 'Guidelines on Places of Refuge for Ships in Need of Assistance', A 23/Res.949, 5 March 2004. Under the Guidelines, 'ships in need of assistance' are deemed as: 'a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard' (para. 1.18). The 2003 Guidelines were complemented by the 'Guidelines on the Control of Ships in an Emergency' adopted on 19 October 2007, MSC.1/Circ.1251.

including the responsible SAR coastal States. It is our firm belief that only if all States live up to their obligation and the shipping industry is more actively involved in rescue operations the ongoing death toll at sea would significantly decrease.

MIGRATION AND ITS SECURITY ASPECTS ON THE WESTERN BALKANS

Trpe Stojanovski[1] *and Aleksandar Stojanovski* [2]

I. Introduction; II. Migration phenomenon tendencies; II. Regional Cooperation on the Balkans in the field of security; III. Importance of the Regional Cooperation; IV. MARRI Initiative; V. Conclusions

I. Introduction

Western Balkans (WB) has traditionally been a region prone to migration flows. The recent history and the global trends label this part of Europe as transit region, and in some limited cases, a destination area. The dramatic process of political transitions, the war and the post conflict situation on the Western Balkans, amplified with the breakdown of Yugoslavia, is influencing the current processes of democratization. WB is surrounded by the EU countries and the migration flows are affecting the region with the same challenges and risks, as the EU. On the other hand, the WB countries have their national mechanisms (usually very limited) in managing the migration processes (including the irregular migration and the related organized crime modalities). The regional response is always a demanding issue, specifically during the increased migration flows, when hundreds of thousands of refugees and migrants are traveling through the Western Balkans.

II. Migration phenomenon tendencies

Speaking of the migration, two forces are making dialectic unity:
a) The world will continue to become even mobile; the people will travel;

[1] Trpe Stojanovski is full professor at the University "St. Kliment Ohridski".
[2] Aleksandar Stojanovski is a Ph.D. candidat at the Faculty of security, University "St. Kliment Ohridtski" – Bitola.

b) The world will become more confronted and a more dangerous place. In that sense, the crime forms linked with migration will bring about new *modus operandi,* specifically in the case when such unprecedented migration flows take place. The 2015 migration and refugee exodus present new set of modalities of smuggling migrants through sea and land.

There is a huge number of irregular entrees made by migrants and refugees who reach the coasts of South East Europe with the goal to enter the EU. Most of them try to escape armed conflicts and violence in Syria, Iraq, Afghanistan, Eritrea and Somalia, by entering Italy and continuing further into the whole Schengen area or first enter Greece and then, continue to the main Schengen area through Macedonia and Serbia, by entering Hungary, or Croatia, Slovenia and after that, continuing to Austria and Germany. The most illegal border crossings took place in 2015, which is more than in 2012 and during the Arab Spring in 2011.

The irregular migrants and refugees arrive by boats guided by traffickers and a lot of them lose their lives at sea. Significant number of them have never before seen salt water. There are numerous reasons for such intensive influx of human beings and refugees on their journey to Europe. The first is humanitarian, natural reaction to escape from the war torn areas and to search for a safe place for life. There are also migrants who are not forced to move, but their motivation is to get in Europe, where the living conditions are better than those of their places of origin. They intend their migration movement to be justified with the refugee exodus, they have calculated the moment in time, as well as the route of travel as an opportunity for easier access to their destination. Beside the exodus, there are criminal groups which have their own calculations and ways of making enormous profits, mostly on the tragedies of their "customers" and their discriminated role during their movement. They are well organized in knowing the circumstances in the countries of origin, transit and destination countries, they are well connected with the criminal groups from other countries on the migration route. One of the open issues in more efficient prevention and combating the transnational organized crime related to the migration are: finding separate legal solutions, which are based on the international instruments, whose implementation might differ in some cases, depending on the national traditions, culture and other specifics. Another interesting point is the absence of efficient legal solutions in the international instruments for preventing and sentencing of crimes connected with smuggling of migrants on the international seas. This situation is reflected in the national legislature, and the organized criminal groups are aware of this fact.

The national response on the migration flows is determined by number of specifics of the countries, their geographical location, configuration, national capacities, potentials of the state institutions to manage inter and intra institutional

cooperation, ability to focus on the crises, trained staff to deal with migrants and refuges in such high numbers as never before, lack of sufficient logistical capacities, lack of financial support by the donors which remains critical, due to the fact that in the current crises the Western Balkan countries have managed the process with their national budgets.

However, the refugee crises highlighted several aspects for the countries directly affected with the migration flows. Non-EU countries react individually, following their national strategies and action plans, which were prepared in different, more regular circumstances. One of the crucial issue was lack of the bilateral and even more – regional cooperation. The first instance of such unprecedented issue was the border between Greece and Macedonia, which is external EU border, where the Greek authorities decline to remain in contact with the neighbouring authorities due to the political issue related with the name Macedonia, while stating that they have more difficulties on the border with Turkey as well as throughout the country, and because of that, they are not able to be more present on their northern border. In such situation, when there is no exchange of valuable information by the neighbouring country Greece, which represents the EU, when 5-12.000 human beings per day are appearing on the wide horizon, when this exodus was not properly recognized, the Macedonian society faced a lot of challenges and improvisation.

Some of these challenges are in the area of internal potentials to react properly, mostly because of ignoring the unfolding scenario and the rising need to prepare reception centers on time near the border, also, mostly because of the very limited transport potentials and other kind of services which the country is obliged to offer for such enormous number of refugees and migrants. The issue of the regular border control is another problem which became evident in the circumstances which seemed like improvisation rather than border check. Another issue which brought confusion and confrontation was the position of the NGO sector who enabled some services to be offered to the humanitarian efforts aimed at helping the refugees as victims who have endured a long trip, strenuous conditions, a lot of prejudices, etc. On the other hand, the state authorities at the beginning were focusing to mobilize their potentials in better border control, better migration management and better repose to the migrants and refugees who are moving from Greece to Macedonia, and their transport to the north, to Serbia. The main challenge was to divide the efforts and streamline the approach: the state authorities were dominantly focused on state security; and the civil society was focused only on the human security.

In the whole Western Balkans, the role of the civil society in the migration exodus is marked as very proactive, service oriented, aimed at mobilizing the citizens to help in collecting the goods, offering of assistance to the refuges, specifically to the vulnerable groups. The NGOs were present on the

border crossing points, assisting in facilitation the accommodation, translation, medical and other services for the migrants and refugees. They present better performances compared with the state authorities; also they have put pressure on the state authorities to improve their services and to be more sensitive regarding the migrants. Very positive attitude by the civil society is noted in networking the NGOs from all countries from South-East Europe, by exchanging the information on the migration flows, sharing the experiences and identifying the denominator for common activities.

In the autumn 2015 the RCC Secretary General stated that the WB states are not able to manage the current crises on their territory, separately. This statement was made early in the beginning by the experts after a conducted analysts, and further it was reaffirmed by the national leaders from the Western Balkan countries. They intended to be part of the European migration policy, but in the reality such policy doesn't exist (up to 1st November, '15). Even more, the Dublin agreement is not functional in such a migration exodus and the reaction by the EU authorities regarding the asylum policy was frequently unclear, the conclusions for the readiness to accept refuges quite often was restructured (and it will continue to work in such trajectory, for while). Some EU member states from the eastern part were very restrictive and unpleasant in regard to the possibility the refuges, mostly Muslims to come in their countries and have created negative campaigns and voicing their refusal for their territory to be used by the refuges and migrants. Starting from August, '15 the Hungarian authorities have built a perimeter on the green border with Serbia, which on 15th of September, 2015 is officially introduced as "forbidden land" for the migration flows. Under such circumstances, the migrants and the refugees were forced to redirect their movement through Croatia. Such a situation has brought tension between Croatian authorities, who are in an election campaign period and the Serbian government, mostly due to the number of refugees who crossed from Serbia into Croatia in the numbers upward of 5000 individuals and more in 24 hours, and the statement by the Croatian authorities that they are able to manage the process of 3-4000 migrants and refuges daily. This scenario had caused a spiral of mutual blaming which introduced an embargo for traveling imposed on the Serbian vehicles and goods to Croatia, and some countermeasures which were introduced from Serbia at Croatia. After six days of tensions, the Croats ceased the embargo. In some cases, the Croatian authorities also organized lift of the migrants to Hungary with buses and trains. Such scenario was seen as a bad attitude toward Hungary by the Croatians and the train ended up being captured by the Hungarians[3]. Another important issue is that Hungarians extended their perimeter on the border line with Croatia to prevent further movements of

[3] During the visit of Croatian President, Ms. Grabar Kitarovic to Hungary, in October, 2015 there was statement on Al Jazera that both states reach the agreement for turning back the train.

migrants from Croatia to their territory. This is a very sensitive issue from the perspective of the EU, having in mind that this "wall" is established inside the European Union, which as an occurrence is against their [EU] philosophy and goals. The intention was made public through the media, that Hungary is going to extend its perimeter with Slovenia, which would disqualify the Schengen values, but such process has not commenced yet.

When the migrants and refugees arrived on the Croatian – Slovenian border, again the nervousness became evident. This time in the way that the Croats voiced their willingness to allow to the people fleeing conflict to live their country while the Slovenians pushed for control of the number of migrants and refugees entering in Slovenia and insisted on having smaller number of those persons. Regardless of the fact that in this case both countries are EU members, the authorities wanted to maintain regular border control and management as much as possible. This scenario was evident even when the migrants moved from Slovenia to Austria. Both countries are members of Schengen, but now the police was present on the border line, trying to separate the migration waves and to allow to the people to pass the border in periodically divided time portions. When the response of the law enforcement services was less than what the authorities have hoped for, the migrants and refugees dictated the development of the scenario and they usually demonstrated pressure for passing the barriers and moving further.

Most of the countries had no proper plan for this kind of phenomenon. Some of them, including Macedonia, because of the delayed reaction, worked on the scenario while the exodus was in full swing. Cases in which the police was in the first line to manage the border line protection emerged, while it had to maintain the peace and order. In some cases the police behaviour was not appropriate with regard to the situation on the field, thus, the police powers were enforced too extensively. The other countries, specifically those which were not on the migration route in the first moment, like Croatia, Slovenia, Albania, Montenegro, Bosnia and Herzegovina – were able to learn from the experience of Macedonia and Serbia and to mobilize their potentials. After Hungary developed the perimeter on the border with Serbia, the migration flows redirected to Croatia and Slovenia, on its way to Germany, via Austria.

Since the beginning of the increased migration flows in June 2015, it is evident that the cooperation between the southeast European countries has some positive examples, like the cooperation between Macedonia and Serbia, and cooperation under tensions between Serbia and Hungary, Serbia and Croatia (which culminated with sanctions in transport between the traffic and goods for the companies from both countries for the period of several days), Croatia and Slovenia and in October, '15 between Slovenia and Austria. The most vulnerable border in this part of Europe is Greek-Macedonian border, where there was no

communication between the police forces, because of the ignorant position by Greece (during the exodus there are contacts between the regular police forces from both sides, however only on the technical level). After the meeting on 25th of October, 2015 in Brussels[4] initiated by the European Union and the leaders of 11 European countries affected with the migration route, the plan with 17 items is endorsed, which should strengthen the further cooperation between the authorities. The main message of this event is concentrated in Mr. Junker's statement: "*Countries affected should not only talk about and at each other but also with each other. Neighbours should work together not against each other. Refugees need to be treated in a humane manner along the length of the Western Balkans route to avoid a humanitarian tragedy in Europe. I am therefore pleased that today we were able to jointly agree on a 17-point plan of pragmatic and operational measures to ensure people are not left to fend for themselves in the rain and cold.*"[5]. At this important event, the current and the future EU Presidency representatives were present, Luxemburg and the Netherlands, as well as the heads of FRONTEX and UNHCR, as the relevant representatives for international cooperation with the migrants, who should strengthen, and contribute in coordination and improvement of the national, bilateral, regional and wider cooperation.

III. Regional Cooperation on the Balkans in the field of security

There are several grounds for making the regional cooperation in the field of security a challenge of today perception of state sovereignty; legally determined police cooperation; other law enforcement agencies cooperation; convergence through regional trainings; cultural diversity in the region; language as a barrier or understanding; combating organized crime demands police cooperation.

The Regional police cooperation as part of the international policing is becoming more challenging and demanding issue for modern policing. It is based on timely sharing of information and is serving as a fundament for the more integrated regional police cooperation. The story of regional police cooperation becomes more challenging when the Western Balkans region is analysed more closely, having in mind the (recent) history of this region, the current balance of power of the member states; the affiliation of some WB countries with the EU and the rest of them, which are close, or not as close in its EU journey. Definitely, the new extraordinary challenge is the migration flow passing through the Balkans towards the EU countries, mostly Germany as a final destination, in figures never

[4] http://europa.eu/rapid/press-release_IP-15-5904_en.htm
[5] http://europa.eu/rapid/press-release_IP-15-5904_en.htm

seen before. In 2014, in the EU 282.000 migrants and refugees have arrived, while, in 9 months of 2015 there are 710.000 migrants and refugees registered.[6] This challenge and the modalities of its migration forms are seen as the test of the existing regional and international police cooperation in extraordinary circumstances.

The Regional police/law enforcement cooperation on the WB is progressing in a number of fields. One is throughout the MARRI Initiative, more precisely, focusing on the MARRI Projects and through the MARRI Networks: **a)** Airports Police Commanders, **b)** National Coordinators for Trafficking in Human Beings, **c)** Heads for Asylum and **d)** Irregular migration/ Readmission (see: www.marri-rc.org).

For the purposes of the EU-funded - FP7 Project titled COMPOSITE (www.composite-project.eu) an evaluation of the regional police cooperation between the border police forces at the above mentioned airports was conducted. In late 2013, a questionnaire was designed and data collection was performed. The aim of the questionnaire was to perform in depth analysis so to evaluate the level of cooperation established as well as to assess further needs in reaching the EU standards.

This analysis employs the results of the data collection performed on 37 respondents, all police officers, in respect to the regional police cooperation among border police organizations operating at these airports, conducted by the MARRI-RC.

The analysis of the regional police cooperation in the WB region has been motivated by the identified characteristics[7], which makes it worthy of scrutiny in its own geographical and social context. These characteristics include:

A. There are persistent feelings for the state sovereignty, which was a strong factor for the state security in the previous political system and until recently (end of the last century) the bilateral and regional cooperation was limited to symbolic, rather than intensive police cooperation. Today the MARRI Member States (MS) as independent states are members of international law enforcement agencies. After the dissolution of the former Yugoslavia and the transformation from totalitarian to democratic societies, the newly independent states became members of associations, initiatives, mutual centers and networks established to speed up the law enforcement cooperation based on mutual trust.

[6] Source: Frontex, Al Jezera 18 October, 2015

[7] FP 7 Project Composite www.composite-project.eu, Title of the Macedonian Targeted Study: Changes in MARRI Regional Centre in Skopje (Migration, Asylum, Refugees Regional Initiative), Trpe Stojanovski[ab], Stojanka Mirceva[a], Katerina Krstevska[a], Rade Rajkovcevski[a], Toni Jakimovski[b] [a]Faculty of Security - Skopje, University "St. Kliment Ohridski" - Bitola (Republic of Macedonia), [b]MARRI Regional Centre in Skopje (2013)

B. The modalities for regional police cooperation are based on both national law and international instruments, which are recognized as *sine qua non* for prevention and fight against transnational organized crime. The modalities for cooperation are already established, however, there is room for further improvements.

C. The regional trainings are of high importance due to the fact that they are effective forums in which the police officers from the neighboring countries are seeking for regional solutions to regional challenges.

D. The cultural differences are evident even in the majority of the countries which were in the same state (Yugoslavia). Such cultural differences cumulated with separate historical differences are even stronger with the states which were not a part of a former larger entity such as Yugoslavia.

E. The different languages spoken in the region (even though most languages belong to the Slavic group) affect the communication and therefore are recognized as a barrier. Following the standards of International Law, English is introduced as official language of the regional initiatives and the main language for the multilateral communications. However, language is still a substantial barrier in mutual understanding, sharing of information between the police services and building confidence, which thwart the fluent cooperation.

F. The institutional relations between the national police forces and the regional organizations are fairly new, established roughly 15 years ago, as a new reality for prevention and fighting the cross border organized crime. The new paradigm for the regional organizations was extensively supported by the USA and the EU institutions by assisting the authorities in the WB (and other geographical regions, where the transformation from totalitarian system to democracy was established) to work together on the security, in order to build the confidence and improve the performance in common activities. Information sharing in a safe and professional manner is the most essential approach. On the other hand, the performances of national police services, their expectations and support to the regional organizations differ from state to state. However, the crucial moment is that the political support is evident, which keeps the room for more professional developments between the national police and the regional organization.

Additionally, the present migration phenomenon throughout Europe is, at least to some extent, historically determined. Modern history offers clues for many similarities and contrasts between countries and regions. For instance, many differences in current population movements in Europe are due to differing times of initiation and courses of modernization. By the same token, it is no

wonder that current migration in South East Europe is influenced by a more recent history of political isolation and forcibly repressed spatial mobility.[8]

Distinct migration trends in South East Europe are attributable less to political developments of the second half of the 20th century than to historical factors, of which the following four seem to be prominent:[9]

- Relative economic and institutional backwardness (compared to the West);
- Relative abundance of labour;
- Relative instability of state boundaries;
- Relative instability of a (comparatively diverse) ethnic mix in the population.

IV. Importance of the Regional Cooperation

The Regional cooperation represents the common interest of all countries of the region and its intensification has already given concrete positive effects in the sense of renewal and further development of partnership and strengthening of mutual trust.[10]

Integration process with the EU is considered to be the strategic commitment of the region and it is carried out throughout dynamic reform process of the Law Enforcement. According to the priorities defined by the WB governments, essential attention is directed to the quality and intensification of regional and international cooperation. Regional initiatives are guiding activities intended for enhancement of cooperation among the Law Enforcement and Administrative organizations of the WB countries, by establishing mechanisms to tackle all forms of crime as well as contribute to strengthening bilateral and multilateral cooperation in the field of security.

Implementation of activities carried out by regional initiatives is entailed during pre-accession negotiations with the EU, aiming at determining and defining direction of association in order to decrease security risks and challenges.

In the last decade, the police organizations have acquired a fully-fledged membership to number of significant European and world Law Enforcement structures as well as international organizations and have signed bilateral and multilateral agreement on police cooperation, which absolutely provides addition impetus to reaching standards of modern policing. It is important to note that the countries of the region are enjoying high quality support from the EU, diplomatic representative offices and other relevant international subjects.

---

[8] http://www.un.org/esa/population/migration/turin/Symposium_Turin_files/P12_Kaczmarczyk%26Okolski.pdf

[9] Okólski, M. (2004). Migration trends in Central and Eastern Europe on the eve of the European Union enlargement: an overview. In Migration in the New Europe: East-West Revisited, Gorny A., P. Ruspini eds. Houndmills/Basingstoke/Hampshire: Palgrave Macmillan, pp. 23-48

[10] More about this issue in: Stojanovski, Mehovic, Stojanovski, Regional Police Cooperation in South East Europe through the MARRI Initiative, Crossroads 2015, Vol 4, No.2

In the process of strengthening cooperation at bilateral level the countries of the region are delegating Law Enforcement representatives to different European countries and to regional and international organizations, in order to enable direct communication on different points of interest, also through cooperation they are creating the joint investigative teams, running synchronized investigations and promptly exchanging information.

Regional initiatives are tasked to assist countries in organizing trainings for Law Enforcement officers, carry out cooperation with international partners and European Commission, implementing IPA projects, arranging expert and financial support, aiming to contribute to strengthening of administrative and operative capacities in the fight against all forms of serious crime. Also, regional initiatives are conducting various analyses and producing assessments of project implementation efficiency, focusing mainly in project sustainability.

The aim of all projects with the regional approach is to assist enhancement and further promotion of strategic and operational regional cooperation.

WB countries are supporting the creation of joint teams, as a mechanism enabling efficient fight against all forms of transnational & trans-border crime. The legal ground for joint teams operation is based on the PCC SEE *(Police Cooperation Convention for Southeast Europe)* and the work is focused on concrete operative proceedings of the law enforcement agencies of the signatory countries.

Beside the activities and progress done in the field of regional cooperation and partnership, during the current migration crises there is no presence of the existing regional entities. Regional Cooperation Council, Migration, Asylum, Refugee Regional Initiative don't come to the public with any initiative or activities. That is a sign that the frame of the migration exodus is too high. The most present international organizations present on the field are FRONTEX and UNCHR, who are able to be present, to survive and to take some actions on the field.

V. MARRI Initiative

The Migration, Asylum, Refugees Regional Initiative (MARRI) is formed in 2003 within the milieu of the Stability Pact for Southeast Europe by merging the Regional Return Initiative - RRI and the Migration and Asylum Initiative - MAI. Since April 2004, MARRI has been within the framework of the Southeast European Cooperation Process (SEECP). MARRI deals with the issue of population movements within the area of WB. The MARRI Member States are: Republic of Albania, Bosnia and Herzegovina, Republic of Croatia, Republic of Macedonia, Montenegro and Republic of Serbia. Each country has

its state official in the MARRI RC; four of them are with police and two are with diplomatic background. MARRI RC has no law enforcement performances. The MARRI Regional Forum, which is the steering body of the initiative and is composed of the ministers of Interior from the six MS, has a meeting at least once per year. Representatives from international partner organizations and donor countries are also invited to attend. The Regional Forum acts as a platform for coordination among the member countries and for consultation with its partners. The initiative is led by a Presidency, which is held by one of the member countries on a rotating basis. The current Presidency is led by Montenegro (2015/2016), which will be followed by Albania.

The one of the aspirations of the RC was to facilitate and strengthen the ownership of the regional cooperation. Today the Initiative is able to identify regional priorities, important from the EU integration perspective. The Initiative is recognized as an important tool for solving regional problems in the field of migration and fostering the regional cooperation and partnership. The MARRI RC acts to support the implementation of the decisions taken by the Regional Forum by carrying out practical cooperation and activities.

MARRI RC acts as a strategic regional initiative for the WB and its objective is to perform activities in a well-coordinated manner. Therefore, MARRI RC has created Networks to achieve the cooperation mentioned previously.

By performing activities under the umbrella of MARRI Networks, the regional cooperation and information exchange mechanisms were scaled up and strategic comprehensive overview has been developed. Joint trainings organized within the MARRI area of responsibility, have assisted in capacity building and improvement of the security level at international airports.

In regards to security aspects of stronger and faster integration, the level of developed regional cooperation represents a necessary constituent for accomplishment of requirements set by the EU, therefore the mission of the regional initiatives is to have continuous approach in enhancing the strategic and operational regional cooperation. The findings confirmed the significant progress developed with the MARRI project in the field of Airport Policing in the MARRI Region, but also the progress in the neighbouring countries and the benefits of this project to the regional and European agencies such as FRONTEX, EESO, etc. The MARRI project is recognized as mean to keep the network alive and interactive through a secure website, where the parties will communicate by bringing their questions (problem oriented, methodological, local/national based aspects), but also, as beneficiaries in using the web based communication for information sharing.

VI. Conclusions

The migration exodus is growing and keeping the constant number of 5-8.000 refugees and migrants per day. Even if the cold months have arrived, the constant number is present. The difference is that the human beings are surrounded with rain, snow, ice, which jeopardize their trip.

The countries from the Western Balkans route are more experienced, better organized and prepared for managing this exodus. They are managing the crises with their budget, which is downsizing their performances. The experiences when the migration flows indicate political tensions are overcome, but it doesn't mean that confrontations will not be present. It is specifically possible in the scenario in which Germany will change its open door policy for the refugees, which during 2015 will be above one million. If such scenario will happen, than unpredicted tensions definitely will appear, with very hard consequences and the final situation is difficult to be predicted.

It is encouraging that European Union is coming with more clear solutions, which are so far to bring the exodus in the frame of control. But, the plan from Brussels done on 25th of October, 2015 with 17 measures bring homogenous tendency between the political leaders. How this items will be implemented from Syria, Turkey, SEE and EU countries is too early to speak now.

The role of the international and regional organizations is extremely important for better exchange of information, better synchronization of the coordinated measures, experience, *modus operandi* and taking the common actions. The main UN and EU organizations like UNHCR, FRONTEX, EASO, EUROPOL and EUROJUST are present and visible in their actions and significantly are helping to the affected countries. However, the regional organizations, specifically from the Western Balkans and SEE are quite out of action, rather than to be present at list with their policy, vision and reasonable activities.

MIGRATION CRISIS: MACEDONIA ON CROSSROADS

Olga Koshevaliska[1], Borka Tushevska Gavrilovikj[2] and Ana Nikodinovska Krstevska[3]

I. Introduction; II. The EU asylum policy; III. Is there criminal responsibility for unlawful entry in EU country and Macedonia?; IV. Asylum trough numbers; V. Macedonia on the crossroad; VI. Macedonian asylum policy and its shortcomings; VII. Intention to submit a request for recognition of the right to asylum and request for recognition of the right to asylum; VIII. Regular procedure for recognition of the right to asylum; IX. Conclusions

Macedonia is witnessing the largest migrant crisis which is driving an unprecedented number of people going on life-threatening journeys to safety within the European Union. As a response to this crisis it seems that Macedonia as well as the European Union lack of solidarity and consistency to deal with this issue. More precisely, even though Macedonia is not a frontline country to the Schengen zone, still its geographical position being the crossroad on the Balkan, puts it in a very controversial position in this migration crisis context. Some of the aspects of this paper are to evaluate the key features of the Macedonian asylum system and their conformity with international standards and to point out the ongoing changes in Macedonia's asylum policy as well as to stress the drawbacks of the current system. Given the fact that there are many international instruments that regulate asylum, the paper will make efforts to define asylum and its procedure according the most important instruments relevant for the EU

[1] Olga Koshevaliska is an Assistant professor at the Faculty of Law, Goce Delchev University in Shtip and a member of the Cost project Network for experts on the legal aspects on maritime safety and security.

[2] Borka Tushevska Gavrilovikj is an Assistant professor at the Faculty of Law, Goce Delchev University in Shtip and a member of the Cost project Network for experts on the legal aspects on maritime safety and security.

[3] Ana Nikodinovska Krstevska is an Assistant professor at the Faculty of Law, Goce Delchev University in Shtip and a member of the Cost project Network for experts on the legal aspects on maritime safety and security.

Asylum policy and Macedonia's policy. Therefore, the paper will focus on the 1951 Convention relating to the Status of Refugees, EU's Common European Asylum System and the Dublin system. Also it will illustrate the ongoing situation with asylum seekers trough numbers in order to capture a full picture about the current migration crises.

I. Introduction

The 1951 Convention and its 1967 Protocol[4] are the only global legal instruments explicitly covering the most important aspects of a refugee's life. According to their provisions, refugees deserve, as a minimum, the same standards of treatment enjoyed by other foreign nationals in a given country and, in many cases, the same treatment as nationals. The 1951 Convention also recognizes the importance of international solidarity and cooperation in trying to resolve any issues with the status and the legal position of refugees.

The 1951 Convention defines a refugee as a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him—or herself of the protection of that country, or to return there, for fear of persecution.[5] The difference between the refugees[6] and migrants is in the following: the refugees are forced to flee because of a threat of persecution and because they lack the protection of their own country. A migrant, in comparison, may leave his or her country for many reasons that are not related to persecution, such as for the purposes of employment, family reunification or study. A migrant continues to enjoy the protection of his or her own government, even when abroad. The word "migrant" is used broadly and not always in the right manner. Hence in everyday use it covers people fleeing war, violence, and natural catastrophes, or seeking to escape poverty and it includes those who move through legal channels as well as those who move across borders without a visa or government approval (the latter is often called irregular or undocumented migration).[7] Under

[4] Convention relating to the Status of Refugees, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 Entry into force: 22 April 1954, in accordance with article 43;

[5] Article 1, The 1951 Convention related to the status of refugees and its 1967 Protocol, published by UNHCR, September 2011, p.3 available at http://www.unhcr.org/pages/49da0e466.html

[6] Broadly, the word "refugee" describes a civilian fleeing danger, such as violence or natural disasters.

[7] Open society Foundation, Understanding Migration and Asylum in the European Union, https://www.opensocietyfoundations.org/explainers/understanding-migration-and-asylum-european-union last access on 21.09.2015;

international law, refugees who cannot return to their home countries due to fear of persecution are entitled to claim protection, or asylum, in the country they are in. Those claiming this right—asylum seekers—are required to file a formal application to receive refugee status, which brings with it rights and benefits. This application process can be long-lasting and complicated. Not every asylum seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum seeker.

II. The EU asylum policy

In the EU, an area of open borders and freedom of movement, countries share the same fundamental values and have a joint approach to guarantee high standards of protection for refugees. Procedures must at the same time be fair and effective throughout the EU and impervious to abuse. With this in mind, the EU States have committed to establishing a Common European Asylum System.[8] The EU's Common European Asylum System (hereafter CEAS) is intended to ensure that the rights of refugees under international law are protected in its member states. The system sets out standards and procedures for processing and assessing asylum applications, and for the treatment of both asylum seekers and those who are granted refugee status. Also important documents regarding the EU asylum policy are the Dublin Convention[9] and the Dublin II Regulation.[10] This Regulation establishes the principle that only one Member State is responsible for examining an asylum application and that is the first EU country reached by the asylum seeker.[11] The objective is to avoid asylum seekers from being sent from one country to another, and also to prevent abuse of the system by the submission of several applications for asylum by one person[12] as well as to identify as quickly as possible the Member State responsible for examining an asylum application, and to prevent abuse of asylum procedures.[13]

[8] See the cite on the European Commission (Migration and Home Affairs) http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm last access 22.09.2015;

[9] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, *Official Journal C 254 , 19/08/1997 P. 0001 – 0012;*

[10] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

[11] But Greece complained that it was blocked with applications, as so many migrants arrived in Greece first. Germany then suspended the Dublin rule and decided to consider asylum cases from the majority of Syrian applicants.

[12] Commonly known as 'asylum shopping'.

[13] In order the migrants to get asylum status in the EU, they have to satisfy the authorities that they are fleeing persecution and would face harm or even death if sent back to their country of origin. Under EU rules, an asylum seeker has the right to food, first aid and shelter in a reception center. They may be granted asylum by

III. Is there criminal responsibility for unlawful entry in EU country and Macedonia?

Under the Dublin Convention[14] in cases when the refugees had entered unlawfully in the country of refuge, then the Contracting States of this Convention shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened, enter or are present in their territory without authorization, under the condition to present themselves without delay to the authorities and show good cause for their illegal entry or presence. In this manner, Hungary has breached this article from this Convention, since it has amendment its legislative to impose a penalty of imprisonment up to three years, for any on the refugees that will be caught on the territory of Hungary.

Also, the Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.[15] This provision was violated by every single country of this region that was on the path to the "good life" up north.

Under the applicable legal framework in Macedonia, asylum-seekers are entitled to enjoy freedom of movement and to be protected from arbitrary arrest or detention.[16] However the "illegal entry" into Macedonia is punishable by detention and expulsion from the country. An irregular *migrant* who is not identified as an asylum-seeker by the police is handed over to the High Inspector for Illegal Migration in the Ministry of Internal Affairs, who is responsible to transfer the person for further processing to the closed "Reception Centre for Foreigners" in Gazi Baba.[17] An *asylum-seeker* who has illegally entered or has

the authorities at "first instance". If unsuccessful, they can appeal against the decision in court, and may win. Asylum seekers are supposed to be granted the right to work within nine months of arrival. Also see Why is EU struggling with the migrants and asylum, available on http://www.bbc.com/news/world-europe-24583286 last access 25.09.2015;

[14] Article 31 from the Convention, see footnote 6;

[15] Article 31, paragraph 2 from the Dublin Convention;

[16] Article 3 from the Law on Foreigners, published in the Official Gazette of the Republic of Macedonia No. 35 on 25 March 2006;

[17] Article 153 form the Law on Foreigners, published in the Official Gazette of the Republic of Macedonia No. 35 on 25 March 2006. All individuals held at the Gazi Baba reception centr have access to information on their right to seek asylum. If an individual claims asylum while in detention, his/her claim should be recorded and the asylum-seeker should be transported to the Reception Centre for Asylum Seekers in Vizbegovo and the Section for Asylum is informed. The conditions in Gazi Baba have been criticized by a number of independent observers and have been rated as '' *inhuman and degrading conditions of detention"* see OHCHR, Committee Against Torture, *Concluding observations on the third periodic report of the former Yugoslav Republic*

been illegally staying on the territory of the Republic of Macedonia, and is coming directly from a state where his/her life or freedom have been threatened will not be punished, provided that he/she immediately requests for the recognition of the right to asylum at the Asylum Department or reports him/herself at the nearest police station and explains his/her request for recognition of the right to asylum, as well as the justified reasons for his/her illegal entry or stay. In this case the police shall immediately escort the person to the Asylum Department.[18] The Law on Aliens shall not apply as of the day of submission of the request for recognition of the right to asylum until the day of issuing the final decision. The submitted request for recognition of the right to asylum shall be regarded as withdrawal of the request for issuance of a permit for residence to an alien, in terms of the provisions of the Law on Aliens.[19]

The Minister of Justice is responsible for the provision of free legal aid to those who express an intention to apply for asylum. As a result of advocacy efforts by UNHCR and partners, as of end June 2015 legal aid has been made available to those in detention who have expressed a wish to apply for international protection. Currently legal aid is being provided through UNHCR's legal aid partner organization, the Macedonian Young Lawyer's Association[20].

IV. Asylum through numbers

It is a fact that the vast majority of asylum applications in the EU is really affecting 'only' 5 EU Member States in 2014 and 2015, because only those 5 Member States take in the highest numbers of refugees and face significant challenges in their economy. This fact has become a political block and has violated the 'friendly' relations between EU member states. In 2014, the EU statistics agency Eurostat Statistics,[21] launched an information that 45%[22] of first

of Macedonia, May 2015; and p.9 UNHCR Observations: The former Yugoslav Republic of Macedonia as a Country of Asylum, UNHCR the Un Asylum Agency, August, 2015;

[18] Article 17 from the LATP;

[19] Article 19 of LATP;

[20] Official web cite http://www.myla.org.mk/ ;

[21] See the cite on Eurostat Statistic Explained, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics last access 25.09.2015;

[22] According to this source in 2014 total number of 104,000 got refugee status in the EU last year, nearly 60,000 subsidiary protection status and just over 20,000 authorization to stay for humanitarian reasons. The highest number of positive asylum decisions in 2014 was in Germany (48,000), followed by Sweden (33,000), then France and Italy (both 21,000) and the UK (14,000). According to Asylum Europe the EU registered 626,710 asylum applicants in 2014, and record numbers during the first half of 2015 is over 300,000 asylum seekers received by four Member States: Germany, Hungary, France and Italy. The majority of applicants come from Syria, Afghanistan and Eritrea, yet their treatment varies substantially between European countries. In

instance asylum decisions were positive and the competent authorities granted refugee or subsidiary protection status, or permission to stay for humanitarian reasons. These data may vary depending from the source. Syrians accounted for the highest number of applicants in 11 of the 28 EU Member States, including 41 thousand applicants in Germany (the highest number of applicants from a single country to one of the EU Member States in 2014) and 31 thousand applicants in Sweden. Some 27 thousand Serbians and 13 thousand Eritreans also applied for asylum in Germany and 12 thousand Eritreans in Sweden. The only other EU Member States to receive in excess of 10 thousand asylum applicants in 2014 from a single group of citizens were Hungary (21 thousand Kosovans) and Italy (10 thousand Nigerians).[23]

V. Macedonia on the crossroad

Macedonia is witnessing the largest migrant crisis which is driving an unprecedented number of people going on life-threatening journeys to safety. At his point we can say that Macedonian as well as the European Union's common policy on asylum lacks solidarity and consistency (according to the AIDA Annual Report 2014/2015 – Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis).[24]

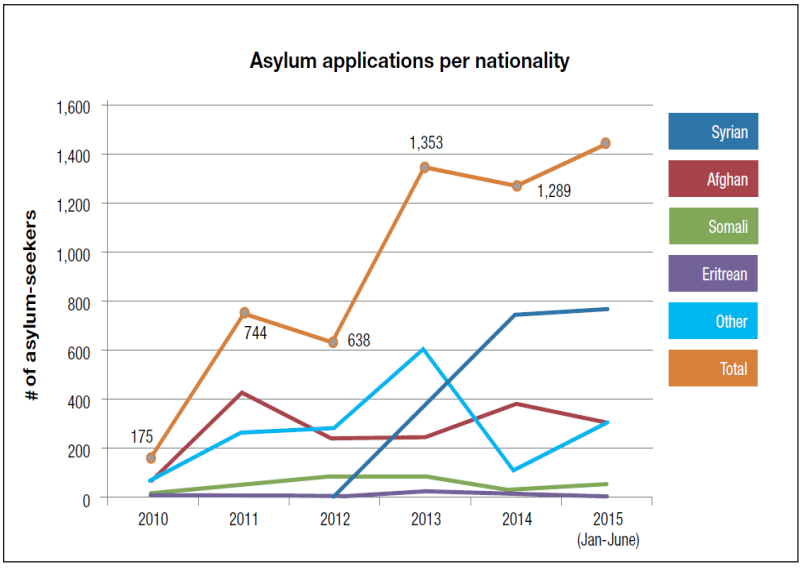
Some 3,000 people are expected to cross into Macedonia each day in the coming months, according to the UN. In *2011*, Macedonia received 744 asylum applications from individuals from outside the region, four times more than in 2010. In *2012*, 638 applications were received and in 2013 a total of 1,353 new asylum applications were submitted. In *2014*, some 1,289 new asylum-seekers from 19 different countries were registered in the country and as of end June 2015, 1,446 persons had applied for asylum, out of whom over 50 per cent were Syrian nationals. Currently about 80 per cent of those who apply for asylum are single men (18-35 years of age), but there is an increasing trend of unaccompanied

2014, positive decision rates for Eritrean nationals varied from 26% in France to 100% in Sweden, while rates for Iraqi nationals ranged from 14% in Greece to 94% in France. See http://www.asylumineurope.org/news/10-09-2015/aida-annual-report-20142015-launched-today last visited 11.09.2015;

[23] Data from http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics last access 25.09.2015;

[24] Annual AIDA Report 2014/2015: Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis. The report covers research for 18 countries: Austria, Belgium, Bulgaria, Cyprus, Germany, France, Greece, Croatia, Hungary, Ireland, Italy, Malta, the Netherlands, Poland, Sweden, the United Kingdom, Switzerland and Turkey - See more at: http://www.asylumineurope.org/annual-report-20142015#sthash.ejTDhelJ.dpuf last access 11.09.2015;

and separated children arriving.[25] In *2015*, despite the high number of asylum applications, so far only one person has been recognized as a refugee. But from these applications, more that 90 % of those who apply for asylum in Macedonia leave the country on their way to EU Member States, before interviews are held and the first instance decision is taken.[26] Since many asylum-seekers leave, the majority of cases in 2013, 2014 and 2015 were dismissed due to 'withdrawal' of asylum requests, although some cases were also pending decision to be taken by the Section for Asylum. Meanwhile, in the period between the adoption of the amendments to the Law on Asylum and Temporary Protection on *18 June 2015* and the *end July 2015*, the authorities have registered 18,750 persons expressing an intention to seek asylum in the country, with trend of some 1,000 new arrivals every day.



Picture 1: Asylum seekers in Macedonia by country of origin.

Source: UNHCR Observations: The Former Yugoslav Republic of Macedonia as a Country of Asylum, UNHCR the UN Asylum Agency, August, 2015;

[25] See p.6 of UNHCR Observations: The former Yugoslav Republic of Macedonia as a Country of Asylum, UNHCR the Un Asylum Agency, August, 2015;

[26] For example, out of the 1,353 asylum applications lodged in 2013, only one interview was held and had a decision taken, which was the granting of subsidiary protection. In 2014, out of 1,289 applications lodged, only 16 decisions on asylum claims were made, with 12 asylum-seekers from Syria being recognized as refugees, while one person was granted subsidiary protection. This information has also been confirmed by the Section for Asylum, Ministry of Interior. See more about these data on p.5 of UNHCR Observations: The former Yugoslav Republic of Macedonia as a Country of Asylum, UNHCR the Un Asylum Agency, August, 2015;

Even though Macedonia is not a frontline country to the Schengen zone, still its geographical position (being the crossroad on the Balkan) puts the country in a very controversial position in this migration crisis context.

VI. Macedonian asylum policy and its shortcomings

Macedonia has a national asylum law, the Law on Asylum and Temporary Protection (hereafter LATP).[27] LATP[28] was substantially amended several times,[29] and the last amendment was in response to urgent need to resolve the crisis with the influx of migrants. The amendment changed the previously restrictive regulations for applying for asylum, which exposed asylum-seekers to a risk of arbitrary detention and return at the border. The new amendments, which were adopted on 18 June 2015 and entered into force the same day, introduce a procedure for registration of the intention to submit an asylum application at the border, protect asylum-seekers from the risk of refoulement[30] and allow them to enter and be in the country legally for a short timeframe of 72 hours, before formally registering their asylum application. In 2015 the government of Macedonia initiated the drafting of a new asylum law, that is supposed to be in line with the EU asylum instruments and it is planned to be adopted in 2016.

[27] Law on Asylum and Temporary Protection, published in the Official Gazette No. 54 on 15 April 2013, http://www.slvesnik.com.mk/Issues/3dff1ee8f23e4547ad198661fe794149.pdf last access 25.09.2015;

[28] According to UNHCR the law currently incorporates many key provisions of the 1951 Convention. Furthermore, the provisions on subsidiary protection in the law are in conformity with relevant EU standards.

[29] Amendments to the Law on Asylum and Temporary Protection, published in the Official Gazette of the Republic of Macedonia No. 49/03, 66/07, 142/08, 146/09, 166/12 and 101/15.

[30] This principle is explained in article 7 of the Law on Asylum and Temporary. According to the principle of non – refoulement**:** The asylum seeker, recognized refugee or person under subsidiary protection cannot be expelled, or in any manner whatsoever be forced to return to the frontiers of the state: in which his/her life or freedom would be threatened due to his/her race, religion, nationality, membership of a particular social group or political opinion; or where he/she would be subjected to torture, inhuman or degrading treatment or punishment. (2) The prohibition referred to in paragraph 1 line 1 of this Article shall not apply to an alien who is considered a danger to the safety of the Republic of Macedonia, or who, after having been convicted by a legally valid decision of a crime or especially of a serious crime, is considered a danger for the citizens of the Republic of Macedonia. The alien referred to paragraph 1 line 2 of this Article, who for the reasons referred to in Article 6 of this Law cannot enjoy the right to asylum in the Republic of Macedonia, shall be allowed to remain within the territory of the Republic of Macedonia as long as in the state of his/her nationality or, if he/she has no nationality, in the state of his/her habitual residence, he/she would be subjected to torture, inhuman or degrading treatment or punishment. The alien referred to in paragraph 3 of this Article, during his/her stay in the Republic of Macedonia, shall have the same rights and duties as the persons under temporary protection in the Republic of Macedonia.

There are positive developments in terms of amending the asylum legislation[31] but still Macedonia is not considered as a safe third country.

In accordance with the Law on Asylum and Temporary Protection[32], asylum-seekers can now register an intention to apply for asylum at the border entry points, in which case the asylum-seeker is provided with a travel permit valid for 72 hours, for the purpose of travelling to a police station to formally register the asylum claim. If already inside the country, the asylum-seeker must register his or her asylum application at the nearest police station. After the initial registration, the police are responsible for referring the asylum-seeker to the Section for Asylum within the Ministry of Interior, which is the primary governmental body responsible for implementation of the reception and asylum procedure, including escorting the asylum-seeker(s) to the country's only reception center for asylum-seekers.

Under the new Criminal Procedure Code,[33] migrants and asylum-seekers arrested together with their smugglers were considered to be witnesses in the criminal cases subsequently pursued against the latter. As a consequence, asylum-seekers were detained in Gazi Baba for the purposes of 'securing evidence', which resulted in their deprivation of liberty for the entire criminal process (which could last three months and sometimes even longer), despite the prohibition

[31] Despite significant progress made to align the national legislative framework with international standards on asylum, UNHCR concludes that substantial shortcomings still persist when it comes to implementation. According to this observation the government currently lacks capacity to ensure protection to the increasing number of asylum-seekers. There are concerns about access to the territory and the asylum procedure. The lack of timely issuance of adequate identification (ID) documents and concerns regarding the processing of claims exposes asylum-seekers to the risk of not being able to obtain international protection, or to exercise rights associated with international protection. The quality of decision-making of asylum claims remains inadequate, as decisions often do not contain clear reasoning, and reference to national security concerns is used excessively as a ground for rejection of applications for international protection. There is also a lack of access to effective legal remedies, as cases are not considered on their merits in the judicial review phase. Other basic procedural safeguards such as access to information and interpretation are not always ensured. Moreover, refugees and subsidiary protection holders have limited integration prospects. UNHCR concludes that the country does not as yet meet international standards for the protection of refugees, and does not qualify as a safe third country. Accordingly, UNHCR advises that other states should refrain from returning or sending asylum seekers to Macedonia, until further improvements to address these gaps have been made, in accordance with international standards. See p.3 from UNHCR Observations: The former Yugoslav Republic of Macedonia as a Country of Asylum, UNHCR the Un Asylum Agency, August, 2015;

[32] Article 16 from the Amendments to the Law on Asylum and Temporary Protection, published in the Official Gazette of the Republic of Macedonia No. 101/15;J

[33] Criminal Procedure Code, published in the Official gazette No. 150 on 18 November 2010, entered into force on 01.12.2013;

under Macedonian law of detaining asylum-seekers.[34] However, as a result of the previously mentioned amendments of the Law on Asylum and Temporary Protection, allowing asylum-seekers to register their asylum application at the border, there has been a reduction in asylum-seekers being arrested on charges of irregular entry or stay.

Since the end of June 2015 the Ministry of interior and the Public Prosecution Office have also speeded their processing of asylum-seekers held in detention in order to serve as witnesses in criminal cases, as a result of which almost all asylum-seekers held in detention (some 350 individuals as of June 2015) have been referred to the open Vizbegovo RC.[35]

The Ministry of Interior, through its organizational unit in charge of asylum (Asylum Department), is responsible for conducting the first instance procedure for recognition of the right to asylum and shall make a decision. This department is obliged to co-operate with the United Nations High Commissioner for Refugees in all phases of the procedure for recognition of the right to asylum.[36]

The asylum seekers have the right to legal assistance and explanation regarding the conditions and the procedure for recognition of the right to asylum, as well as the right to free legal aid in all phases of the procedure, in accordance with the regulations on free legal aid. The asylum seekers in all phases of the procedure may communicate with persons who provide legal assistance, with the representatives of the High Commissioner for Refugees, as well as with non-governmental humanitarian organizations. The representatives of the High Commissioner for Refugees have the right to access to, and communicate with, the asylum seekers, in all phases of the procedure, wherever they are staying.[37]

The asylum procedure is carried out in accordance with the Law on General Administrative Procedure.[38] The Law on Asylum and Temporary Protection

[34] The long detention period was mainly due to the lack of interpreters in relevant languages for criminal court cases. According to the law, the police cannot detain a person without a court order, which needs to be produced within 24 hours. However, in practice those detained in order to serve as witnesses were not considered to be formally detained. Since the detention was not formalized with a court order, it was also impossible to appeal against the decision to detain the person. Upon release from detention, the persons concerned often left the the Repubic of Macedonia immediately. In the absence of witness statements, the smugglers were released, as the police was often unable to gather enough evidence to charge the smugglers. UNHCR has been working with the authorities to accelerate the court procedure in order to reduce the period in detention, as well as to advocate for alternatives to detention.

[35] See p.11 of UNHCR Observations: The former Yugoslav Republic of Macedonia as a Country of Asylum, UNHCR the Un Asylum Agency, August, 2015. UNHCR continues to advocate with the authorities for the Criminal Code to be amended in order to ensure that asylum-seekers are not detained if summoned to act as witnesses in court cases;

[36] Article 12 and 13 of the Law for Asylum and Temporary protection;

[37] Article 14, Ibid;

[38] Article 15 of LATP and Law on the General Administrative Procedure ("Official Gazette of the Republic of Macedonia" no. 38/2005, 110/2008 and 51/2011). Decision of the Constitutional

allows for a speeded or a regular procedure, where a speeded procedure is initiated for those claims that are considered to be manifestly unfounded.[39] The Asylum Department decides whether a case should be processed in the regular or speeded procedure based on information obtained during registration and based on provisions in the law. The majority of cases are referred for regular processing.

VII. Intention to submit a request for recognition of the right to asylum and request for recognition of the right to asylum

A foreigner at the border crossing point or in the inland of the Republic of Macedonia may orally or in a written form state his/her *intention* to submit a request for recognition of the right to asylum to a police officer of the Ministry of Interior. The police officer will write down the personal data of the foreigner who has stated his/her intention, and shall issue a copy of the certificate for the stated intention, and shall instruct him/her, within a period of 72 hours, to submit a request for recognition of the right to asylum with an authorized official in the premises of the Asylum Department situated in the Reception Center for Asylum Seekers. If the foreigner does not act in accordance with this, it shall be acted in accordance with the regulations on foreigners. An asylum seeker may submit a *request* for recognition of the right to asylum to the police at the border crossing point, in the nearest police station, or in the premises of the Asylum Department situated in the Reception Center for Asylum Seekers. If the request is submitted to the police at the border crossing point or in the nearest police station, the police officer shall escort the asylum seeker to the Reception Center for Asylum Seekers.[40] Upon submission of the request for recognition of the right to asylum, the Asylum Department shall, within a period of three days, issue to the asylum seeker a sealed certificate, containing the number and date of submission, confirming the status of an asylum seeker and proving that the asylum seeker is allowed to stay on the territory of the Republic of Macedonia for the duration of the procedure upon his/her request for recognition of the right to asylum.

Court of the Republic of Macedonia, U.no. 102/2008 dated 10.09.2008, published in the "Official Gazette of the Republic of Macedonia" no. 118/2008;

[39] Article 34 from the LATP: The urgent procedure shall be conducted if the request for recognition of the right to asylum is obviously unfounded, unless an unaccompanied minor or a mentally disabled person has submitted the request. In this paper well only refer to the regular procedure.

[40] Article 16 -1 from the LATP. An asylum seeker, who resides on the territory of the Republic of Macedonia, shall submit a request for recognition of the right to asylum to the Asylum Department. In cases of family reunification, the request may be submitted to the diplomatic-consular mission of the Republic of Macedonia abroad.

The Asylum Department in the Ministry of Interiors shall notify the asylum seekers, in writing and orally, in a language that can be reasonably presumed that they understand, and within a time period not exceeding 15 days as of the day of submission of the request for recognition of the right to asylum, about the manner of conducting the procedure for recognition of the right to asylum, about the rights and obligations of the asylum seeker in that procedure, about the possible consequences if they do not comply with their obligations and do not cooperate with the competent bodies, as well as about the conditions for accepting the right to legal assistance, as well as the right to contact persons providing legal assistance, representatives of the High Commissioner for Refugees and non-governmental humanitarian organizations, during all the phases of the procedure no matter where the asylum seekers are.[41] During this procedure the rights to interpreter and the right to secrecy are recognized.[42]

But is a fact that up to 90 per cent of asylum-seekers leave the country before the asylum procedure is completed that means that Macedonia is used as transit stage on the way to Western Europe. The authorities close the case files of asylum-seekers who have left the country as "unfounded" on procedural grounds.[43]

The asylum seekers can withdrawal the request for recognition of the right to asylum. The request for recognition of the right to asylum shall be considered withdrawn and the procedure shall be discontinued by a conclusion if it is determined that the asylum seeker has withdrawn the request for recognition of the right to asylum, has not responded to the call for hearing in the Asylum Department, and he/she has not justified the absence within a period of 48 hours as of the day the hearing has been scheduled, has left the place determined for his/her accommodation without an approval in the course of the procedure, longer than three days without informing the competent body or without obtaining consent from the competent body for leaving the place determined for his/her accommodation.[44]

VIII. Regular procedure for recognition of the right to asylum

The Asylum Department is the body responsible for the implementation of a regular procedure for recognition of the right to asylum in the first instance. This Department is obliged to adopt the decision within six months as of the day of submission of the request. Firstly, before reaching any decision there has to be a hearing of the asylum seeker. The asylum seeker has the possibility to

[41] Article 17 from the LATP;

[42] Article 21 and 22 from the LATP respectively;

[43] Information obtained by UNHCR through discussions with the Section for Asylum. See UNHCR Observations;

[44] Article 24 from the LATP;

be personally heard, and the hearing may be recorded as a sound for which the asylum seeker will be previously informed. The hearing is confidential and is gender sensitive.[45] The authorized official who conducts the hearing will take into consideration the personal or general circumstances of the asylum seeker which refer to the request for recognition of the right to asylum, including the cultural origin or the vulnerability of the asylum seeker, in the manner and in the volume possible to do that. An interpreter can be provided. The communication shall not be necessary to be led in a language required by the asylum seeker, in the case where the asylum seeker may communicate in another language for which it may be reasonably presumed that he/she understands. During the hearing, the asylum seeker shall present all the facts and evidence of relevance for establishing the existence of a well-founded fear of persecution. During the hearing, minutes shall be kept and the participants of the hearing shall sign the minutes.[46]

The request for recognition of the right to asylum shall be rejected in the course of a regular procedure in case it is established that:

i. there is no well-founded fear of persecution in terms of Article 4 of the LATP;
ii. there are reasons for expulsion referred to in Article 6 of the LATP; and
iii. the persecution for the reasons referred to in Article 4 of the LATP is limited only to a particular geographic area of the state of his/her nationality or, if he/she has no nationality, in the state of his/her habitual residence, and that there is a possibility for effective protection in another part of the state, unless in light of all circumstances it cannot be expected that the person shall seek protection there.[47]

The Asylum Department can adopt the following decisions: decision to recognize the status of a recognized refugee, a decision to recognize the status of a person under subsidiary protection,[48] or a decision to reject the request for recognition of the right to asylum.[49]

[45] The asylum seekers, upon their request, shall have the right to be heard by an authorized same sex official of the Asylum Department.

46 Article 28 of the LATP;

[47] Article 29 of the LATP. In cases where it is established that the asylum seeker does not meet the conditions for recognition of the right to asylum in accordance, the Asylum Department shall, *ex officio* , investigate the existence of reasons and conditions for recognition of the right to asylum due to subsidiary protection in accordance with Article 2 line 2 of this Law;

[48] If both parents have acquired the status of a recognized refugee or of a person under subsidiary protection, the Asylum Department may adopt a decision to recognize the same status to their minor child born and living on the territory of the Republic of Macedonia. Where one of the parents has acquired the status, the Asylum Department may adopt a decision the minor child born and living on the territory of the Republic of Macedonia to recognize the right to asylum, a recognized refugee or subsidiary protection.

[49] The decision to reject the request for recognition of the right to asylum shall state the reasons, due to which the request has not been accepted, the advice on legal remedy and the time frame within which the person is obliged to leave the territory of Republic of Macedonia, which cannot be less than 15 days from the day on which the decision becomes effective.

The asylum seeker may initiate an administrative dispute with the competent court against the decision of the Asylum Department within 30 days as of the day of delivery of the decision. The lawsuit shall postpone the enforcement of the decision.

If the asylum seeker submits a new request for recognition of the right to asylum, he/she must provide evidence that his/her circumstances have significantly altered since the moment of adoption of the former decision to reject his/her request for recognition of the right to asylum. If he/she fails to do so, the Asylum Department shall reject the request.[50]

The termination of the right to asylum recognized in the Republic of Macedonia shall apply for a person who has voluntarily re-availed him/herself under protection of the country of his/her nationality; who has, after losing the nationality of that country, voluntarily re-acquired it; who has acquired a new nationality and enjoys the protection of the state of his/her new nationality; who has voluntarily re-established him/herself in the country which he/she left or outside which he/she remained owing to fear of persecution; who can no longer continue to refuse to avail him/herself of the protection of the country of his nationality, because the circumstances in connection with which he/she has been granted asylum have ceased to exist,; and who has no nationality, and is able to return to the state of his/her former habitual residence, because the circumstances in connection with which he/she has been granted asylum have ceased to exist. Regarding the termination of the right to asylum for the reasons referred above, a procedure shall be conducted, as well as for recognition of the right to asylum.

IX. Conclusions

Under international law, refugees who cannot return to their home countries due to fear of persecution are entitled to claim protection, or asylum, in the country they are in. Also, refugees deserve, as a minimum, the same standards of treatment enjoyed by other foreign nationals in a given country and, in many cases, the same treatment as nationals. Not every asylum seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum seeker. Those claiming this right—asylum seekers—are required to file a formal application to receive refugee status, which brings with it rights and benefits. This application process can be long-lasting and complicated. At this point we can say that Macedonian as well as the European Union's common policy on asylum lacks solidarity and consistency to deal with this problem. The EU's Common European Asylum System is intended to ensure that the rights of refugees under international law are protected in its member states. The

[50] Article 33 of the LATP;

system sets out standards and procedures for processing and assessing asylum applications, and for the treatment of both asylum seekers and those who are granted refugee status. It is a fact that the vast majority of asylum applications in the EU is really affecting 'only' 5 EU Member States in 2014 and 2015, because only those 5 Member States take in the highest numbers of refugees and face significant challenges in their economy. This fact has become a political block and has violated the 'friendly' relations between EU member states. Under the applicable legal framework in Macedonia, asylum-seekers are entitled to enjoy freedom of movement and to be protected from arbitrary arrest or detention. Even though we are not a frontline country to the Schengen zone, still the geographical position of Macedonia (being the crossroad on the Balkan) puts us in a very controversial position in this migration crisis context. Macedonia has a national asylum law, the Law on Asylum and Temporary Protection which was substantially amended several times, and the last amendment was in response to urgent need to resolve the crisis with the influx of migrants. The amendment changed the previously restrictive regulations for applying for asylum, which exposed asylum-seekers to a risk of arbitrary detention and return at the border. The new amendments, which were adopted on 18 June 2015 and entered into force the same day, introduce a procedure for registration of the intention to submit an asylum application at the border, protect asylum-seekers from the risk of refoulement and allow them to enter and be in the country legally for a short timeframe of 72 hours, before formally registering their asylum application. In 2015 the government of Macedonia initiated the drafting of a new asylum law, that is supposed to be in line with the EU asylum instruments and it is planned to be adopted in 2016. Under the new Criminal Procedure Code, migrants and asylum-seekers arrested together with their smugglers were considered to be witnesses in the criminal cases subsequently pursued against the latter. As a consequence, asylum-seekers were detained in Gazi Baba for the purposes of 'securing evidence', which resulted in their deprivation of liberty for the entire criminal process (which could last three months and sometimes even longer), despite the prohibition under Macedonian law of detaining asylum-seekers. However, as a result of the previously mentioned amendments of the Law on Asylum and Temporary Protection, allowing asylum-seekers to register their asylum application at the border, there has been a reduction in asylum-seekers being arrested on charges of irregular entry or stay.

Macedonia has steadily strengthened its asylum system over the years. The legislative framework has been improvement and is today largely in line with international standards. But significant weaknesses persist in the asylum system in practice. Macedonia has not been able to ensure that asylum-seekers have access to a fair and efficient asylum procedure. This is reflected, amongst others, by the fact that the Macedonia has not yet put in place protection sensitive

screening mechanisms at the border to identify those who may be in need of protection and to refer the individuals concerned to appropriate procedures.

Considering the outstanding gaps in the asylum system in Macedonia and taking into account the sharp increase in the number of new arrivals in the country more recently which presents major challenges to the asylum environment, UNHCR considers that the country does not as yet meet international standards for the protection of refugees, and does not qualify as a safe third country. Accordingly, UNHCR advises that other states should refrain from returning or sending asylum-seekers to the country, until further improvements to address these gaps have been made by the Government of the Republic of Macedonia.

THE HUMANITARIAN ASPECTS OF THE REFUGEE CRISIS

Mersiha Smailovikj[1]

A Testimonial from a Humanitarian NGO activist regarding the refugee crisis in Macedonia, presented at the International Conference Migration at sea: International Law Perspectives and Legal Approaches (06 Oct 2015, Ohrid) reproduced in written form

Respected colleagues, Professors, activists….

Thank you for your invitation to be part of this international conference.

Even if the focus of this conference is "Migration in the Mediterranean", still, myself as an activist from Macedonia, I will speak about the refugee crisis in Macedonia, as witnessed from the ground route.

For the first time in modern history, the country became part of important global happenings and movements that affect not only the Balkans and the European Union, but the entire world community. Unexpectedly, Macedonia became a key component of the so-called "Balkan route", the route that migrants take in order to reach EU states like Austria or Germany in order to seek asylum. This specific geopolitical position, imposed the country with an important or better to say a crucial role in the migration phenomenon, which as awkward as it seems implies "defending" national borders from illegal crossings from Greece, an EU-country and a member of the Schengen zone.

This migration phenomenon became known to the Macedonian public for the first time in November 2014, when a "migrant was run over by a train on the railway from Veles to Skopje".[2] This shocking news that reached to every person, raised many questions and pored many doubts. In fact, myself and my colleagues from the NGO "LEGIS" - a humanitarian organization that participated in several big humanitarian actions in Syria, we posed some important questions

[1] Mersiha Smailovijk has a degree in Law and is the Vice President of the NGO "Legis" in Republic of Macedonia

[2] http://mrt.com.mk/node/16671

about what was happening in Macedonia… How come all of a sudden there are so many migrants that cross the country? Where do they come from? Where are they headed to? What is their route? Why do they cross Macedonia and why do they take the railway instead of seeking other passages?

Of course, our questions and demands brought us to discover the unfortunate migrants' road through Macedonia, to interrogate Macedonia's laws and legislation, and to actively help refugees and also being involved in the ongoing crisis.

Let me begin from the very origin of migration flow which took the route through Macedonia. Namely, most of the migrants or better to say refugees, are coming from war zones in the Middle East and other countries. After taking a dangerous boat trip from Turkey to Greece, they disembark on Greek soil where usually refugees obtain registration documents that allow them to travel through Greece. Afterwards, they take public transport to Thessaloniki (in northern Greece), and from there refugees walk by foot for approximately 30 km to the village of Idomeni, that is the nearest village to Macedonia's boarder. From here, in order to avoid border police and vehicle patrol, they pass through natural non-marked and unsafe land in order to reach Macedonia's boarders.

After the point of reaching and entering Macedonia, here is where our first contact with the refugees started, and most probably the only contact, since during the first half of 2015 we were the only organization to assist and to help the refugees. Apart from us, there was also a 48 year old woman from the city of Veles (a town near the capital), Lence Zdravkin[3] is her name, who had her household right in front of the train rail where the refugees were passing. Lence was constantly assisting and helping the refugees all day and all night long, giving them food, refreshments, clothing, first necessities etc. In fact, most of the refugees called her the "Mother of the refugees".

This situation started changing and the public opinion became aware of the refugees flow, when on the 24th of April it went on the breaking news the information that 14 migrants died on the train tracks in Veles.[4] The majority of migrants were teenagers from Afghanistan and one of them was from Somalia. It was then when the Macedonian public for the first time, started talking with compassion and solidarity for these innocent souls, whose "only sin" was, wrong nationality!

After this tragedy, LEGIS started investigating these events and of course we started interrogating many aspects of what was to be the following refugee crisis. In fact, here is where things started to become really intriguing and interesting. The first thing that came out from our conversations and interviews

[3] http://www.independent.mk/articles/20441/Exemplary+Humanitarian+Lence+Zdravkin+Helps+Immigrants+Daily

[4] http://www.theguardian.com/world/2015/apr/24/several-migrants-hit-by-train-killed-central-macedonia_

with the refugees, was Macedonia's Law on Foreigners and the treatment of refugees/migrants.

Namely, according to the Law on Foreigners[5], anyone that illegally crosses into Macedonia (presumably that they are smuggled by smugglers), will be deported to the country of first entry; and while awaiting the process of interrogation and investigation, those foreigners will be accommodated in a Reception Center "Gazi Baba" in Skopje, better known as a detention facility. Having said that, most often happens that refugees, unfamiliar with the territory of the Republic of Macedonia, they turn to smugglers. The smugglers on the other hand, have already well established network, which is among the best developed businesses on the black market in Macedonia, and of course smuggling had become the most frequent criminal offence prosecuted either. In fact, as of 31st of May 2015 the Public Prosecution stated[6] that 160 criminal proceedings, which amongst other were initiated by the inquiries of LEGIS, were undertaken against nationals and foreigners under a founded suspicion that they were smuggling illegal migrants.

The most interesting and intriguing part is yet to come. Namely, the amendments to the Criminal Law according to which the witness must testify against the perpetrator of the criminal offence, implied that in every police action where smugglers were arrested, refugees were also arrested and taken to the transit Centre of "Gazi Baba", in order to wait for trial (of the smuggler), so they could testify about the identification of the perpetrator of the criminal offence, i.e. "human trafficking". Furthermore, the amendments of the Criminal Code[7] that refer to Public Prosecutor as in charge of the investigation measures, greatly slowed down the work of the prosecution, which as a result prolonged the stay of the arrested refugees in the Centre of "Gazi Baba" even for months. The procedure continues in a way that after their testimony, refugees are allowed to seek asylum or otherwise if they do not seek, they will be deported back to Greece or Bulgaria or the country of entry. In fact, in base of the inquiries that LEGIS has conducted on field, we found out that refugees were detained in this Reception centre without actually being charged or without even being put on testimony. Sadly to know, this detention sometimes lasted up to 8 months in environments that did not fulfil the minimum living standards, where regrettably refugees had to stay in inhumane conditions.

Having the thought that the migrants were refugees, running away from war, torture… everything that it is written in the International Convention for refugees[8] for what you could hear in their life stories, pushed us to investigate even more thoroughly the whole situation. Unfortunately, even if Macedonia

[5] http://62.162.77.57/Uploads/Precisten%20zakon%20za%20strancite%2025.-01.13.pdf
[6] http://jorm.gov.mk/
[7] http://finpol.gov.mk/Files/Zakon/4.pdf
[8] http://www.unhcr.org/3b66c2aa10.html

has accessed and is a part of all Geneva Conventions and other UN international documents, and even though the country developed in 2008 a long term strategy for refugees and foreigners[9], still the we were witnessing refugees that walked for 8 days by foot, that we hungry, were unprotected and beaten by criminal gangs[10], and were forced to use smugglers. At the end of the day, they were just 'illegal immigrants' with no rights. The most disappointing things was that we couldn't secure them with basic human rights like the RIGHT TO LIFE.

Willing to oppose and fight the impotence towards these breaches of human rights we turned to UNHCR office in Macedonia, in order to seek clarification and answers. However, after various attempts to gain some kind of information unfortunately we didn't receive any feedback.

Instead, we found an open door with Human Rights Watch, who were willing to work with us and together we continued investigating the status of refugees and migrants in Macedonia. The field investigation started in January, and ended in September 2015, and the final outcome of it was summarized in a 59 pages report[11] which was drafted upon more than 64 testimonies of refugees, that testified about their trip through Macedonia and especially about the terrifying conditions in the Reception centre in "Gazi Baba". Our report got high feedback from the public opinion, and soon after as a result the Reception centre was closed, and the remaining migrants were transferred to a new facility.

In parallel, we also started making pressure on the local political elite with the purpose of changing the Law for Asylum in Macedonia, as well as we had also numerous meetings and interviews with Members of the Parliament, who we pressurized in order to make the presence of the refugees in Macedonia to be legal. Combining these actions together with the harsh public opinion that couldn't stand watching refugees walking on foot or driving bicycle along dangerous roads, the Parliament drafted a new article in the Law of Asylum, adding the term: expressed intention for applying request to seek asylum. [12] This meant that refugees who will express their intention in a police station, they will get a document issued by the Police with which they could legally travel through Macedonia by registered means of transportation (for example train, bus or licenced taxi), and within 72 hours from their first entry they have to leave the country. After the expiration of this timeframe, refugees that are still found on the territory of the country, are allowed either to ask for Asylum or otherwise be deported back to the country of their entry.

Taking stand of the reviewed legislation, a new wave of refugees knocked on Macedonia's doors, walking by foot and up-taking dangerous

[9] http://mtsp.gov.mk/WBStorage/Files/strategija_begalci.pdf

[10] http://daily.mk/makedonija/pretepan-ograben-migrant-sirija-1

[11] https://www.hrw.org/report/2015/09/21/though-we-are-not-human-beings/police-brutality-against-migrants-and-asylum

[12] http://www.voanews.com/content/macedonia-migrants-asylum-law/2828577.html

journeys through the rail tracks, along with many small children and babies with them. The lack of a proper response from the institutions and the state, generated a humanitarian wave of self-organised citizen initiatives, where LEGIS was the most active organization with the role of an all-unifying, inspirational agent in the country – it did not matter which religion, ethnicity or nationality you were, in front of that we were all united for a common goal – help the ones that are helpless. Except for LEGIS and the NGO NUN, with whom we were working in a stationary near the train station, providing for food and clothing, the UNHCR and the Red Cross were also present in the vicinity, providing for medical assistance on the road. As Aleksandra Davidovska, an activist of LEGIS from Kumanovo, concerning the mosque of Kumanovo where refugees were being accommodated, justifiably observed:

> "As an atheist, never in my life did I think that I would spend that much time in the house of God. Of any God. But what this house represents in times of incessant suffering and deep pain of thousands of people – when the institutions that have the authority to help, decide to resort to bureaucratic excuses and remain blind – what this house represents, restores my faith. Not in God, but in humanity. In doing good. Regardless of nationality or religion."

Portrayed in numbers, this massive influx counted more than 1000 refugees registered per day, but however, the number of the refugees that could travel through Macedonia to Serbia's border, was not more than 500 refugees, since there was only one train in circulation. This once again showed a shameful picture of especially of Macedonia's institutions.[13]

The road that the refugees took once they entered Macedonia was long. Firstly, refugees entered the country from Idomeni to Gevgelija (the nearest town on the Macedonian side), in only one border crossing - stone 59. While entering Macedonia, each refugee had to possess Greek registration documents or any other document that would confirm their nationality. Going further on, from the border crossing to the camp there are about 600 meters, and here refugees gathered and waited in groups to enter the camp. The waiting time was from 1 until 3 hours. After they've entered, refugees waited for registration in Macedonia that lasted maximum one hour. During their stay in the camp, refugees were being provided with complete aid that was offered from the organizations in the camp. The aid comprised food for each refugee, free medical aid, tents for mothers and children with heating and educational materials, winter clothes and shoes, and all

[13] http://www.dailymail.co.uk/news/article-3165752/Hundreds-migrants-clamber-board-packed-trains-Macedonia-desperate-attempt-seek-new-life-Europe-Hungary-build-175km-fence-stop-crossing-country.html

was free of charge. Continuing the journey, refugees needed 3 or 4 hours to reach the Serbian border. There was another camp in a place called Tabanovce on the border with Serbia, about 5,5 km from the first village Miratovac, from where refugees usually walked by foot, on plus temperatures or in dark night, because state authorities didn't organize any transport. In this camp as well the one in Gevgelija, thankful to NGO Legis, Vlaznia and Merhamet, refugees received aid that was free of charge.

However, regardless of Aleksandra's precious words we witnessed for the umpteenth time a state restriction to the humanitarian wave. All of a sudden it became "illegal" to give water to a person that is thirsty or to give shoes to a kid that is barefoot. In fact, an arbitrary rule was introduced which prescribed that anyone that wants to give water to another human being (refugee) and help refugees in general, should be registered to an organization! And this was said to be "according to the law", even though no such law was to be found anywhere. Once again, NGO LEGIS played the leading unifying role here as well. In spite of all restrictions, LEGIS opened the door for every citizen who wanted to get involved in humanitarian actions, so that he or she could help refugees.

Furthermore, as the number of refugee's increased, the State xenophobia also climbed to an alarming level in Gevgelija. In fact, we witnessed the closure of the state border for 3 days and the proclamation of a state of emergency. [14] Soon after, the State established a new camp, right outside of the city Gevgelija, in an empty desert, which did not have any water nor electricity, nor did it have any track of civilization. Luckily, the daily work of LEGIS together with other organizations, including the UNHCR who rapidly provided the main facilities, we managed to put in place a camp that provided refugees with the basic needs. And sadly to say, but the situation in Tabanovce was some kind similar.

Summa summarum, around a million refugees entered Macedonia and at the same time left the country. Until now, no request for asylum was prosecuted and neither was it granted. My message to the Government and to the EU is that we should not leave refugees helpless. They are people like all of us. The only difference is that they are escaping from war, terror and indecency, without wanting that, and we, we are closing doors like they are aliens from another world. Furthermore, the EU should not forget that Macedonia is also a poor country and it cannot struggle alone with the influx of refugees. However, at the end of the day, we, LEGIS are happy to have the chance to tell all of them: Refugees, welcome in Macedonia!

[14] http://vlada.mk/node/10918

CONCLUSIONS

Giuseppe Cataldi[1]

The papers presented in this volume examine questions of dramatic and immediate relevance. They also deal with themes of immigration by sea from a special, and decidedly interesting, perspective – the perspective of the Balkan region.

Because of the widespread economic crisis and political instability existing throughout the African continent and the Middle East, exacerbated by the "Arab Springs", the phenomenon of immigrants seeking a better life has become a mass exodus in the past few years. As we all know, the right of human beings to emigrate does not mean there is a corresponding duty by the State of arrival to welcome and accept them (on the "asymmetrical right to emigrate" see Scovazzi, "Human Rights and Immigration at Sea", in Rubio-Marin (ed.), *Human Rights and Immigration*, Oxford, 2014, p. 212 ff.). This has led to a massive amount of unauthorized migrations, in respect of which we can make a general distinction between forced immigration resulting from the need to escape political persecution or contingent events (a war, revolution, environmental disaster) and immigration for economic reasons, stemming from endemic and unbearable misery (on the different meanings of "irregular immigrants" see Trevisanut, *Immigrazione irregolare via mare. Diritto internazionale e diritto dell'Unione Europea*, Napoli, 2012).

The transit of migrants is particularly dramatic in the Mediterranean, as immigration by sea, though a minor percentage of the global phenomenon, entails serious risks to human life due to the methods of transportation used and the fact that most of the people attempting to cross to the opposite shore have little experience with salty waters, as pointed out in the paper written by T. and A. Stojanovski. It is a known fact that transnational criminal organizations control and profit from the entire chain of migratory movements, from the

[1] Professor of International Law, University of Naples "*L'Orientale*", Holder of the Jean Monnet ad personam Chair on the Protection of Human Rights in the European Union; Director of the Jean Monnet Centre of Excellence on the Protection of Migrants Rights in the Mediterranean; President of the International Association of the Law of the Sea.

departure, often from sub-Saharan countries, to transit through the desert, to detention in "refugee centres" along the southern coast of the Mediterranean, to embarkation on "mother" ships from which the immigrants are then moved to small, dilapidated boats directed toward the shores of European countries, up to the "assistance" provided when they finally reach land and their ultimate chosen destination. The natural "wall" that is the Mediterranean has recently been supplemented by artificial ones put up by several States on land, especially along the Balkan route, whose utilization increased significantly throughout 2015.

How do we deal with this phenomenon? The challenge for countries of the northern coast, and especially for European Union (EU) Member States, all of which having decided, with the Treaty of Lisbon, to implement a common immigration policy, is to reconcile humanitarian aspects, considered a priority, with the need for border control and the requirement to prevent and combat crime. Naturally, as many have demanded, the problem should be resolved at the source by acting on the causes that compel so many to leave their own country, therefore "on land" rather than at sea. However, a discussion regarding this specific point merits much greater consideration that can be provided in the present context.

On a strictly humanitarian level, the most significant example so far has been "Operation *Mare Nostrum*", launched by Italy following the tragedy that occurred off the coast of Lampedusa on 3 October 2013, resulting in over 350 deaths. This operation, which lasted until the end of 2014, was a strictly national undertaking, though one wholly in compliance with EU principles on the matter. Means and men of various administrations were activated throughout a vast area of the Mediterranean (up to the coast of Libya), accomplishing a truly significant number of interventions and saving an untold number of human lives. The high cost of this operation, and the outspoken criticism of numerous EU partners, led to termination of the operation. The primary accusations, made by the domestic political opposition as well as by European governments (specifically Spain and Greece) consisted of an alleged incentive ("calling effect") to departures, given the high probability of being intercepted in an extremely vast area, being "saved" by Italian patrol vessels, and accompanied to ports of the peninsula. In light of the tragic events taking place in the months following the cessation of *Mare Nostrum*, the merits of such accusations have been revealed to be groundless. Departures continue unremittingly, as do tragedies at sea, culminating in the carnage that took place on the night of 18 April 2015, with an undefined number of dead but one that was surely between 700 and 900 victims. The incentive to departure by sea, and this is also proven by the number and the tragedies of 2015, is triggered only by the socio-political conditions of the countries of origin and transit, in addition to such contingent initiatives as the construction of a containment "wall" along the Bulgarian, Hungarian and Macedonian frontier, the rather forceful "rejections" by Greece and Spain (as noted by several

humanitarian organizations), and the restrictive visa policies recently adopted by many countries of northern Europe.

Operation *Mare Nostrum* has been replaced by "Operation *Triton*", which has very different characteristics. It is, first of all, an operation that, though taking place in maritime spaces close to the Italian coastline, is managed and funded by the EU, specifically with the involvement of the Frontex Agency ("European Agency for the Management of International Cooperation at the External Borders of the Member States of the European Union"). This agency, with headquarters in Warsaw, was created by the EU for the purpose of coordinating air, maritime and land border patrols of EU States and to ensure implementation of agreements with countries bordering on the Union for the return of immigrants who are nationals of non-EU countries and who have been repelled along the borders. Secondly, the main objective of this operation is to monitor frontiers and not to protect human lives at sea, as stated by its Executive Director (statement made upon launching of operation *Triton*, available on the Frontex website: "*According to the mandate of Frontex, the primary focus of operation Triton will be border control, however I must stress that, as in all our maritime operations, we consider saving lives an absolute priority for our agency*"). It follows that, presumably (and as has been partly demonstrated by events during the first months of 2015), rescue at sea of immigrants will continue to be delegated to coastal States.

Another important aspect in managing the phenomenon of migration by sea is the prevention and suppression of crimes, both from the aspect of the jurisdiction to adjudicate and the exercise of force in respect of the ship and the persons on board, obviously in accordance with regulations and methods that differ according to the maritime spaces considered. The question of Migrants smuggling was the principal concern of the various institutions of the European Union during the final months of 2015. It was to combat this phenomenon that Operation EUNAVFOR Sophia was launched, an operation that resumes the "Atalanta" experience conducted off the waters of Somalian coasts to prevent and repress piracy.

In reading the papers contained herein we have the perception that the legal instruments currently available are insufficient, in many cases obsolete, and are an inadequate response to the challenge of managing current migration flows. This holds true for international norms, the norms issued by the European Union as well as those of many domestic legal systems. The paper by E: Belja and S. Manduca, for example, demonstrates the difficulties involved in using Art. 110 of the UNCLOS to implement the right to visit on the high seas in the case of migrant smuggling. As is known, this provision does not contemplate, among the exceptions to the exclusive power of control of the flag State, the case of *smuggling* immigrants, and only a broad interpretation of the definition of "slave trade" has sometimes allowed for the use of such power in situations such

as the one under review. Much more specific and detailed is the United Nations Convention against Transnational Organized Crime of 15 November 2000 (UN Doc. A/RES/55/25), whose Protocol No. 4 (Protocol against the Smuggling of Migrants by Land, Sea and Air), in Article 8 (Measures against the smuggling of migrants by sea), deals with this issue.

The paper by E.D. Papastavridis is very interesting as it shows, first, how "*challenges in the Mediterranean are mirrored in other regions*". Secondly, it deals with gaps in the legal framework, and in particular how can we define the term "place of safety" for people rescued at sea, as it is not made clear by SOLAS nor by SAR Convention.

T. and A. Stojanovski's paper analyses the limits and shortcomings of the MARRI initiative (as well as its merits, of course). The paper by O. Koshevaliska, B. Tushevska Gavrilovikj and A. Nikodinovska Krstevska is an insightful analysis of Macedonia's asylum domestic rules and is highly interesting as it shows how difficult it is for a small, young country to deal with this complicated issue and how the implementation of rules differs from the general framework imagined at the moment of their enactment.

The testimonial from M. Smailovikj, a humanitarian NGO activist, is important mainly because it provides us with a glimmer of hope concerning the present refugee crisis in Macedonia and in Europe in general.

A useful book, in conclusion, which can concur in the effort of dealing with migration issues from a broader perspective not necessarily linked to any real or presumed emergencies. We must remember that the two and one half million Syrian refugees in Turkey, and the million refugees in tiny Lebanon represent a very different emergency from that of migrants knocking on the doors of the twenty-eight member States of the European Union.

... The present volume comprises the written version of some of the interventions presented at the Conference. They touch upon the salient points of the discussions, and regard the comparison of prospects within international law and the regional approaches recently adopted. Their aim is to make a contribution to the legal literature currently available, and to offer many points for reflection, from the complexity of the legal picture on the subject of migration as a whole, and the responsibility of states in the matter of rescue at sea, to the main questions relating to problems of security inherent in migration in the Balkans. Many other aspects are also considered beyond the legal, arising from this, including an analysis of some specific and critical humanitarian points intrinsic to the phenomenon of migration, and in particular of the current emergency of asylum seeking refugees. ...

Extract from the Foreword by Gemma Andreone

ISBN 978-88-7431-818-6