

Seeking the Golden Fleece through Lampedusa: Situating Municipal Action in International Law

Osatohanmwene OA Eruaga*

DOI: 10.21827/5d5141b5d71c1

Keywords

ILLEGAL MIGRATION BY SEA; HUMAN RIGHTS; INTERNATIONAL LAW; BORDER CONTROL

Abstract

The crises of illegal migration by sea, currently plaguing the coastal States around the Mediterranean Sea, have created a situation of tightening border controls. Italy, as a choice destination State for many migrants, has continued to employ measures to ensure that the number of vessels carrying irregular migrants arriving onshore is reduced to the barest minimum. Push-back measures, which are conducted based on bilateral agreements with Libya, are one such method of seaward border management. This article questions the legality of the Italian push-back measures, as a representation of State interest, when placed next to international law. The paper argues that, since such measures of externalisation of border security may conflict with principles of international law, destination States should consciously adopt measures that are sensitive to migrant rights.

Introduction

Across the world, since the emergence of modern nation States, States have asserted control over their borders as a matter of jurisdictional right.¹ Part of this control seeks to manage illegal migration, which is said to threaten security and labour markets, as well as the cultural and national identity of the State.² Even with these controls, the international community has, of recent, continued to face problems associated with illegal migration. The International Organisation for Migration (IOM) statistics reveal that in 2015, over one million illegal migrants and refugees arrived at various countries across the Mediterranean, with the coastal States of Italy, Greece and Spain serving as access points into Europe.³ The figures of about 363,401 persons in 2016 and 25,589 persons at the end of March 2017 respectively exclude

* LLM (University of Nottingham), Doctoral Candidate (World Maritime University, Malmö, Sweden). Research Fellow Nigerian Institute of Advanced Legal Studies, Three Arms Zone Abuja.

¹ Secretariat General, Council of European Union, 'Feasibility Study on the Control of the European Union's Maritime Borders' (11490/1/03) Brussels 19 September 2003, 8; Pia Oberoi and Eleanor Taylor-Nicholson, 'The Enemy at the Gates: International Borders, Migration and Human Rights' (2013) 2 *Laws* 169, 178.

² Michael Pugh, 'Drowning not Waving at Sea: Boat People and Humanitarianism at Sea' (2004) 17 *Journal of Refugee Studies* 51, 52; Oberoi and Taylor-Nicholson (n 1) 170.

³ International Organisation for Migration (IOM), 'Irregular Migrant, Refugee Arrivals in Europe Top One Million in 2015: IOM' (*IOM UN Migration*, 22 December 2015) <www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom> accessed 25 May 2019.

the lives lost or declared missing at sea.⁴ The growing numbers of migrants cause States disadvantaged by their inflow to adopt a protectionist position with regards to migration management and security control of their maritime borders.⁵ From a protectionist perspective, the State places its national interest as paramount, such that border controls take the shape of services that fulfil this goal.

This paper seeks to interrogate the complexities of international principles and national interest as it relates to illegal migration by sea by economic migrants. The paper focuses on Italy as the choice destination of this class of migrants, and argues that States, for the purpose of their security interests, are entitled to take actions which will minimise the risks created by illegal migration. However, the paper argues that the initiative of externalising control adopted in the securitisation of border control may be at odds with certain obligations under existing international law. Thus, the paper advocates for, among other measures, the adoption of border control procedures that are sensitive to the human rights of migrants, especially those who attempt to undertake the journey for purely economic reasons. The paper also calls for increased global investment that translates to socio-economic enhancements in States identified statistically as migrant-producing States, as a means to strike an appropriate balance between international law and State interest and, at the same time, contribute significantly to curtailing the problem of illegal migration.

This paper consists of six sections, including the introduction and conclusion. Section II identifies and examines the threat of illegal migration as a security issue for destination States. This section of the paper lays the foundations for an assessment of the how State interest exists side-by-side with international law in the discourse of illegal migration by sea. Italy's externalisation of migrant control is examined in Section III before it is considered side-by-side with international law in Section IV. Section V proffers solutions to balancing the protectionist actions of the State with the requirements of international law.

I. The Threat of Illegal Migration

Globalisation creates a scenario where contemporary society expects the movement of capital, physical goods, ideas and even people.⁶ In line with this expectation, migration covers any kind of movement of an individual or a group of persons, transnationally or within a State, for various reasons and irrespective of legal status.⁷ A wide spectrum of persons engage in migration, include those engaging in the process for solely economic reasons. However, the existence of necessary requirements to enter a destination country presents a means of classifying migrants broadly into two classes – illegal and legal migrants.

⁴ IOM, 'Mediterranean Update' <migration.iom.int/docs/MMP/170328_Mediterranean_Update.pdf> accessed 25 May 2019.

⁵ Pelin Sönmez, 'The EU's Black Sea Initiatives and their Effects on Migration Control and Security Cooperation' (2016) 49 *Journal of Black Sea Studies* 1, 4.

⁶ Raimo Vayrynen, 'Illegal Immigration, Human Trafficking, and Organised Crime' in George J Borjas and Jeff Crisp (eds) *Poverty, International Migration and Asylum* (Studies in Development Economics and Policy, Palgrave Macmillan London 2005) 143.

⁷ IOM, 'Definition of Migrant' in IOM, United Nations High Commission for Refugees (UNHCR) and Save the Children *Addressing Irregular Migration Flows in Southern Africa: Protection and Assistance in Mixed Migration* (Training Manual Facilitator's Guide, March 2016) 9 <www.refworld.org/pdfid/5804d4204.pdf> accessed 25 May 2019.

Migration may be broadly classified as unlawful, irregular or illegal in the absence of compliance with relevant requirements of domestic immigration legislation and rules of a receiving or destination country.⁸ The IOM defines irregular or illegal migration as one which occurs ‘outside the regulatory norms of the sending, transit and receiving countries’.⁹ In other words, an individual’s recognised freedom to exit a country is not matched with a corresponding right to enter another country.¹⁰

I.I The Concept of Illegal Migration by Sea

Although usage of the phrase ‘illegal migration by sea’ has gained frequency in recent years, it remains an unclear term due to the paucity of its precise definition by its users, who nevertheless engage the term copiously. It may be the case that scholars opt to avoid a precise definition due to assertions, such as that made by Mallia, that ‘within the broad classification of illegal migrants is a mixed population comprising *de facto* asylum seekers, economic migrants and victims of trafficking.’¹¹ This mixed population shares the feature of having entered into a country in contravention of laid-down rules and procedures.¹² However, the illegal economic migrant has no genuine reason to engage asylum procedures. Vayrynen limits illegal migration in the strictest sense to voluntary movements by immigrants.¹³ This is because other illegal migrants engage in movement due to circumstances beyond their immediate control. From this dimension, the intention behind illegal migration is economic in nature, hinged on the hope improving one’s financial status through better payment for work in the destination country, albeit by means defined as illicit by governments. Illegal economic migrants, more often than not, require the help of persons to bring them to their destination clandestinely. Hence the connection between illegal migration and human smuggling.¹⁴ Voluntary migrants may also be in the company of vulnerable persons who have been preyed upon, have lost their freedom and are to be bonded in servitude in the destination

⁸ Vayrynen (n 6) 143; Patricia Mallia, ‘The Challenge of Irregular Maritime Migration’ (2013) Jean Monnet Occasion Paper No 4/2013 <citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.662.4953&rep=rep1&type=pdf> accessed 28 June 2019 5.

⁹ IOM, *International Migration Law: Glossary of Migration* (IOM 2004) 34.

¹⁰ Eric Tardif, ‘Migration Crisis in the Mediterranean: Reconciling Conflicting Agendas’ (2017) Human Rights Brief 1, 2 <hrbrief.org/hearings/migration-crisis-mediterranean-reconciling-conflicting-agendas-2/> accessed 11 May 2019.

¹¹ Mallia (n 8) 5. Some writers also employ the term ‘mixed migrants’ to capture the mixed population that undertake the journey of illegal migration.

¹² Ervin Ciorobai ‘Smuggling of Migrants: Threats to National Security’ (2017) 13 *Research and Science Today* 54, 57 (where the author states that undoubtedly, smuggling and trafficking of persons are forms of illegal migration and the operations share common features).

¹³ Raimo Vayrynen, ‘Illegal Immigration, Human Trafficking, and Organised Crime’ (UNU/WIDER Poverty, International Migration and Asylum conference, Helsinki, 27-28 September 2002) 4.

¹⁴ See Protocol on Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 40 ILM 384 (Smuggling Protocol) art 3 on the definition of smuggling. See also Vayrynen (n 13), 4; Felicity Attard, ‘Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?’ (2016) 47 *Journal of Maritime Law and Commerce* 219, 210.

country. These are trafficked persons.¹⁵ This paper identifies that adopting the umbrella of illegal migration shields the nested, yet distinct, concepts of smuggling and trafficking that carry significant legal and political consequences.¹⁶ However, in reality, the legal distinction between the concepts of illegal migration, human smuggling and human trafficking may not be so clear cut.¹⁷ This is because, frequently, economic migrants become victims of trafficking; traffickers may act as smugglers and use the same routes for both trafficking and smuggling; and the conditions of these illegal migrants may be so bad that it is difficult to believe they agreed to it.¹⁸ Tardif affirms that migrants arriving in Europe seldom belong to just one group, blurring the distinction between the various categories of migrants that attempt to access the continent illegally.¹⁹ Similarly, the IOM links illegal migration to smuggling and trafficking-processes by which individuals are assisted to enter a State's territory in a manner which violates State laws, in exchange for compensation (payment or benefits). Following this association, one can understand why illegal migration in its broad sense is defined as movement of persons, with assistance, into a State's territory in a manner that violates the law of the destination State.

With specific reference to entry through maritime routes, Tervo and others define illegal migration by sea as the unauthorised entry of a third country national to the territory of a State through its maritime borders.²⁰ This paper utilises the phrase 'illegal migrant by sea' to describe persons who, for economic reasons, voluntarily engage in the process of entering a State's territory through its maritime borders in a process that contravenes generally accepted migration standards.²¹

A. Illegal Migration by Sea as a Threat to Coastal States

In recent years, illegal migration at sea has attained priority status on the security agendas of several States, especially in Europe.²² Statistics reveal that a large number of migrants wish to

¹⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 40 ILM 335 (Trafficking Protocol) art 3 on the definition of trafficking.

¹⁶ Vayrynen (n 13) 6.

¹⁷ MJ Miller, 'The Sanctioning of Unauthorized Migration and Alien Employment' in David Kyle and Rey Koslowski (eds), *Global Human Smuggling: Comparative Perspectives* (John Hopkins University Press 2001) 326.

¹⁸ United Nations Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons: Global Programme against Trafficking in Human Beings* (United Nations 2008) 3.

¹⁹ Tardif (n 10) 2. See also Ciorobai (n 12) 57 (where the author states that undoubtedly, smuggling and trafficking of persons are forms of illegal migration and the operations share common features).

²⁰ Kamruk Hossain, Adam Stepien and Henna Tervo, 'Illegal Immigration by Sea as a Challenge to the Maritime Border Security of the European Union with a Special Focus on Maritime Surveillance Systems' in Timo Koivurova et al (eds), *Understanding and Strengthening European Union-Canada Relations in Law of the Sea and Ocean Governance* (University of Lapland Arctic Centre 2009) 387.

²¹ It will, however, draw a distinction in discussing persons smuggled (PS) and victims of trafficking (VOT) when the need arises.

²² Vayrynen (n 13) 9; Hossain, Stepien and Tervo (n 20) 387; Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee

either take advantage of the socio-economic discrepancies between developed and less developed countries or are forced to flee due to wars.²³ This creates a herculean challenge to the control of territorial borders as a fundamental attribute of the sovereignty of the destination States, which is translatable to a security threat from the maritime domain.²⁴ Generally, security (including maritime security) as a 'post-cold war era' concept jettisons the traditional idea that security revolves around the fear of, and the exercise of, domination or warfare between nations.²⁵ This is because the emergence and exposure to new risks and dangers (such as environmental degradation, climate change and transnational crimes) which challenged the well-being of individuals and communities necessitated a normative shift.²⁶ The broadened conceptualisation of security creates a field of integrated and multi-sectoral linkages with the possibility of an infinite pool of threats and vulnerabilities.²⁷ For destination States, appearing to crack down on these unwanted patterns of migration is increasingly regarded as essential for safeguarding social peace.²⁸ Notably, securitisation arising from threat perception differs among States, although they may coincide with globally defined threats.²⁹

The movement of migrants across the Mediterranean is considered to constitute the largest movement of people through European borders since World War II.³⁰ Ever since October 2013, when 366 migrants died in a shipwreck off the Italian island of Lampedusa, captured the world's attention, the international community continues to express grave concern about the trends of illegal migration by sea. Migrants embark on crossing the Mediterranean sea -a major commercial shipping route- in inhuman transport conditions that violate international maritime safety standards, often leading to human tragedies.³¹ Heightened control measures on land borders contribute to refugees and migrants increasingly resorting to death-defying crossings, including along the central Mediterranean

Law' (2009) 21 *International Journal of Refugee Law* 256, 257; European Commission, 'EU Action Plan Against Migrant Smuggling (2015-2020)' (27 May 2015) COM(2015)285 final, 1.

²³ Vayrynen (n 13) 20; Amnesty International '*Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*' (Amnesty International 2014) 8.

²⁴ Martin Heisler and Zig Layton-Henry, 'Migration and the Links Between Social and Societal Security' in Ole Weaver et al, *Identity, Migration and the New Security Agenda in Europe* (New York 1993) 149; Mallia (n 8).

²⁵ Osatohnamwen O Eruaga, 'Towards a Normative Shift in Maritime Security Governance: Appraising Private Maritime Security Companies in Nigeria's Anti-Piracy and Armed Robbery at Sea Institutional Framework' (2016) 4 *Akunba Law Journal* 1, 316.

²⁶ *ibid.*

²⁷ Wang Yizhou, 'Defining Non-Traditional Security and Its Implication for China' (2004) 12 *China and World Economy* 59, 62; Christian Burger, 'What is Maritime Security?' (2015) 53 *Marine Policy* 159, 160. Oberoi and Taylor-Nicholson (n 1) 170.

²⁸ Yizhou (n 27) 62; Burger (n 27) 160.

²⁹ Gervais Appave, 'Migrations: Some Observations about Contemporary Trends' (WMU Symposium on Migration by Sea, 26-27 April 2016, Malmo) (on file with the author).

³⁰ Marcello Di Filippo, 'Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life' (2013) 1 *Paix et Sécurité Internationales* 53, 56. The three main problems relating to the boat voyages in illegal migration by sea are overcrowding, the poor condition of the boat resulting in technical failures, and the lack of a 'professional driver'. Crimes against navigational safety jeopardises safety and property at sea and, at the same time, undermines the operation of maritime services. See also Attard (n 14) 210.

route.³² Accordingly, the Feasibility Study on the Control of EU Maritime Borders identifies that vessels engaged for the purposes of illegal migration are ‘chartered for their last trip under the flag of convenience of a country located far from the Mediterranean basin. The ships... are unseaworthy and highly dangerous for both their passengers and for regular navigation.’³³ In most cases, migrants are placed in fishing boats and dinghies which are ordinarily unsuitable for use on the high sea.³⁴ The Migration Policy Research reveals that the number of persons who die at sea, compared to those who survive, is steadily increasing and has constantly been above 3% since 2006.³⁵ This translates to at least three deaths for every 100 crossings.³⁶ According to the IOM’s Missing Migrant project, over 3,770 refugees and migrants are known to have died at sea while trying to reach Europe in 2015, representing a 15% increase compared to the previous year.³⁷

II. Italian Pushbacks as a Migration Control Measure

In spite of several reports of migrants perishing at sea, large numbers seeking a better living still embark on the deadly journey by sea to Europe. Italy is one of the closest European coastal States to the African continent, separated only by the Mediterranean which makes it faster and cheaper for travellers to access.³⁸ Furthermore, Italy matches the description of a country where migrants could attain political and socio-economic liberation. The Italian Human Development Index (HDI) value increased from 0.768 to 0.887 between 1990 and 2015, positioning it at 26 out of 188 ranked countries and territories.³⁹

Statistics shows that migrants are not primarily of Mediterranean origin.⁴⁰ Nigeria was the second most common country of origin in 2015 and topped the list of the main

³² Amnesty International (n 23) 13.

³³ Council of the European Union, Secretariat General, ‘Feasibility Study on the Control of the European Union’s Maritime Borders - Final report’ (19 September 2017) 11490/1/03, 10.

³⁴ Sara Hammond, ‘African Transit Migration Through Libya to Europe: The Human Cost’ (*The American University Forced Migration and Refugee Studies*, 2006) 51 <www.migreurop.org/IMG/pdf/hamood-libya.pdf> accessed 25 May 2019.

³⁵ Anna Di Bartolomeo, Philippe De Bruycker and Philippe Fargues, ‘Migrants Smuggled by Sea to the EU: Facts, Law and Policy Options’ Migration Policy Centre Research Report 2013/09 (European University Institute 2013) 4.

³⁶ *ibid.*

³⁷ IOM, ‘Over 3,770 Migrants Have Died Trying to Cross the Mediterranean in Europe in 2015’ <missingmigrants.iom.int/over-3770-migrants-have-died-trying-cross-mediterranean-europe-2015> accessed 11 May 2019.

³⁸ Job Osazuwa, ‘Illegal Desert Journey to Europe: How Nigerian drowned in Mediterranean Sea’ *The Sun* (Lagos, 24 March 2016) <sunnewsonline.com/illegal-desert-journey-to-europe-how-nigerian-drowned-in-mediterranean-sea/> accessed 25 May 2019.

³⁹ United Nations Development Programme (UNDP), *Human Development for Everyone* (UNDP 2016) 202. HDI is a summary measure adopted by the UNDP for assessing progress in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living. Italy’s HDI for 2015 was at par with the average of Organisation for Economic Cooperation and Development (OECD) countries while it was below the average of very high performing HDI countries such as the United Kingdom.

⁴⁰ Hossain, Stepien and Tervo (n 20) 388. Apart from the short periods of unrest in countries such as Syria, Algeria, Lybia and Tunisia, which caused a surge of citizen migrants from these countries, the eastern countries majorly serve as transit countries.

nationalities arriving to Italy from West and Central Africa in 2016.⁴¹ The Nigerian Immigrations Services asserts that not less than 10,000 Nigerians have died between January and May 2017 trying to cross the Mediterranean Sea and the deserts.⁴² The death of thousands at sea and the pressure which those who survive the journey put on the Italian State spurs the State to continually explore and establish migration control methods which Obiero and Taylor-Nicholson argue are often dangerous.⁴³ Migrants are increasingly confronted by border control measures detached from the landward territorial borders of destination States, commonly known as externalisation or push-backs. Lomba identifies that externalisation of control occurs through the deflection of migrants and transfer of responsibilities to safe third countries, first country of asylum, safe country of origin and readmission agreements with third countries.⁴⁴ The objective is to prevent the physical arrival of illegal migrants at their desired final destination.⁴⁵

The use of push-back measures in the control of illegal migrants by sea is not a new phenomenon.⁴⁶ The United States of America, and Australia, as well as several European States, including Italy, have engaged in migrant deflections since the nineties, as a means of migration control.⁴⁷ Giuffrè notes that the expectation of such externalisation is the dilution and reallocation of State responsibility.⁴⁸ Such transfers of responsibility have gained strength in Europe through incorporation into various European Union (EU) measures.⁴⁹ Indeed, several European governments consider the push-backs as necessary to counter 'the emergency' represented by the influx of people and to deter 'a million' waiting in Libya from reaching Italian shores.⁵⁰

A significant proportion of Italy's externalisation measures controlling migration flows across the Mediterranean are expressed in several bilateral partnership agreements and practical cooperation arrangements with Libya, reflecting the contemporary international

⁴¹ IOM's Global Migration Data Analysis Centre (GMDAC), 'Global Migration Trends Fact Sheet' (2015) 12 <gmdac.iom.int/global-migration-trends-factsheet> accessed 11 May 2019.

⁴² Gbenro Adeoye, Adelani Adepegba, Jesusegun Alagbe and Success Nwogu, 'Illegal Migration: 10,000 Nigerians Die in Mediterranean Sea, Deserts – NIS' *The Punch Newspaper* (27 May 2017).

⁴³ Oberoi and Taylor-Nicholson (n 1) 173; Mariagiulia Giuffrè, 'State Responsibility Beyond Borders. What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 *International Journal of Refugee Law* 692, 693.

⁴⁴ Sylvie Da Lomba, *The Right to Seek Refugee Status in the European Union* (Intersentia 2004) 106.

⁴⁵ Oberoi and Taylor-Nicholson (n 1) 172.

⁴⁶ Frank Brennan, 'Human Rights and the National Interest: The Case Study of Asylum, Migration, and National Border Protection' (2016) 39 *Boston College International and Comparative Law Review* 47, 59; Natalie Klein, 'Assessing Australia's Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 *Melbourne Journal of International Law* 2, 414.

⁴⁷ Stephen H Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18 *International Journal of Refugee Law* 677, 684. For a recount of Italy's use of pushbacks, see generally, Rutvica Andrijasevic, 'Lampedusa in Focus: Migrants Caught between the Libyan Desert and the Deep Sea' (2006) 82 *Feminist Review* 120, 121.

⁴⁸ Giuffrè (n 43) 693.

⁴⁹ Consolidated Version of the Treaty on European Union [2008] OJ C115/13 arts 77 and 79; Council Regulation (EC) 2007/2004/EC (26 October 2004). See also, Fischer-Lescano, Löhr and Tohidipur (n 22) 256–296.

⁵⁰ Andrijasevic (n 47) 122.

relationship between the two States.⁵¹ These arrangements became necessary for Italy because Libya serves as one of the most prominent departure countries for migrants aiming to reach Italy and its islands of Lampedusa and Sicily.⁵² The arrangements and partnerships to combat illegal migration were first initiated in 2000 with the *Agreement on the War Against Terrorism, Organised Crime, Drug Trafficking and Illegal Migration* and subsequently reiterated in the several other Protocols entered into in 2004 and 2007.⁵³ Under these agreements, the States agreed to establish joint missions with Libya patrolling both her coastline and international waters on vessels provided by Italy. The agreements provided a layered approach to ensuring that migrants are deterred from reaching their preferred destination. In the first instance, potential migrants by sea are stopped on land by Libyan coastguards before they commence the seaward journey from Libya to Italy. In the event that they embark on the journey, there is still room for timely interception by Libyan authorities within Libyan territorial waters. The agreements also provide for the deflection of migrants intercepted by the Italian authorities in international waters closer to Italian territory. On the strength of the aforementioned agreements, thousands of illegal migrants have been deflected to Libya.⁵⁴

The *Treaty of Benghazi* of 2008⁵⁵ formalised Italy's cooperation with Libya against illegal migration, by providing the legal framework for unifying, and providing treaty backing for, previous bilateral agreements.⁵⁶ Article 19 of the Treaty provides for the implementation of previous agreements and protocols on immigration, particularly the *Tripoli Protocol* of 2007, which provides for the patrol of Libya's approximately 2,000km coast by a mixed crew from both countries.⁵⁷ The Treaty also provides for the establishment of a control system on the Libyan land border to be run Italian companies possessing the necessary technical skills to

⁵¹ Hammond (n 34); Mustafa Abdalla Kashiem, 'The Treaty of Friendship, Partnership and Cooperation Between Libya and Italy: From an Awkward Past to a Promising Equal Partnership' (2010) 1 *California Italian Studies* 1, 4.

⁵² Hossain, Stepien and Tervo (n 20) 388.

⁵³ Tullio Scovazzi, 'Human Rights and Immigration at Sea' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (Oxford University Press 2014) 224. The entire contents of the bilateral agreements remained undisclosed despite the request from the European Parliament, UN Human Rights Committee, and NGOs to make it public. Nevertheless, they formed the basis of cooperation between the two States, aimed at tackling the movement of migrants from Libya to Italy. See Andrijasevic (n 47) 121; Silja Klepp, 'Italy and its Libyan Cooperation Program: Pioneer of the European Union Refugee Policy?' in Jean-Pierre Cassarino (ed), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean* (Middle East Institute 2010) 78–85.

⁵⁴ Klepp (n 53) 78–85.

⁵⁵ Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la grande Giamahiria araba libica popolare socialista (Treaty of Friendship, Partnership, and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya) (Italy-Libya) (2008) [Benghazi Treaty] <www.istitutospiovt.it/sites/default/files/articolo/Trattato%20di%20Amicizia,%20Partenariato%20e%20Cooperazione%20tra%20la%20Repubblica%20Italiana%20e%20la%20Grande%20Giamahiria%20Araba%20%20Libica%20Popolare%20Socialista/testo_trattato_it_lib.pdf> accessed 25 May 2019.

⁵⁶ Natalino Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation Between Italy and Libya: New Prospects for Cooperation In The Mediterranean?' (Mediterranean Strategy Group Conference, Genoa, 11–12 May 2009) 3 <www.iai.it/sites/default/files/iai0909.pdf> accessed 25 May 2019.

⁵⁷ Benghazi Treaty (n 55) art 19(1).

promote migration control. This project is to be financed equally between Italy and the European Union.⁵⁸

Notably, the agreements on illegal migration do not draw a distinction between nationals of Libya and third country nationals, nor do they differentiate the individuals at sea into the various classes of irregular migrants. Thus, all illegal migrants at sea are subjected to push-back measures, irrespective of the fact that they may actually be entitled to enjoy protection under principles of international law.

III. The Tension between Italy's Migration Control and International Principles

The Libya-Italy agreement, as a reflection of Italy's externalisation of migration control, provides the necessary framework for exploring the compatibility of border control policies with international law. Ordinarily, destination States can rightfully undertake border control measures which may include pushbacks. This assertion hinges on the principle of (land and seaward) territorial control, which recognises that States have sovereign rights that are not subject to external interference.⁵⁹ However, as part of and in commitment to the global order, States are expected to conduct their sovereign affairs with due regard to international legal principles which reflect a universal legal system. As such, any State conducting push-back measures has to do so within the confines of their rights and obligations at sea, including respect for international human rights principles.⁶⁰

International law, through several international instruments, provides the backdrop within which States operate at sea. The *United Nations Convention on the Law of the Sea* (UNCLOS), as one such instrument, provides the broad framework for the determination and further development of rights and duties associated with activities occurring within global maritime jurisdiction.⁶¹ UNCLOS bestows on coastal States legislative and enforcement jurisdiction to prevent the infringement of immigration laws within the territorial sea and contiguous zones.⁶² Outside the aforementioned zones, the principle of freedom of the high sea is exercised and a vessel is subject only to the exclusive jurisdiction of the flag State.⁶³ Accordingly, where a vessel is within its territorial sea or continuous zone, Italy, as a State,

⁵⁸ Benghazi Treaty (n 55) art 19(2).

⁵⁹ Stuart Elden, 'Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders' (2006) XXVI SAIS Review 1, 11.

⁶⁰ Klein (n 46) 441.

⁶¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3/ 21 ILM 1261 (UNCLOS). UNCLOS is regarded as international customary law so its provisions are applicable to all States. See United Nations Security Council (UNSC) Resolution 1950 (20 November 2010) UN Doc S/RES/1950, preamble; James Kraska, *Contemporary Maritime Piracy* (Praeger 2011) 129.

⁶² UNCLOS (n 61) art 33. See also Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart 2010) 80.

⁶³ UNCLOS (n 61) art 92(1). On the principle of exclusive State jurisdiction, see also Tamo Zwinge, 'Duties of Flag States to Implement and Enforce International Standards and Regulations and Measures to Counter Their Failure to Do So' (2011) 10 Journal of International Business and Law 2 297, 299; Klein (n 46) 421.

can carry out measures against a vessel carrying illegal migrants at sea.⁶⁴ The right of Italy to carry out measures against a vessel on the high sea that is stateless is also recognised under international law.⁶⁵ Specifically, research has shown that vessels out at sea for the purpose of illegal migration are either stateless or registered under flags of convenience, meaning that they are not under the effective control of any State.⁶⁶

Article 98 of UNCLOS imposes a duty on States to rescue persons in distress, including migrants at sea, and disembark them in a place of safety.⁶⁷ According to the aforementioned provision, a State shall require any vessel flying its flag to render assistance to anyone found at sea in danger of being lost and proceed with all possible speed to rescue persons in distress.⁶⁸ While UNCLOS provides the framework for the duty to assist, the details of the obligation are contained in the International Maritime Organisation (IMO) multilateral treaties – the *Conventions on Safety of Life at Sea* (SOLAS)⁶⁹ and the *Search and Rescue (SAR) Convention*,⁷⁰ as well as the IMO Guidelines on the Treatment of Persons Rescued at Sea.⁷¹ These subsequent instruments require that rescued persons be disembarked in a place of safety.⁷² Notably, these treaties fall short of explicitly setting out and imposing on the State the ultimate responsibility to receive rescued persons.⁷³ Arguably, a State will be well within its duties to rescue people at sea and send them to the State closest to the rescue site or even

⁶⁴ UNCLOS (n 61) 27.

⁶⁵ UNCLOS (n 61) 110; Smuggling Protocol (n 14) art 8; Klein (n 46) 420.

⁶⁶ Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 *Syracuse Journal of International Law and Commerce* 145, 159; Mallia (n 8) 7; Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmented Reading of EU Member States' Obligation Accruing at Sea' (2011) *International Journal of Refugee Law* 1, 13; Klein, (n 46) 421.

⁶⁷ Search and Rescue operations stem from the moral-turned-legal obligations to render assistance to those who are stranded at sea. For an in-depth discussion of the duty, see Bernard Oxam, 'Human Rights and the United Nations Convention on the Law of the Sea' (1998) 36 *Columbia Journal of Transnational Law* 399, 414; Jessica E Tauman, 'Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters Of The Tampa Crisis' (2002) 12 *Pacific Rim Law and Policy Journal* 11 461, 473; Frederick Kenney and Vasilios Tasikas, 'The Tampa Incident: The IMO Perspectives and Responses to the Treatment of Persons Rescued at Sea' (2003) 12 *Pacific Rim Law and Policy Journal* 143; Martin Ratcovich, 'The Concept of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?' (2016) 33 *Australian Yearbook of International Law* 81; Osatohanmwon Eruaga 'Illegal Migration in the Mediterranean and the Challenges of Observing the Duty to Render Assistance at Sea: Appraising the Legal Order from a Commercial Shipping Perspective' (accepted for publication in *Loyola Maritime Journal*).

⁶⁸ UNCLOS (n 61) art 98(1)(a).

⁶⁹ International Convention for the Safety of Life at Sea (opened for signature 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention) annex.

⁷⁰ International Convention on Maritime Search and Rescue (opened for signature 27 April 1979, entered into force 22 June 1985) 1405 UNTS 119 (SAR Convention) annex.

⁷¹ IMO, 'Guidelines On The Treatment Of Persons Rescued At Sea' (20 May 2004) Res MSC.167(78) (IMO Guidelines) annex, 5.1

<[http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf)> accessed 29 June 2019.

⁷² SOLAS Convention (n 69) Ch. V Reg 33, para 1(1); SAR Convention (n 70) Annex Ch. 3, para 3(1)(9).

⁷³ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011) 143; Klein (n 46) 427.

to a State that is further away, so long as such a State is willing to allow them to disembark.⁷⁴ However, the concept of the place of safety remains a relevant consideration in the determination of the place of disembarkation. The IMO Guidelines define a place of safety as a place where rescue operations terminate, and ‘where the survivors’ safety or life is no longer threatened, basic human needs can be met and transportation arrangements can be made for the survivors’ next or final destination.’⁷⁵ Rather than this simplistic interpretation of the notion of the place of safety, current international practice, arising from a convergence of human rights and humanitarian approaches, constructs a wider definition which puts into consideration the quality of the rescued persons as well as the possible need for international protection.⁷⁶ As a result, the notion of ‘a place of safety’ is interpreted to coincide with the idea of safety under humanitarian and human rights principles which is synonymous with freedom from threat.⁷⁷ The requirement of the disembarkation of migrants to a third country willing to accept them thus requires the original destination country to ensure that the third country is actually safe in the true sense of the word.⁷⁸ Jurisprudence from the Court of Justice of the European Union affirms this obligation in the cases of *NS v United Kingdom* and *ME v Ireland* (joined cases)⁷⁹ and *Hirsi Jamaa and Others v Italy*.⁸⁰ Accordingly, Godwin-Gill asserts that a State which disembarks migrants in a country which it knows or reasonably expects will violate their fundamental human rights becomes party to that violation of rights.⁸¹

Migrants, regardless of their nationality or legal status, are protected by a considerable number of international and regional instruments that recognise their human rights as they do for other human beings.⁸² The *Universal Declaration of Human Rights* (UDHR),⁸³ the *International Covenant on Civil and Political Rights* (ICCPR)⁸⁴ and the *Convention on the Rights of*

⁷⁴ Jasmine Coppens and Eduard Somers, ‘Towards New Rules on Disembarkation of Persons Rescued at Sea?’ (2010) 25 *International Journal of Marine and Coastal Law* 377, 388. This is especially so since some State parties to the original Conventions are not parties to the amendments that attempt to provide further clarity. For example, for Malta who is not a party to the amendments, rescued people must be disembarked at the closest safe port, usually at Lampedusa or in Sicily, even though the rescue happened in the Malta SAR region. Italy, on the other hand, considers that unless a different arrangement is reached on a case by-case basis, the State competent for the relevant SAR zone must allow the disembarkation, in which case the State conducting the search and rescue becomes irrelevant. See Amnesty International (n 23).

IMO Guidelines (n 71) para 6.12.

⁷⁵ Ratcovich (n 67) 92–94, 120; Klein (n 46) 427.

⁷⁶ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECHR 23 February 2012); Klein, (n 45) 428.

⁷⁷ *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECHR 23 February 2012).

⁷⁸ Joined cases C-411-10 *N.S. v United Kingdom* and C-493-10 *M.E. v Ireland* ECLI:EU:C:2011:865.

⁷⁹ *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECHR 23 February 2012).

⁸⁰ Guy Goodwin-Gill, ‘The International Protection of Refugees and Asylum Seekers: Between Principle and Pragmatism?’ (3 November 2014) <hperma.cc/A3N4-WYTN> accessed 11 May 2019.

⁸¹ Brennan (n 46) 59.

⁸² Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 3 (right to life), art 5 (prohibition of torture or cruel, inhuman or degrading treatment), art 13 (movement rights) and art 14 (right to seek and to enjoy in other countries asylum from persecution).

⁸³ UN General Assembly, *International Covenant on Civil and Political Rights* (opened for signature 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 6, 7 and 12.

the Child, as well as several regional agreements,⁸⁵ recognise several rights that are relevant in the context of irregular migration. These rights include the right to life and the prohibition of torture or cruel, inhuman or degrading treatment, as well as movement rights. Tardif notes that the movement rights, which are the legal basis of migration, are subject to certain limits which are reflective of rights accorded to States to control movement in and out of their territory.⁸⁶ This means that international law expects individuals engaging in migration to respect the sovereignty of State territories by abiding by their respective immigration rules. However, a breach of these rules by migrants does not deprive them of the protection afforded by provisions on human rights.⁸⁷ Clearly, a conflict of interest between national and international law, arising from human rights violations, is likely to occur in the course of handling irregular migration through Italy's push-back measures.⁸⁸ There is a tendency for officials of destination States, in conducting push-backs, to treat migrants in a cruel and degrading manner, and even to cause physical damage to the vessel carrying the migrants, in an attempt to ensure that they do not reach their preferred destination. The Commissioner for Human Rights of the Council of Europe observed that the 'excessive use of force by law enforcement officials charged with border control' contributes to the risk migrants face of losing their lives or facing serious injury during their journey.⁸⁹

The recognition of the right to flee one's country and seek asylum in another country gives rise to the principle of *non-refoulement*. *Non-refoulement* prohibits the return of an individual to a country in which he or she has a well-founded fear of being persecuted.⁹⁰ Although considered principally as the cornerstone of refugee protection in humanitarian law, *non-refoulement* also receives recognition under general international human rights law as an independent but related principle.⁹¹ Flowing from this recognition, *non-refoulement* obligations to migrants have been extended to cover migrants who do *not* fall under the protection of the

⁸⁵ African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (4 November 1950) (ECHR).

⁸⁶ Tardif (n 10) 4.

⁸⁷ Klein (n 46) 432–33.

⁸⁸ Commissioner for Human Rights, 'The Human Rights of Irregular Migrants' CommDH/Issue Paper (Strasbourg, 17 December 2007) 1, 14 <rm.coe.int/16806da797> accessed 25 May 2019; Mark R von Sternberg, 'Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection' (2014) 2 Journal of Human Movement Science 4, 329–360; Klein (n 46) 420.

⁸⁹ Commissioner for Human Rights (n 88) 1, 3.

⁹⁰ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention); Protocol Relating to the Status of Refugees of the Convention Relating to the Status of Refugees (opened for signature 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 art 3; Alice Framar, 'Non-Refoulement and *Jus Cogens*: Limiting Anti-Terror Measures That Threaten Refugee Protection' (2008) 23 Georgetown Immigration Law Journal 1, 2.

⁹¹ Tardif (n 10) 4; *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECHR 23 February 2012), Concurring opinion of Judge Pinto De Albuquerque ('Although the concept of refugee contained in art 33 of the UN Refugee Convention is less extensive than the one under international human rights law, international refugee law has evolved by assimilating the broader human rights standard and thus enlarging the convention concept of refugee (incorrectly called "de jure refugees") to other individuals who are in need of complementary international protection (incorrectly called "de facto refugees")').

Refugee Convention.⁹² For instance, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)⁹³ contains an unambiguous *non-refoulement* provision as a general principle of human rights.⁹⁴ Skyes states that the principle of *non-refoulement* in human rights is implicit in other contexts and serves as a corollary of other recognised rights.⁹⁵ Accordingly, the UN Human Rights Committee explains that the Article 6 obligation of the ICCPR is extendable to the principle of *non-refoulement* and, as a result, ‘State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*’⁹⁶

A necessary corollary of the prohibition against *refoulement* is ensuring that each migrant is afforded an opportunity to seek asylum and that migrants are not expelled collectively.⁹⁷ Under several regional human rights instruments, collective expulsion is unequivocally prohibited, in order to ensure the protections that the principle of *non-refoulement* explicitly guarantees.⁹⁸ The UNHCR Note on the Principle of *Non-Refoulement* explains that the right not to be collectively expelled is imperative in irregular migration because ‘every refugee is, initially, also an asylum applicant; therefore, to protect refugees, asylum applicants must be treated on the assumption that they may be refugees until their status has been determined.’⁹⁹ Accordingly, Italy, through its push-back measures, is obligated not to peremptorily expel persons arriving on its shores, regardless of whether they arrive legally or illegally.¹⁰⁰ Giuffrè argues that the denial of entry of a vessel into territorial waters

⁹² Katharina Röhl, ‘Fleeing Violence and Poverty: Non-Refoulement Obligations Under the European Convention of Human Rights’ (2005) New Issues in Research Working Paper 111/2005, 4 <www.unhcr.org/afr/research/working/41f8ef4f2/fleeing-violence-poverty-non-refoulement-obligations-under-european-convention.html?query=fleeing%20violence> accessed 12 May 2019; Katie Sykes, ‘Hunger Without Frontiers: The Right to Food and State Obligations to Migrants’ in David D Caron, Michael J Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (Cambridge University Press 2014) 193; Klein (n 46) 427–428.

⁹³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

⁹⁴ CAT (n 93) art 3 provides that ‘[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’.

⁹⁵ Sykes (n 92) 193.

⁹⁶ United Nations Human Rights Committee (UNHRC) ‘General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’ (10 March 1992) UN Doc HRI/GEN/1/Rev 1, para 9.

⁹⁷ *Union Inter-Africaine des Droits de l’Homme and others v. Angola* Communication no.159/96 (1997) <www.achpr.org/files/sessions/22nd/comunications/159.96/achpr22_159_96_eng.pdf> accessed 12 May 2019; Tardif (n 10) 4.

⁹⁸ ECHR (n 85) art 4; Organization of American States (OAS), American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention) art 22(9); African Charter (n 85) art 12(5); League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in 12 Intl Hum Rts Rep 893 (2005) (Arab Charter) art 26(1).

⁹⁹ UNHCR ‘Note on International Protection’ (31 August 1993) UN Doc.A/AC.96/815 (1993) para 11.

¹⁰⁰ Brennan (n 46) 59.

does not amount to a breach of the principle of *non-refoulement* per se.¹⁰¹ In fact, the right to seek asylum is not accompanied by any guarantee that the quest would be successful. The right is purely permissive.¹⁰² As Justice Gummow of the Australian High Court notes, ‘...viewing it otherwise would amount to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals.’¹⁰³ What international law guarantees is that persons seeking asylum are to be afforded the opportunity to do so. It is this failure of States to allow migrants the opportunity to apply and potentially achieve asylum seeker status that is the infringement of international law. In essence, when, after appropriate procedures have been engaged, push-back measures result in the return of a migrant to a territory where there is no threat to their life or liberty, Italy is well within its rights to avoid responsibility under general international law, with no violation of human rights or humanitarian treaties.

Notably, it is immaterial whether push-back measures are characterised as lawful under Italian municipal laws. International judicial decisions leave no doubt that an act which is lawful under national law may constitute a breach of international law. In *S.S. Wimbledon*,¹⁰⁴ the Permanent Court of International Justice affirmed that orders issued by a State could not prevail over an international treaty.¹⁰⁵ Similarly, the International Court of Justice in *Electronica Sicula S.p.A (El Si)*¹⁰⁶ emphasised that ‘compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of a treaty may be lawful in the municipal law.’¹⁰⁷ The ILC commentaries on State responsibility explain that, by virtue of membership of the international community, every State has an interest in the protection of certain basic rights and the fulfillment of certain obligations, a failure of which would be a breach of the laws of State responsibility.¹⁰⁸ The international legal principles applicable in situations of illegal migration by sea create a legal interest which ought to be protected by Italy, or by any other State wishing to control migration. The State cannot protect its own interest over and above the legal interest created by the international community.

IV. Addressing the Complex, Which Way Forward?

This article establishes that while border control measures, including push-back initiatives, constitute an exercise of jurisdictional authority, they must be subject to the international human rights obligations of the State. Unfortunately, the complexity arising from the conflict between international human rights law and State interests in relation to irregular migration

¹⁰¹ Giuffrè (n 43) 693.

¹⁰² *ibid.*

¹⁰³ *Minister for Immigration and Multicultural Affairs v. Hussein Mohamed Haji Ibrahim* (2000) HCA 55, 138, 204 CLR 1 (Austl).

¹⁰⁴ *SS Wimbledon (United Kingdom and others v France)* PCIJ Rep Series A No 1.

¹⁰⁵ *ibid.*

¹⁰⁶ *Electronica Sicula S.p.A (ELSI)* ICJ Reports 1989, 15.

¹⁰⁷ *ibid.* 51.

¹⁰⁸ International Law Commission, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10 (ARSIWA), 33.
<legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 21 December 2018.

by sea is one which will continue to linger unless and until destination States proactively strike the appropriate balance between conducting State policies and legislation and paying due regard to international legal principles on the subject. Conciliation between human rights and security concerns is possible; it is, however, necessary that the goal of State control of irregular migration is not achieved at the expense of the necessary prioritisation of protection of the human person.¹⁰⁹ Upholding basic human rights is achievable where States, though primarily aiming to achieve effective border control, take proactive steps to ensure the inclusion of effective strategies to protect the human rights of migrants and save lives on the Mediterranean.

In dealing with mixed migration flows, emphasising control and law enforcement can obscure rights, obligations, needs and vulnerabilities of parties. Consequently, countries need to develop a 'needs based protection approach' in dealing with illegal migration by sea. This means that the needs of the various migrant sub-groups require attention. In recent times, the EU has taken initiatives to better protect the human rights of migrants. For instance, joint sea border surveillances such as Frontex joint operations (Triton and Poseidon) and military operations (EUNAVFOR MED/Sophia) include training on fundamental rights for border guards.¹¹⁰ Actions of this nature bolster the needs-based approach to protection, as persons who are first in contact with migrants are better equipped to deal with the phenomenon.

Destination countries argue that the continuous insistence on respect for principles of international law creates a situation whereby irregular migration cannot be effectively curtailed. These States contend that migrants (especially economic migrants) are encouraged to undertake the journey across the Mediterranean because they are aware that international principles afford them some level of protection.¹¹¹ While the insistence on the observation of international principles may contribute to the unwavering migration saga, a recent study by Steinhilper and Gruijters reveals that, contrary to the pull factor hypothesis, migrants will continue to attempt the treacherous journey across the Mediterranean in the hope of a better life if nothing is done to address the motivating factors of migration.¹¹² The protection chief of the UN Refugee Agency says that restrictive policies, like push-backs and border closures, do not stop people from undertaking dangerous journeys, and that combined efforts could be undertaken to address the continued movement of refugees and migrants.¹¹³

The issue of the conflicting interests of States regarding border management and migration arises because of the high rates of movement. Hence, curbing illegal migration as a phenomenon is imperative. The complexities of illegal migration are such that they cannot be

¹⁰⁹ *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* [1970] ICJ Rep 3, where the Court states that all States can be held to have a legal interest in the protection of international human rights and the obligation to protect them is *erga omnes*.

¹¹⁰ European Political Strategy Centre (EPSC), 'Irregular Migration via the Central Mediterranean From Emergency Responses to Systemic Solutions' Issue 22, Strategic Solutions (2 February 2017) 3 <ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_22_0.pdf> accessed 25 May 2019.

¹¹¹ *ibid.*

¹¹² Elias Steinhilper and Rob Gruijters, 'Border Deaths in the Mediterranean: What We Can Learn from the Latest Data' (*University of Oxford*, 2017) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/03/institutional> accessed 25 May 2019.

¹¹³ UNHCR, 'Better Protecting Refugees in the EU and Globally: UNHCR's Proposals to Rebuild Trust Through Better Management, Partnership and Solidarity' (UNHCR 2016) <www.refworld.org/docid/58385d4e4.html> accessed 25 May 2019.

successfully dealt with by States individually. The problem of migration by sea requires a global, multi-stakeholder strategy that builds on unified national efforts throughout the world to ensure that everybody takes responsibility for the issue. To pave the way for this strategy, stakeholders must, apart from coordinating efforts already underway in destination States, increase knowledge and awareness in States of origin. States producing high numbers of migrants should raise awareness of the risks of illegal migration and also of the deterrent measures that destination States are adopting. As the UN Secretary General noted,

Those attempting to immigrate illegally do not know the risk involved in crossing straits, and after having invested in a long and expensive land journey they do not hesitate to invest in a dangerous sea passage.¹¹⁴

The scourge of illegal migration festers because States of origin do not show a holistic commitment to solving the problem. Improving the socio-economic welfare of their citizens implies that migrants engaged in the act of illegal migration by sea for purely economic reasons might be less inclined to undertake the journey. States of origin are thus enjoined to invest more in the socio-economic welfare of their citizens.

Furthermore, the process of illegal migration is highly reliant on the existence of persons such as smugglers and traffickers to aid movement. Migrant smuggling is a business model that relies on the principles of demand and supply.¹¹⁵ While it may be difficult to cut off demand, States should tackle the ability of operators to supply the services of smuggling. The Smuggling and Trafficking Protocols provide the appropriate framework at the international level for tackling the issue of supply. This is because these Protocols criminalise smuggling, as well as trafficking, and create an obligation on States to cooperate in eradicating the offence through the established framework for maritime interdiction at sea, while safeguarding the safety and security of vessels and treating migrants in a humane fashion.¹¹⁶ The success of these Protocols hinges on the coordination between law enforcement and judicial structures within and between States.

V. Conclusion

State interest in ensuring sufficient border control to manage illegal migrants by sea remains a priority for a destination State such as Italy. However, the legality of such actions are only ascertainable when they are placed within the boundaries of international principles relating to obligations and rights at sea. Whilst this paper does not excuse illegal migration by sea, nor the flagrant disregard for immigration laws of destination States such as Italy, it is clearly the case that migrants, irrespective of their status, enjoy certain rights flowing from international legal principles which coastal States should consider when undertaking border control measures for the purposes of curbing illegal migration by sea.

*

www.grofil.org

¹¹⁴ Council of the European Union (n 33) 15.

¹¹⁵ Vayrynen (n 13) 19.

¹¹⁶ Smuggling Protocol (n 14) arts 7–9.