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**Irregular Migration across the Mediterranean Sea:
An analysis of safety and security regulatory
measures**

By

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DECLARATION

I, Sharkirah Khan, declare that:

- (i) The research reported in this dissertation, except where otherwise indicated, is my original work.
- (ii) This dissertation has not been submitted for any degree or examination at any other University.
- (iii) This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
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Sharkirah Khan

Date: 12 February 2019

LIST OF ABBREVIATIONS

<i>CAT</i>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<i>ECHR</i>	European Court of Human Rights
<i>ECHR</i>	European Convention of Human Rights
<i>EU</i>	European Union
<i>ExCom</i>	Executive Committee of the United Nations High Commissioner for Refugees
<i>ICCPR</i>	International Covenant on Civil and Political Rights
<i>IMO</i>	International Maritime Organization
<i>MSF</i>	Doctors without borders
<i>RCC</i>	Rescue Coordination Centre
<i>SAR</i>	Search and Rescue
<i>SAR</i>	International Convention on Maritime Search and Rescue
<i>SGBV</i>	Sexual and gender-based violence
<i>SOLAS</i>	International Convention for the Safety of Life at Sea
<i>UN</i>	United Nations
<i>UNCC</i>	United Nations Crime Commission
<i>UNCLOS</i>	United Nations Convention on the Law of the Sea
<i>UNHCR</i>	United Nations High Commissioner for Refugees
<i>UNTOC</i>	United Nations Convention against Transnational Organized Crime

TABLE OF INTERNATIONAL CONVENTIONS AND STATUTES

Council Directive 2002/90 defining the Facilitation of Unauthorised Entry, Transit and Residence (OJ L328/17).

European Convention of Human Rights, CETS no. 194.

Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence 2002/946 (OJ L328/1).

International Maritime Organization (IMO), *International Convention for the Safety of Life at Sea*, 1184 UNTS 278.

International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue*, 1405 UNTS 118.

International Maritime Organization (IMO), *International Convention on Salvage*, 1953 UNTS 165.

United Nations Convention against Transnational Organized Crime and the Protocols thereto. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime. Adopted by the United Nations General Assembly Resolution 55/25.

United Nations Convention on the Law of the Sea, 1833 UNTS 3.

United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85. Adopted by General Assembly resolution 39/46.

United Nations General Assembly, *1951 Convention Relating to the Status of Refugees*, 189 UNTS 137.

United Nations General Assembly, *International Covenant on Civil and Political Rights*, 999 UNTS 171.

United Nations General Assembly, *1967 Protocol Relating to the Status of Refugees*, 19 U.S.T. 6223, 606 UNTS 267.

ABSTRACT

The phenomenon of ‘irregular migration’ by sea or ‘boat migration’ is not new, however, it has only recently caught the public’s attention since the Mediterranean ‘migration crisis’ in 2015. Historically, travelling by sea has been a dangerous journey for migrants and today, images of gruesome scenes of death in the Mediterranean Sea reveal the risks of ‘irregular migration’. This study was prompted by the need to provide insight into irregular migration at sea from the viewpoint of the irregular migrant by focusing on the perils and risks that are faced by irregular migrants on their journeys across the Mediterranean Sea.

The aims and objectives of this study were to critically analyse the current legal framework that seeks to protect irregular migrants from the risks faced on their voyage across the Mediterranean Sea and to evaluate the gaps and shortcomings in this respect. The study shows that although the crisis of 2015 led to spikes in the death toll, the Mediterranean Sea is still a deadly route for irregular migrants today. This fact is followed by findings of all the safety and security risks faced by irregular migrants. Having identified all the safety and security risks faced at sea, the study goes on to discuss and analyse the legal framework in place that offers protection to irregular migrants from these risks. The protection available is then critically analysed and protection gaps as well as other shortcomings are identified.

Following the findings and protection gaps, recommendations are made that creating a new binding legislation may be necessary and if not, then the existing legal framework should be amended. The existing legal framework should be amended so that it is more comprehensive and clarifies the definitions and content of certain key terms that adversely affect the protection available to irregular migrants.

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CHAPTER ONE:
INTRODUCTION

1.1 Research Objectives

This research is relevant as it adds to the existing body of knowledge by providing insight into irregular migration at sea from the viewpoint of the irregular migrant. The research focuses on the perils and risks that are faced by irregular migrants on the journey across the Mediterranean Sea.

The objectives of this research are to critically analyse the current legal framework that seeks to protect irregular migrants from the risks faced on their voyage across the Mediterranean Sea and to evaluate the gaps and shortcomings in this respect. After an evaluation has been conducted, recommendations are put forth as to how the gaps should be filled to provide adequate protection to irregular migrants.

1.2 Research Questions

The following research questions are examined and addressed in this dissertation:

- 1.2.1 What safety and security risks do irregular migrants face at sea?
- 1.2.2 Are there any laws or regulatory measures in place to protect irregular migrants from the safety and security risks faced at sea?
- 1.2.3 Are irregular migrants adequately protected by the current legal framework?

1.3 Parameters and Research Methodology

This dissertation will use only the Mediterranean Sea as a case study. The reason for this is to limit the study geographically and focus on one of the most problematic regions for irregular migration in the world. This allows the study to discuss and analyse the risks faced by irregular migrants in more detail as the geographical region is narrowed down.

The study contains a temporal limit as well. Irregular migration at sea is a major problem that reached crisis level in the Mediterranean Sea in the year 2015. This study will focus on the period from 2015 to date, to show that irregular migration is still just as much a problem today,

as it was in 2015. This temporal limit allows the study to remain relevant and tackle the current risks faced by irregular migrants. This paves the way for further research in the field, based on the most recent findings and shortcomings in the legal framework.

The research methodology of this study is doctrinal, desktop-based research. Thus, this will encompass international law, international treaties and conventions, maritime law, foreign case law, academic journal articles, as well as web newspaper articles. These sources will be examined and used to provide a critical analysis of the laws regulating the safety and security risks faced by irregular migrants on their journeys across the Mediterranean Sea.

1.4 Architecture of the Dissertation

This introductory chapter, Chapter 1, will set the scene for the research that will follow. It starts off with an outline of the rationale for the study, the objectives, research questions, parameters and research methodology. This chapter also provides a history and background to the study and goes on to discuss the concept of irregular migration at sea.

Chapter 2 will consider the ‘Mediterranean Migration Crisis of 2015’. The chapter will begin with an account of a family that attempted to cross the Mediterranean Sea in September 2015. Following this account, the factors that led to the crisis and the death toll will be discussed. Having discussed the start of the irregular migration problem, a discussion of more recent incidents will be made to show that this is still a problem today. A statistical analysis will be undertaken to prove that there are risks associated with irregular migration and these risks have resulted in significant loss of life.

A discussion of all the safety and security risks faced on the journey across the Mediterranean Sea will then be done. The security risks that will be discussed are: abuse and exploitation by smugglers and state officials, human trafficking, sexual and gender-based violence, being detained, tortured, and lastly being subjected to cruel, inhuman and degrading treatment. The safety risks that will be discussed are: ocean perils, unseaworthy and overcrowded vessels, safety of life, interception operations, ‘refoulement’ or being ‘pushed back’, rescue operations, and lastly disembarkation in a place of safety once rescued. Another account of an irregular migrant will be discussed to sum up the deadly risks involved in irregular migration.

Having discussed all the safety and security risks associated with irregular migration across the Mediterranean Sea, Chapter 3 will examine the international legal framework that is in place

to protect irregular migrants from all these risks. Security risks such as migrant smuggling and human trafficking will be discussed and defined using international law conventions and protocols, along with international human rights law and international refugee law. Various maritime treaties will be identified as the main sources of protection from the safety risks faced by irregular migrants, together with international refugee law and the principle of ‘non-refoulement’. Each safety and security risk will be linked to a law or laws and the wording of the law will be discussed and elaborated on. This will show the protection available to irregular migrants.

Chapter 4 is linked directly to Chapter 3, as it exposes the gaps and shortcomings in the international legal framework. The chapter will begin by looking at each safety and security risk and the gaps and shortcomings in the international legal framework that deals with these risks. The gaps and shortcomings will be discussed in detail to show that irregular migrants are not adequately protected by the safety and security regulatory measures in place.

Apart from the gaps and shortcomings in the legal framework, the chapter briefly discusses that irregular migrants are viewed in a negative light and this has resulted in lack of protection and remedies that are available to them. States view irregular migrants as a threat to their border security and thus tend to interdict irregular migrants at sea and return them to third countries or back to where they came from. This is known as ‘refoulement’ and is a major problem that opens irregular migrants up to various risks, including death. Thus, States offer scant protection and remedies to irregular migrants by failing to incorporate and implement existing legal standards and protections.

Chapter 5 will conclude by providing an overview of the preceding chapters and summing up the findings of the entire dissertation. The findings will then be used to provide recommendations on how to address the protection gaps and shortcomings in the legal framework and protect irregular migrants at sea.

1.5 Background and History

The Mediterranean Sea has always been the epicentre of migration from several countries including North Africa and Libya. Historically, sea-borne travel was known for the risks that were attributed to it and as a result, was undertaken only as a necessity.¹ Today, due to conflict in countries, such as Syria, travelling by sea to Europe is almost always the only means of escape for millions of refugees and migrants. However, these voyages come with its share of risks and unfortunately for migrants, quite often end in death. To paint this picture, in March 2014, a group of Syrians attempted to flee conflict by heading to Greece.² Of the fifteen on board the tiny fibreglass vessel to Greece, one was a little girl, barely just four years old.³ However, not long after departure, the vessel took on stormy seas and rapidly began to sink.⁴ Around eight people on board drowned as a result, one of whom was the little girl.⁵

Map of the Mediterranean Sea and Bordering Countries



Source: <http://www.yourchildlearns.com/online-atlas/mediterranean-map.htm>

¹ D Wagner 'A Push to the Sea: A Global Analysis of Immigration by the Sea: A United States Coast Guard Policy Expansion in Preparation for an Influx of Migrants Via the Sea' (2015) 14(2) *Loyola Maritime Law Journal* 304.

² Wagner at 303. See also H Smith 'Seven Syrian Migrants Drown off of Greek Coast' *The Guardian* 19 March 2014, available at <http://www.theguardian.com/world/2014/mar/18/syrian-migrantsdrown-greece>, accessed on 20 August 2018.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

Images of ghastly deaths along the Mediterranean Sea route, like the little girl, expose the risks of irregular migration and leaves us all with an unbearable feeling of despair.⁶ ‘Irregular migration’ at sea, also known as ‘boat migration’, is not new.⁷ ‘Boat migration’ has a long history, starting with the Vietnamese ‘boat people’ around the 1970s, Cubans and Haitians along the Caribbean Sea since the 1980s and Albanians travelling via the Adriatic Sea in the 1990s.⁸ Following this, there was also a series of movements in the 2000s, that included Sub-Saharan Africans passing along the Strait of Sicily, Iraqis passing through the Aegean Sea and of course, the fairly recent migration of Syrians attempting to cross the Mediterranean Sea.⁹

1.6 Definition of ‘Irregular Migration’

Various definitions of the term ‘irregular migration’ exist throughout the world. I will first discuss the United Nations definition of ‘migrant’ before examining a few of the definitions of ‘irregular migration’ that exist in some of the countries surrounding the Mediterranean Sea. Before the term ‘irregular migrant’ is discussed, the term ‘migrant’ itself should be made clear. ‘Migrant’ is defined by the United Nations as “an individual who has resided in a foreign country for more than one year irrespective of the causes, voluntary or involuntary, and the means, regular or irregular, used to migrate”.¹⁰ This definition encompasses refugees, asylum-seekers and economic migrants.¹¹ Each of these will be defined below, after having examined various definitions of ‘irregular migration’.

In Germany, irregular migration is defined as “unlawful entry” and irregular migrants as foreigners no longer “possessing a necessary residence title and a right of residence” and are therefore “required to leave the territory”.¹² The Netherlands legally defines irregular migration as “the presence in the Netherlands of foreign nationals who are not in possession of a valid residence permit and are therefore obliged to leave the country”.¹³ French legislators define irregular migration as “penetrating or working without conforming with the law” and “staying

⁶ G Sanchez ‘Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research’ (2017) 5(1) *Journal on Migration & Human Security* 9.

⁷ V Moreno-Lax *The Interdiction of Asylum Seekers at Sea: Law and (mal)practice in Europe and Australia* Policy Brief 4 (2017) 1.

⁸ Moreno-Lax (2017) at 2.

⁹ *Ibid.*

¹⁰ V Metcalfe-Hough *The migration crisis? Facts, challenges and possible solutions* (2015) 3, available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9913.pdf>, accessed on 1 December 2018.

¹¹ *Ibid.*

¹² F Düvell ‘Paths into Irregularity: The Legal and Political Construction of Irregular Migration’ (2011) 13 *European Journal of Migration & Law* 279.

¹³ *Ibid.*

on the territory of France for a duration not authorized by a visa”.¹⁴ Italy, similarly to France, defines irregular migration as “foreigners in an irregular position”.¹⁵ Thus, there is no unanimous definition of ‘unlawful’, ‘irregular’, ‘illegal’ or ‘clandestine’ migration, instead, every EU state has its very own legislation and varying definition therein.¹⁶

While the former part of the difficulty is related to the definition of irregular migration, which often differs by country, the latter part lies in the wide-ranging nature of an ‘irregular’ status.¹⁷ This latter part can result, for instance, from people entering countries undetected via smuggling as well as from minor administrative issues that essentially render a person irregular.¹⁸ Thus, ‘irregular migration’ is often based on a mix of references to the crossing of borders illegally, no residence permits, irregular stay, no work permits, obligations to leave the country or violations of removal orders from the country.¹⁹ Definitions also tend to either conflate entry with stay, such as in Austria and the United Kingdom, or to conflate regular with irregular migrants, as in Germany and the Netherlands.²⁰ Consequently, irregular migration includes a range of people who are in an irregular situation for different reasons, and people can also shift from being regular to irregular, or vice versa.²¹

McAuliffe and Mence state that ‘irregular migrants’ can be separated into five different categories: (i) migrants who illegally entered a country by either presenting false papers or physically evading formal immigration control; (ii) migrants who legally entered a country for a time period which has expired, did not renew their permission to stay, and are therefore unlawful overstayers; (iii) migrants who are lawfully entitled to stay in a country but are in breach of some visa condition, for example, working more hours than their status permits; (iv) asylum seekers who legally entered the country to claim refugee status, but remain despite a final decision refusing them the right to remain; and lastly (v) children born in a country to these ‘irregular migrants’, who also lack a right to remain although they are not themselves migrants.²² For the purposes of this study, however, ‘irregular migrant’ will refer only to (i).

¹⁴ F Düvell (2011) at 279-280.

¹⁵ F Düvell (2011) at 282.

¹⁶ F Düvell (2011) at 285.

¹⁷ M McAuliffe & V Mence ‘Irregular maritime migration as a global phenomenon’ in M McAuliffe & K Koser *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-making* (2017) 21.

¹⁸ *Ibid.*

¹⁹ F Düvell (2011) at 286.

²⁰ *Ibid.*

²¹ M McAuliffe & V Mence (2017) 20.

²² M McAuliffe & V Mence (2017) 21.

Having discussed irregular migration, it is important to now discuss and differentiate between refugees, asylum-seekers and economic migrants. A refugee is defined as a person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, or membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.²³ An asylum-seeker is defined as “a person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status under relevant international and national instruments”.²⁴ In the case of an adverse decision, the person may be expelled from the country, unless they are granted permission to stay on humanitarian or other related grounds.²⁵ Last, those people that are not forced to escape their country because of persecution, but rather choose to leave for the economic benefits in the destination country, such as better job prospects, would be labelled as economic migrants.²⁶

There is a growing trend towards what is now known as “mixed migration flows”, when refugees are travelling amongst population flows that consist of both “forced” and “voluntary” movements.²⁷ Forced movements refer to refugees and asylum-seekers who are forced to migrate due to persecution in their countries, whilst voluntary movements refer to economic migrants that leave their home countries voluntarily, to seek better opportunities and escape poverty. The focus in this study will be on refugees and asylum-seekers who are forced to migrate due to their circumstances.

²³ Article 1A(2) of the *1951 Convention Relating to the Status of Refugees*, opened for signature on 28 July 1951, 189 U.N.T.S. 137.

²⁴ V Metcalfe-Hough *The migration crisis? Facts, challenges and possible solutions* (2015) 3, available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9913.pdf>, accessed on 1 December 2018.

²⁵ *Ibid.*

²⁶ Wagner at 305-306.

²⁷ B Miltner ‘Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception’ (2006) 30 *Fordham International Law Journal* 75.

CHAPTER TWO:
IRREGULAR MIGRATION BY SEA

2.1 Introduction

In Chapter One, a background and history of migration at sea was provided. Following this, the reasons for the focus on the Mediterranean Sea region and the temporal scope of this dissertation were elaborated on. ‘Irregular migration’ and the term ‘irregular migrant’ were then discussed, narrowing the scope of the research in this dissertation further. Having provided a background into irregular migration, this chapter will begin by examining the ‘Mediterranean Migration Crisis’ of 2015 and will then discuss recent incidents in the Mediterranean Sea. A discussion of what these incidents reveal will take place through an analysis of statistics and graphs. This chapter will then move on to the risks and threats faced by irregular migrants on the sea-leg of their voyage. The risks will be analysed in terms of security risks and safety risks faced by irregular migrants. In conclusion, an assessment of what pertinent issues arise from these safety and security risks will be made.

2.2 The ‘Mediterranean Migration Crisis’ of 2015

On the day of his death, 3-year-old Aylan Kurdi wore sneakers and a red shirt with blue shorts.²⁸ Father, Abdullah and mother, Rihanna, along with their children Aylan, three and Galip, five, boarded a dinghy from Turkey in order to escape conflict.²⁹ The Kurdi family paid a significant sum of 4 000 Euros because the smugglers had promised a yacht for the trip from Turkey to Greece, however, showed up with a 15-foot rubber dinghy.³⁰ Abdullah was aware of people who had died on similar journeys across the Mediterranean Sea and was cautious.³¹ On

²⁸ S B Ray ‘Saving Lives’ (2017) 58 *Boston College Law Review* 1227. Note: “Aylan” has also been spelt as “Alan” in some sources, however, the spelling “Aylan” was chosen here because it is closest to the pronunciation of the name in its original language. Similarly, the names of Galip, Rihanna and Abdullah differ in spelling in different newspaper articles.

²⁹ *Ibid.* See also A Barnard ‘Remembering Alan Kurdi: Syrian Family’s Tragedy Goes Beyond Image of Boy on Beach’ *New York Times* 27 December 2015, available at <https://www.nytimes.com/2015/12/28/world/middleeast/syria-refugees-alan-aylan-kurdi.html?smid=pl-share>, accessed on 13 August 2018.

³⁰ A Barnard & K Shoumali ‘Image of Drowned Syrian, Aylan Kurdi, 3, Brings Migrant Crisis Into Focus’ *New York Times* 3 September 2015, available at <https://www.nytimes.com/2015/09/04/world/europe/syria-boy-drowning.html>, accessed on 13 August 2018.

³¹ S B Ray (2017) at 1227.

2 September 2015, the Kurdi family set sail on what was known as one of the “safest” routes through the Mediterranean Sea, sadly, only Abdullah survived the journey.³²

Abdullah Kurdi used to be a humble barber from Syria.³³ However, life in Syria proved impossible when the family increasingly found themselves being persecuted as a result of the war.³⁴ The family decided to escape the conflict by relocating several times, to Kobani and then Turkey, but life in those countries also proved too dangerous.³⁵ Eventually, Abdullah came up with a plan to join his sister and her family in Canada.³⁶ His plan was to borrow money to pay for a boat from Bodrum, Turkey to Greece, where once him and his family received refugee status, they could travel to Canada.³⁷ However, when the family set off for Greece, the sea was too rough for the dinghy, realising this the smuggler decided to abandon the boat.³⁸ Despite Abdullah’s efforts to man the dinghy, the waves proved too wild, capsizing the boat, and his family along with it.³⁹ The family tried to hold on to Abdullah, who clung to the boat, begging his sons not to let go of him; but despite his arduous efforts, the sea claimed the lives of his wife and then his sons, one by one.⁴⁰ The next day, Aylan's body was found on a Turkish beach, his cheek lay on the sand as if he were sleeping, except for the waves washing over him.⁴¹ He was still wearing his red shirt, blue shorts and sneakers.⁴²

The image of little lifeless Aylan Kurdi made headlines the world over, alerting the world to a crisis that had been advancing for years.⁴³ In the end it was not the magnitude of people forced to abandon everything they ever knew, but this single tragedy that clarified it all.⁴⁴ However, by the time Aylan’s story was told, more than 300 000 irregular migrants had already risked

³² S B Ray (2017) at 1227. *See also* G Rayner ‘Aylan and Galip Kurdi: Everything we know about drowned Syrian refugee boys’ *The Telegraph* 3 September 2015, available at <https://www.telegraph.co.uk/news/worldnews/europe/11841802/eu-migrant-crisis-refugee-boys-aylan-galip-kurdi.html>, accessed on 13 August 2018.

³³ S B Ray (2017) at 1227.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.* *See also* Y Steinbuch ‘Photo of drowned toddler causes outcry over migrant crisis’ *New York Post* 2 September 2015, available at <https://nypost.com/2015/09/02/photo-of-drowned-toddler-causes-outcry-over-migrant-crisis/>, accessed on 13 August 2018.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ S B Ray (2017) at 1227-1228.

⁴¹ A Barnard & K Shoumali at 1.

⁴² S B Ray (2017) at 1228.

⁴³ A Barnard & K Shoumali at 1.

⁴⁴ *Ibid.*

their lives trying to reach Europe since the start of 2015 alone, and over 2 600 had perished in the attempt.⁴⁵ Manderson aptly remarks that:

‘We are invited to feel a shudder of sublime horror at this fate, but we are never brought close enough to see faces, or engage with individual stories. This specificity might change our relationship to these images, and more to the point we might be brought from a generalised pity of the circumstances of these refugees, to anger at the injustice of our own policies. While barbed wire enclosures, like the open ocean, are treated as the law of nature, and asylum seekers as something like wild animals at the mercy of those laws, what we are really invited to experience is our own feelings and our own moral virtue.’⁴⁶

As the above quote suggests, by reading about Abdullah Kurdi and his family, and looking at the image of little Aylan’s lifeless body; it is an illustration of the risks of irregular migration and also illustrates the gaps in our laws and policies. Although parents can be criticised for putting their children in boats, poet Warsan Shire aptly acknowledges that “no one puts their children in a boat unless the boat is safer than the land”.⁴⁷ In an interview responding to Aylan’s death, Nicola Sturgeon, the first minister of Scotland soberly stated: “his is not an isolated tragedy. He and thousands like him whose lives are at risk is not somebody else’s responsibility; they are the responsibility of all of us.”⁴⁸ From the quotes above and the account of Abdullah Kurdi, there is a need for effective policies and laws that deal with irregular migrants and offer better protection to them so that more incidents like Abdullah’s can be prevented.

While irregular migrants have been dying in the Mediterranean Sea since the 1990’s, border deaths were only labelled a ‘crisis’ in 2015, when there was an unprecedented increase in the

⁴⁵ W Spindler ‘2015: The year of Europe's refugee crisis’ *UNHCR: The UN Refugee Agency* 8 December 2015, available at <http://www.unhcr.org/afr/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html?query=the%20mediterranean%20migration%252%E2%80%A6>, accessed on 20 August 2018.

⁴⁶ D Manderson ‘Not Drowning, Waving: Images, History, and the Representation of Asylum Seekers’ in M Dickie, D Gozdecka, & S Reich (Eds) *Unintended Consequences: The impact of migration law and policy* (2016) 163-164, available at <http://www.jstor.org/stable/j.ctt1rqc9ds.10>, accessed on 13 August 2018.

⁴⁷ J Jeandesboza & P Pallister-Wilkins ‘Crisis, Routine, Consolidation: The Politics of the Mediterranean Migration Crisis’ 2016 *Mediterranean Politics* 1.

⁴⁸ I Tharoor ‘Death of drowned Syrian toddler Aylan Kurdi jolts world leaders’ *The Washington Post* 3 September 2015, available at https://www.washingtonpost.com/news/worldviews/wp/2015/09/03/image-of-drowned-syrian-toddler-aylan-kurdi-jolts-world-leaders/?noredirect=on&utm_term=.6f1d8dd40916, accessed on 15 August 2018.

number of migrants crossing the Mediterranean Sea.⁴⁹ The fairly low migrant mortality rate prior to 1990 may be due to the fact that it was much easier to reach Europe, even without any authorisation, through ‘regular’ paths.⁵⁰ Many countries began introducing carrier sanctions and stricter visa requirements which has led to a change in transportation for migrants from ‘regular’, for example airplanes, to ‘irregular’ transportation used today, such as rubber boats.⁵¹

In 2011, illegal border-crossings in the European Union began to spike when thousands of Tunisians arrived at the Italian island of Lampedusa, due to the onset of the ‘Arab Spring’.⁵² The Mediterranean migration ‘crisis’ is the culmination of the growing restriction of legal channels for regular migration due to Europe’s securitisation of borders and large-scale war in the Middle East, Syria and certain African countries, causing millions to leave their homes and desperately seek asylum in Europe.⁵³ Due to the recent increase in political upheaval and wars in Africa, the Middle East and South Asia, the surge of migrants attempting to flee conflict are largely Syrian, Afghan, and Eritrean.⁵⁴

Gruijters and Steinhilper argue that Europe’s strategy of securitisation and shutting of its borders is the key factor in the increase in border deaths, as migrants are forced to undertake clandestine journeys across the Mediterranean Sea, due to the lack of legal and safe paths.⁵⁵ The rise in irregular migration across the Mediterranean Sea, often in extremely overcrowded boats or dinghies, has inevitably led to a substantial increase in the loss of life.⁵⁶ To illustrate this point, an incident occurred on 18 April 2015 in Libyan waters, around 180 kilometres from Italy’s Lampedusa Island, where more than 600 migrants drowned in the Mediterranean Sea when their boat overturned and eventually sank.⁵⁷ A subsequent Maltese and Italian rescue

⁴⁹ R J Gruijters & E Steinhilper ‘A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranean’ (2018) 52(3) *Sociology* 516.

⁵⁰ T Brian & F Laczko *Fatal Journeys: Tracking Lives Lost during Migration* (2014) 88.

⁵¹ *Ibid.*

⁵² J Park ‘Europe’s Migration Crisis’ *Council on Foreign Relations* 23 September 2015, available at <https://www.cfr.org/background/europes-migration-crisis>, accessed on 18 August 2018.

⁵³ J Freedman ‘Engendering Security at the Borders of Europe: Women Migrants and the Mediterranean ‘Crisis’’ (2016) 29(4) *Journal of Refugee Studies* 570.

⁵⁴ J Park ‘Europe’s Migration Crisis’ *Council on Foreign Relations* 23 September 2015, available at <https://www.cfr.org/background/europes-migration-crisis>, accessed on 18 August 2018.

⁵⁵ R J Gruijters & E Steinhilper (2018) at 517-518.

⁵⁶ M Berry, I Garcia-Blanco and K Moore *Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries* (2016) 3, available at <http://www.unhcr.org/protection/operations/56bb369c9/press-coverage-refugee-migrant-crisis-eu-content-analysis-five-european.html>, accessed on 17 August 2018.

⁵⁷ W Spindler ‘2015: The year of Europe’s refugee crisis’ *UNHCR: The UN Refugee Agency* 8 December 2015, available at <http://www.unhcr.org/afr/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html?query=the%20mediterranean%20migration%252%E2%80%A6>, accessed on 20 August 2018.

operation only managed to save around 50 of the estimated 700 people on board.⁵⁸ Thus, the public's perception of a serious humanitarian crisis was strengthened by a number of large-scale deaths in the Mediterranean Sea in 2015.⁵⁹

2.3 The Mediterranean Sea Today

Irregular migration across the Mediterranean Sea has been an on-going problem for the European Union, one that is apparent in newspaper headlines from 2015 to date. A recent incident occurred on 31 March 2018 when the Italian Rescue Maritime Coordination Centre (IMRCC) alerted the Libyan Coast guard and a search and rescue ship named the *Aquarius*, that a dinghy had cited distress in the high seas.⁶⁰ The *Aquarius* was operated by a technical crew, medical staff from Doctors Without Borders (known by its French acronym MSF), a nautical crew and rescue workers from the *SOS Mediteranee*.⁶¹ 629 people were rescued from the Mediterranean Sea by the *Aquarius*, however, upon arriving in Italy, it was forced to wait at port, having been denied the right to berth by Italy and then Malta.⁶² Matteo Salvini, leader of the far-right League and the new interior minister, announced the decision to deny the ship disembarkation in Italy, after his demand that Malta take in the ship instead, was turned down.⁶³ Mr Salvini stated: "From today even Italy is starting to say NO to human trafficking, NO to the business of illegal immigration. My goal is to ensure a serene life for these kids in Africa and our children in Italy".⁶⁴

Over 500 of the 629 migrants were transferred to two of Italy's navy and coastguard boats.⁶⁵ Inclusive of the 629 people, were eleven children, 123 unaccompanied minors and seven

⁵⁸ W Spindler '2015: The year of Europe's refugee crisis' *UNHCR: The UN Refugee Agency* 8 December 2015, available at <http://www.unhcr.org/afr/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html?query=the%20mediterranean%20migration%252%E2%80%A6>, accessed on 20 August 2018.

⁵⁹ R J Gruijters & E Steinhilper (2018) at 516.

⁶⁰ 'Aquarius: Migrant rescue ship returns to Libyan coast' *DW* 1 August 2018, available at <https://www.dw.com/en/aquarius-migrant-rescue-ship-returns-to-libyan-coast/a-44904769>, accessed on 20 August 2018.

⁶¹ *Ibid.*

⁶² 'Five things to know about the Aquarius refugee ship' *Al Jazeera* 13 June 2018, available at <https://www.aljazeera.com/news/2018/06/aquarius-refugee-ship-180613132710742.html>, accessed on 17 August 2018.

⁶³ J Politi 'Italy refuses port access to migrant rescue boat' *Financial Times* 11 June 2018, available at <https://www.ft.com/content/7c6b73a4-6cfe-11e8-92d3-6c13e5c92914>, accessed on 17 August 2018.

⁶⁴ 'Five things to know about the Aquarius refugee ship' *Al Jazeera* 13 June 2018, available at <https://www.aljazeera.com/news/2018/06/aquarius-refugee-ship-180613132710742.html>, accessed on 17 August 2018.

⁶⁵ *Ibid.*

pregnant women.⁶⁶ Those on board were mostly sub-Saharan Africans who had departed from Libya and were found in six different rescue operations around the Libyan coast; this was inclusive of hundreds who were rescued from drowning by the Italian navy and then moved onto the *Aquarius*.⁶⁷ After it was denied the right to port by Italy and then Malta, the *Aquarius* was then forced to undertake a 1 500 kilometre or 810 nautical mile voyage to reach Spain.⁶⁸ The ship was forced to head to Spain because it was offered safe harbour in the port of Valencia, despite apprehensive MSF officials, who stated that: “disembarking at the closest port was preferable to a journey of an extra four days”.⁶⁹

Apart from the *Aquarius*, in June 2018 Italy’s new interior minister Matteo Salvini also turned away Germany’s vessel *Lifeline*, which had around 234 migrants on board.⁷⁰ Salvini has now blocked all search and rescue and charity-run vessels from docking in Italy.⁷¹ Additionally, Italy has handed over responsibility to Libyan coast guard forces to intercept and rescue Libyan migrants found in the Mediterranean Sea and return them to Libya.⁷² Sadly, the International Maritime Organization (IMO), a United Nations agency, acknowledged Libya’s announcement of its vast search and rescue (SAR) area.⁷³ Italy also has the support of EU heads of state for transferring responsibility of SAR operations to Libyan coast guard forces, even in international waters, despite the limited capacity of these forces and the well-known fate of those who are returned to Libya.⁷⁴ Sunderland commented that the EU’s actions of blocking rescues and indecisiveness on where those rescued should disembark, driven by Italy’s draconian approach to migrants, is leading to an increase in deaths and further suffering in Libya.⁷⁵ In responding to the Mediterranean Migration Crisis, the Director General of the

⁶⁶ ‘Five things to know about the Aquarius refugee ship’ *Al Jazeera* 13 June 2018, available at <https://www.aljazeera.com/news/2018/06/aquarius-refugee-ship-180613132710742.html>, accessed on 17 August 2018.

⁶⁷ *Ibid.*

⁶⁸ ‘Aquarius: Migrant rescue ship returns to Libyan coast’ *DW* 1 August 2018, available at <https://www.dw.com/en/aquarius-migrant-rescue-ship-returns-to-libyan-coast/a-44904769>, accessed on 20 August 2018.

⁶⁹ ‘Five things to know about the Aquarius refugee ship’ *Al Jazeera* 13 June 2018, available at <https://www.aljazeera.com/news/2018/06/aquarius-refugee-ship-180613132710742.html>, accessed on 17 August 2018.

⁷⁰ ‘Aquarius: Migrant rescue ship returns to Libyan coast’ *DW* 1 August 2018, available at <https://www.dw.com/en/aquarius-migrant-rescue-ship-returns-to-libyan-coast/a-44904769>, accessed on 20 August 2018.

⁷¹ *Ibid.*

⁷² ‘EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk’ *Human Rights Watch* 25 July 2018, available at <https://www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk>, accessed on 16 August 2018.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* Note: This statement was made by Judith Sunderland, associate Europe and Central Asia director at Human Rights Watch. She went on to say that: “Instead of discouraging rescues by nongovernmental organizations,

International Organisation for Migration pointed out that: “the time is now, and we are already late.”⁷⁶

2.4 Migrant Deaths in the Mediterranean Sea: A Statistical Analysis

It is significant to discuss the number of people whose attempts to cross the Mediterranean Sea have ended in death.⁷⁷ First, this information allows for an examination of the amount of migrant deaths in the Mediterranean Sea and second, migrant statistics regarding the place and cause of death helps to determine the factors that contribute to these deaths and thus aids the prevention of further deaths through apt legal and policy changes.⁷⁸ Note, however, that these are mere estimates of migrant deaths and as such, they consist of only those incidents that are widely reported.⁷⁹ The fact that the bulk of deaths happen in isolated areas and many of these are unknown or not reported, means that the resultant figures tend to underestimate the extent of migrant fatalities.⁸⁰ With that said, to calculate the risks involved in migration, the estimated number of people who have attempted crossing the Mediterranean Sea together with the estimated number of deaths, need to be examined.⁸¹

The statistics and graphs that follow will be presented in chronological order, ranging from 2014-2016, to pin-point the spike in deaths and attempted crossings. Following this discussion, the most recent statistics from 2017 to date will be presented in comparison, to prove that the number of attempted crossings and migrant deaths remain high today. Before looking at the statistics, however, it should be noted that there are three main routes via the Mediterranean

commercial vessels, and even military ships, EU member states and institutions should ensure that rescued people can be taken to safe ports where their protection needs can be met.” Human Rights Watch visited Libya in July 2018 and interviewed Libyan coast guard forces, a few officials from international organizations and a number of detained migrants and refugees in four different detention centres in the cities of Zuwara, Tripoli and Misrata. The detainees interviewed alleged serious abuse by Libyan guards and smugglers. A few also alleged hostile behaviour by coast guard forces during their rescues at sea. Human Rights Watch stated that “Libyan coast guard forces lack the capacity to ensure safe and effective search-and-rescue operations.”

⁷⁶ T Brian & F Laczko (2014) at 6.

⁷⁷ T Brian & F Laczko (2014) at 85.

⁷⁸ *Ibid.*

⁷⁹ T Brian & F Laczko (2014) at 19. He states: “A comprehensive source is *The Migrants Files* which is managed by a consortium of European media outlets. With the publication of the first volume of the *Fatal Journeys* report the International Organization of Migration (IOM) started to draw attention to migrant deaths worldwide, including the Mediterranean. The organization has since provided updated information on the *Missing Migrants Project* (MMP) homepage <http://missingmigrants.iom.int/>. The MMP is no longer based on media reports alone; in addition to media coverage, the IOM receives data from various organizations that receive survivors at landing points along the Mediterranean coast, as well as from national authorities such as coast guards and medical examiners. A team of researchers at the VU University Amsterdam has compiled the ‘Deaths at the Borders Database’ www.borderdeaths.org covering migrant deaths from 1990-2013. This database has a somewhat different focus since it is derived from death certificates, and thus records confirmed deaths only.”

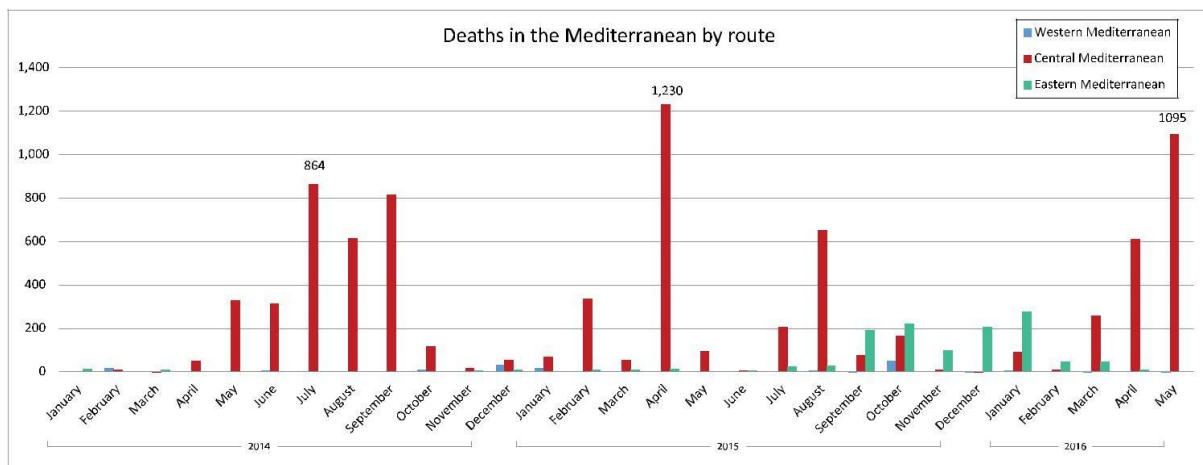
⁸⁰ *Ibid.*

⁸¹ R J Gruijters & E Steinhilper (2018) at 523.

Sea. The Central route is from certain North African countries such as Libya towards Malta and Italy, the Western route is from North-West Africa to Spain, and the Eastern route is from Turkey to Greece.⁸²

The deadliest route, the Central Mediterranean route, shows that in 2014 the ratio of migrant deaths to crossings was 1 in 50 and this ratio decreased slightly to 1 in 53 for 2015.⁸³ However, from January 2016, 1 in every 23 migrants had died attempting the voyage across the Central Mediterranean, clearly showing a significant increase in the death toll.⁸⁴ The ratio of deaths per attempted crossing in 2016 was more than double 2015, from 0.18% of crossings in 2015 to 0.43% in 2016.⁸⁵ The ratio of deaths per attempted crossings deteriorated further in April and May 2016 when 1 person died for every 17 attempted crossings.⁸⁶ Figure 1 below shows the monthly disappearances and deaths on each Mediterranean route. It is evident that the death rate in the Central Mediterranean route occurs at excessively high levels to the number of people who were attempting the crossing, especially in comparison to other routes.⁸⁷

Figure 1: Migrant deaths in the Mediterranean by route, January 2014 –May 2016⁸⁸



Source: Global Migration Data Analysis Centre (GMDAC): Data Briefing Series

⁸² R J Gruijters & E Steinhilper (2018) at 8.

⁸³ J Black, A Singleton & A Malakooti ‘The Central Mediterranean route: Deadlier than ever’ (2016) Issue No. 3 *Global Migration Data Analysis Centre: Data Briefing Series* at 1, available at https://publications.iom.int/system/files/pdf/gmdac_data_briefing_series_issue3.pdf, accessed on 16 August 2018. Note: Irregular migrants tend to land in coastal states, such as Italy first, and then move interior. This explains the influx of migrants in Italy.

⁸⁴ *Ibid.*

⁸⁵ J Black, A Singleton & A Malakooti ‘The Central Mediterranean route: Deadlier than ever’ (2016) Issue No. 3 *Global Migration Data Analysis Centre: Data Briefing Series* at 2, available at https://publications.iom.int/system/files/pdf/gmdac_data_briefing_series_issue3.pdf, accessed on 16 August 2018.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

In the Mediterranean Sea from 2014 to May 2016, 9 492 individuals were estimated dead or missing.⁸⁹ Within these overall figures, over 20 incidents, occurring along the Central Mediterranean route, gave rise to more than 100 deaths each, which totalled 6 406 people.⁹⁰ Overloading of vessels are predicted to be the main contributory factor to the deaths, even more so than rough seas, with large shipwrecks claiming more than half of the lives in the Mediterranean Sea.⁹¹ The increase in numbers and in the ratio of deaths to attempted crossings on the central route are accompanied by a recent increase in migrant arrivals.⁹² Figures that arrived using the Central Mediterranean route dropped to 153 842 in 2015, whereas 847 930 people were estimated to have used the Eastern Mediterranean route to arrive in Greece.⁹³ However, geographic factors and different routes do not provide an explanation for the variations in the risk of crossing over the years.⁹⁴ Although this variation in risk may be partially due to random fluctuation, smugglers are also likely to be a factor; for instance, it is believed that the increased death toll in 2016 along the Central Mediterranean was interlinked with the rise of a militia-led smuggling syndicate in Libya, that cruelly disregarded the safety of migrants when carrying out their operations and strategies.⁹⁵

Thus, migration has become riskier and resulted in drastic loss of life since 2014. This, however, must be examined in comparison to the most recent Mediterranean Sea statistics. Between the start of January and end of June 2018, over 48 300 migrants and refugees departed from Turkey and North Africa and crossed the Mediterranean Sea.⁹⁶ 25% of those who arrived in 2018 were children, 59% men and 16% women.⁹⁷ It is estimated that nearly 1 288 people have died between January and June 2018 as a result of the risks associated with crossing the Mediterranean Sea mentioned above, however, this is in contrast with 2 300 deaths in the same period in 2017.⁹⁸ June 2018 registered the worst fatalities for those crossing the Central Mediterranean, with around 564 people estimated dead at sea, which is 1 death for every 7

⁸⁹ J Black, A Singleton & A Malakooti 'The Central Mediterranean route: Deadlier than ever' (2016) Issue No. 3 *Global Migration Data Analysis Centre: Data Briefing Series* at 2, available at https://publications.iom.int/system/files/pdf/gmdac_data_briefing_series_issue3.pdf, accessed on 16 August 2018.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ RJ Gruijters & E Steinhilper (2018) at 527.

⁹⁵ *Ibid.*

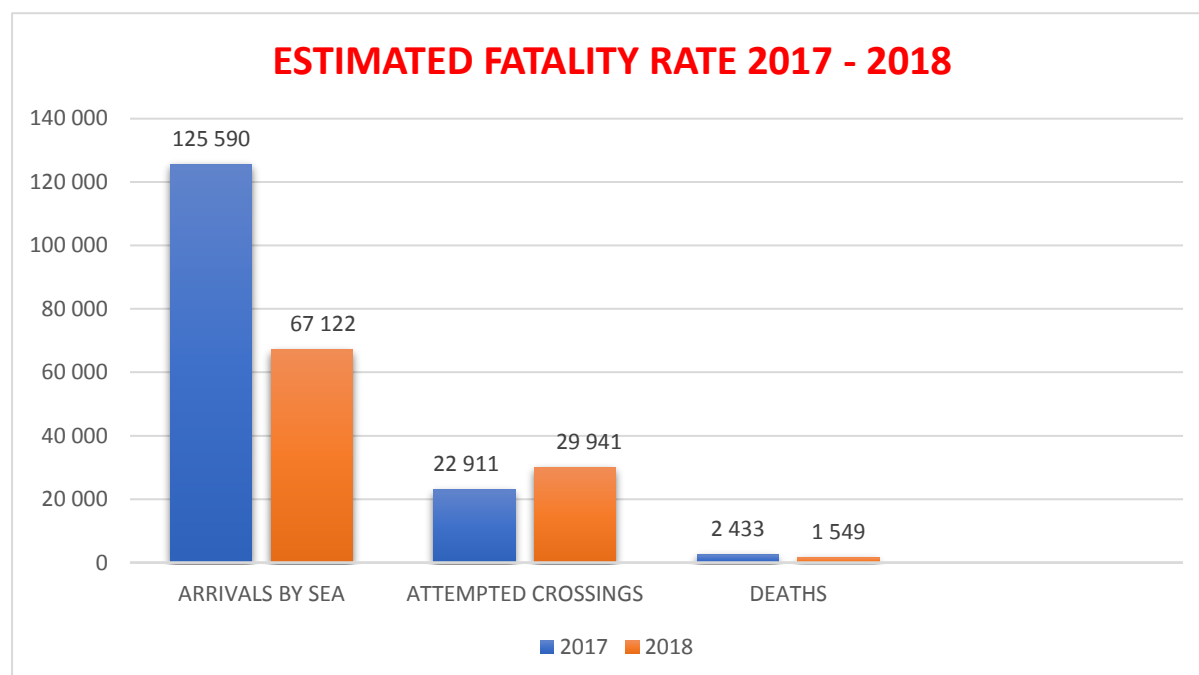
⁹⁶ 'Refugees & Migrants arrivals to Europe in 2018 (Mediterranean)' *United Nations High Commissioner for Refugees (UNHCR)* available at <https://data2.unhcr.org/en/documents/details/64891>, accessed on 20 August 2018.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

people.⁹⁹ 73% of deaths took place along the Central Mediterranean route from North Africa to Italy, however, the 302 deaths that occurred along the Western route is far higher in comparison to the 57 deaths in the same period in 2017.¹⁰⁰ Figure 2 below shows the estimated fatality rate in the Mediterranean Sea, with 1.6% in 2017 and 1.5% in 2018. This demonstrates that migration is still an on-going problem leading to dire loss of life at sea today.

Figure 2: Recorded migrant arrivals, crossings and deaths in the Mediterranean – January 2017 - August 2018¹⁰¹



Source: Missing Migrants Project

Statistics also show that although in the past, most irregular migrants were men, whereas today many women and children are making these perilous journeys.¹⁰² Although the EU have acknowledged the risks associated with women migrating and have called for increased action to prevent violence against women, recent migration and asylum strategies are forcing them into irregular migration, wherein they are at greater risk.¹⁰³ Freedman has also highlighted the difficulties and impediments associated with women migrating, such as responsibility for their children, scarce economic resources, restrictions within their country and other countries on

⁹⁹ ‘Europe Monthly Report’ *United Nations High Commissioner for Refugees (UNHCR)* 7 August 2018, available at <https://data2.unhcr.org/en/documents/download/65078>, accessed on 24 August 2018.

¹⁰⁰ *Ibid.*

¹⁰¹ ‘Mediterranean Update: Migration Flows Europe: Arrivals and Fatalities’ *IOM: Missing Migrants Project* available at <https://missingmigrants.iom.int/mediterranean-update>, accessed on 27 August 2018.

¹⁰² J Freedman (2016) at 568-569.

¹⁰³ J Freedman (2016) at 569.

women travelling alone, and uncertainties regarding violence on the journey.¹⁰⁴ The increase in female migrants who are risking the voyage across the Mediterranean to reach Europe could be attributable to the worsening circumstances in Syria, and for Syrian refugees in Turkey, accompanied by the harsh realisation that the conflict is unlikely to end soon.¹⁰⁵ Thus, it is clear that women do not migrate unless they have no other choice and do so as a last resort.¹⁰⁶ The fact that there is an increase in the number of female migrants aptly encapsulates the desperation that is at the root of irregular migration.

2.5 Risks Faced by Irregular Migrants in the Mediterranean Sea

The following account of Louay Khalid illustrates the deadly risks that irregular migrants face at sea. Having paid 1 300 Libyan dinars to be smuggled to Europe, Louay Khalid was eventually crammed onto a heavily overloaded vessel with around 500 other migrants, some of whom were steering it.¹⁰⁷ There were people stuffed into every space on the boat, including the engine room and on the mast.¹⁰⁸ Before long, the vessel was approached by police circling around and demanding the vessel stop its voyage, however, the vessel did not cease; shots were then fired and police started to “round” the vessel, tossing ropes to jam the engine fan in an attempt to stop the boat.¹⁰⁹ Parents were now holding their children close and others on board were crying and panicking, but the gunfire sustained until the cabin gave way; during this chaos, two of the pregnant women gave birth.¹¹⁰

The next day, after a four hour wait, an airplane arrived following one of the migrant’s distress call to the Red Cross.¹¹¹ However, the passengers all shifted to one side of the boat in a

¹⁰⁴ J Freedman (2016) at 573-574.

¹⁰⁵ J Freedman (2016) at 574.

¹⁰⁶ *Ibid.*

¹⁰⁷ T Brian & F Laczko (2014) 107. *See also* D Lindsay ‘11 October 2013 migrant tragedy: Italians navy officers placed under investigation’ *The Independent* 23 October 2013, available at <http://www.independent.com.mt/articles/2016-10-23/local-news/11-October-2013-migrant-tragedy-Italians-navy-officers-placed-under-investigation-6736165560>, accessed on 25 August 2018. *See also* L Davies ‘At least two dozen killed after boat capsizes near Lampedusa’ *The Guardian* 11 October 2013, available at <https://www.theguardian.com/world/2013/oct/11/two-dozen-killed-boat-capsizes-lampedusa>, accessed on 25 August 2018.

¹⁰⁸ *Ibid.* *See also* ‘IMO guidelines for the unwanted person onboard-Stowaway’ *Marine Insight* 19 April 2019, available at <https://www.marineinsight.com/maritime-law/imo-guidelines-for-the-unwanted-person-onboard-stowaway/>, accessed on 12 June 2019. Smuggling of migrants must be contrasted with stowaways. A stowaway is a person who illegally and secretly boards and hides in a ship, without the consent of ship owner and master, to travel into international waters to reach some other country without any monetary payment and legal documents.

¹⁰⁹ *Ibid.* *See also* K Stagno-Navarra ‘Migrant deaths as boat capsizes off Malta’ *Al-Jazeera* 12 October 2013, available at <https://www.aljazeera.com/news/europe/2013/10/migrant-boat-capsizes-near-italy-20131011164942554158.html>, accessed on 25 August 2018.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

desperate attempt to attract the plane's attention, and it capsized as a result.¹¹² Sadly, most of the passengers had already drowned when the plane circled back later with life buoys; Luckily, Louay had on a lifejacket which managed to save his life.¹¹³ At long last, two speedboats came to rescue the women and children and a helicopter was sent to hand out life jackets.¹¹⁴ The meagre forty survivors, were also given floats but were then forced to wait a further day and night to be taken to Malta.¹¹⁵

On 15 April 2015, around 400 migrants died after their vessel capsized and just five days later, a further 700 migrants drowned in a second capsizing in Libyan waters.¹¹⁶ These two devastating events lead to a swift European response to the Mediterranean crisis and within days, EU leaders called an emergency meeting of the European Council.¹¹⁷ The result was a series of commitments to reinforce the EU's response to the 'migration crisis'; the largest initiatives included creating new resettlement programs to reduce the strain on Italy and Greece's asylum processes and resources; immensely increasing the budgets for operations 'Triton' and 'Poseidon Sea'; and lastly initiating a military operation to "disrupt criminal smuggling networks" and "destroy smugglers' vessels".¹¹⁸ However, academics and human rights advocates criticized the Frontex and anti-smuggling operations for focusing on militarized border control measures, rather than on the humanitarian obligations to rescue those in distress and to identify those eligible for international protection.¹¹⁹

Thus, it is clear from the aforementioned that irregular migrants who attempt to cross the Mediterranean Sea face a plethora of risks.¹²⁰ Being intercepted by State authorities, such as

¹¹² T Brian & F Laczko (2014) 107. *See also* A Momigliano 'Italian forces ignored a sinking ship full of Syrian refugees and let more than 250 drown, says leaked audio' *The Washington Post* 9 May 2017, available at https://www.washingtonpost.com/news/worldviews/wp/2017/05/09/italian-forces-ignored-a-sinking-ship-full-of-syrian-refugees-and-let-more-than-250-drown-says-leaked-audio/?utm_term=.8fd37592fa2a, accessed on 25 August 2018. Momigliano states that until 2017, what was not known was that: "the refugees had alerted Italian authorities that they were in distress as early as five hours before their ship sank. Even though the refugees' ship called the Italian coast guard and warned that it was floating adrift, taking on water and had wounded children aboard, Italian authorities refused to intervene for several hours."

¹¹³ T Brian & F Laczko (2014) 107.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ B Miltner 'The Mediterranean Migration Crisis: A Clash of the Titans' Obligations' (2015) 22(1) *Brown Journal of World Affairs* 223.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* However, *see also* 'Immigration to Italy: a look at the numbers' *The Local Italy* 12 June 2018, available at <https://www.thelocal.it/20180612/immigration-to-italy-numbers>, accessed on 12 June 2019. Migration study foundation ISMU estimates around 500 000 people living in Italy illegally – 0.9% of the population. Figures from the International Organization for Migration show around 120 000 immigrants arrived in Italy via sea in 2017, with the Italian government stating the cost of taking them in at €4.2 billion. Two-thirds of that cost was spent on asylum-seekers, 18% on sea rescue and 13% on medical assistance.

¹²⁰ T Brian & F Laczko (2014) at 90.

coast guards and border patrol guards, is a fairly common risk.¹²¹ As irregular migrants, being found by these State authorities at sea often results in being subjected to violence, rape and/or abuse, thrown overboard by smugglers who are afraid of being arrested, being detained or even worse, “pushed back”, which involves being escorted out of the State’s jurisdiction and deprived of a chance to claim asylum.¹²² In addition to the aforementioned, irregular migrants are forced to deal with problematic travelling conditions and as a result, many migrants never reach Europe.¹²³ Thus, Lutterbeck acknowledges that threats to migrants’ safety and security during their voyage to Europe derive from two main sources, as noted above: (i) harsh, perilous weather and travel conditions and (ii) ill-treatment by both smugglers and State authorities.¹²⁴ The security risks faced by irregular migrants will now be discussed in detail and examples of the risks mentioned above will be provided. Following this discussion, the same will be done to explain the safety risks faced by irregular migrants on the sea-leg of their voyage.

2.5.1 Security Risks

Abuse of migrants by smugglers, much like smuggling itself, is wide-spread and has become a norm in the Mediterranean Sea.¹²⁵ The relationship between migrants and their smugglers is an unusual one because although the migrants are “customers” of the smugglers and pay for their “services”, migrants are also unlike “ordinary customers”, as they are extremely vulnerable.¹²⁶ This is due to the fact that migrants more often than not have no knowledge about the country they are travelling through; this, coupled with their ‘irregular’ status and sheer desperation, means that they are more prone to abuse and exploitation by smugglers.¹²⁷ Freedman states that some European leaders erroneously believe that the existence of smuggling gangs are the main reason for spike in numbers of migrants that are attempting to cross the Mediterranean Sea.¹²⁸

¹²¹ T Brian & F Laczko (2014) at 90.

¹²² *Ibid.*

¹²³ D Lutterbeck ‘A View from the Ground: Human Security Threats to Irregular Migrants across the Mediterranean’ in O Grech & M Wohlfeld (Eds) *Migration in the Mediterranean: Human Rights, Security and Development Perspectives* (2014) 124.

¹²⁴ *Ibid.*

¹²⁵ D Lutterbeck (2014) at 128. *See also* F Düvell ‘The ‘Great Migration’ of summer 2015: analysing the assemblage of key drivers in Turkey’ (2018) *Journal of Ethnic and Migration Studies* 7. He states that “irregular service providers stand out as one of the most significant but also controversial agents in this process. Of our 215 interviewees in Greece all but 2 used the services of smugglers, only 2 bought a dinghy and made the journey themselves and 34 of the 50 respondents in Izmir were already in touch with a smuggler for the remainder of their journey. A remarkable characteristic of the smuggling businesses is their omnipresence and easy accessibility. Most of the interviewees stated that they did not experience any difficulty in finding smugglers in Turkey”.

¹²⁶ D Lutterbeck (2014) at 128-129.

¹²⁷ D Lutterbeck (2014) at 129.

¹²⁸ J Freedman (2016) at 571.

However, she goes on to argue that these smugglers are only gaining more work because the safe and ‘regular’ passages into Europe are increasingly blocked, forcing migrants to pay smuggler’s more money and for them to undertake more perilous journeys in order to reach Europe.¹²⁹

Lutterbeck points out that in offering their ‘services’ smugglers tend to conceal the risks and dangers of crossing the Mediterranean Sea, promising that the trip will be short and unproblematic.¹³⁰ Furthermore, smugglers often lie to migrants by stating that they will provide a large vessel for the journey, and sometimes show pictures of a large boat as proof, but the harsh reality is a small and unseaworthy vessel, to say the least.¹³¹ Freedman relays the account of a Syrian family, along with their two small children, who were reassured of their journey in a proper fibreglass vessel and as a result, were happy to pay 1 000 dollars for this; to their dismay they were loaded onto a three metre rubber boat with fourteen others.¹³² She goes on to add that to make matters worse, shortly after their departure, the boat’s motor ceased and it proceeded to float aimlessly for nine hours until finally, the Greek coastguard came to the rescue.¹³³

It is clear from first-hand accounts of migrants, that smugglers have no respect for human life; this is clear because if and when they can, they do not hesitate to risk the lives of migrants in order to make a profit.¹³⁴ Many first-hand accounts of migrants prove that it is common to be sold, like mere commodities, either by smugglers to the police or vice versa.¹³⁵ In an interview with Lutterbeck, one migrant confessed that a smuggler who was smuggling him and a few others from Sudan to the Libyan city of Ajdabiya, sold them to the Libyan police and they were all detained until they offered up payment in exchange for their release from prison.¹³⁶ Several other interviews done by Lutterbeck also show that migrants themselves were sometimes

¹²⁹ J Freedman (2016) at 571. She also adds at 572, that “tighter controls seem to have had the paradoxical effect of increasing the market for smugglers and traffickers who the EU has tried to eradicate but who are ever more involved in the migration process. The difficulties in reaching Europe now mean that it is almost impossible to undertake the journey without the assistance of a smuggler or trafficker, and the demands of these traffickers are thus more onerous for the migrants, creating further sources of insecurity”.

¹³⁰ D Lutterbeck (2014) at 129.

¹³¹ *Ibid.*

¹³² J Freedman (2016) at 576. *See also* F Düvell (2018) at 7, where he stated that a smuggler’s Facebook advertisement “illustrated that the crossing to the Greek islands depended on the type of vessel used: the journey with an inflatable dinghy was around \$1000 while a journey by yacht costed around \$2500.”

¹³³ *Ibid.*

¹³⁴ D Lutterbeck (2014) at 129.

¹³⁵ D Lutterbeck (2014) at 129.

¹³⁶ *Ibid.*

integrated into the smuggling processes by being asked to serve as middlemen and offered to steer the boats in return for a free crossing.¹³⁷

Migrants are also, more often than not, exploited and manipulated by smugglers during their journeys.¹³⁸ To illustrate this, Lutterbeck states that despite having agreed to transport migrants directly to Tripoli, smugglers sometimes drop migrants off in another coastal town, in the clutches of another smuggler, demanding more money to complete the voyage to Tripoli.¹³⁹ Similarly, in 2017 there were a number of reports of migrants being wronged and also detained by smugglers, in order to obtain more money than was previously agreed upon.¹⁴⁰ Several families who were interviewed also protested that their smugglers had offloaded their belongings into the sea and explaining it by saying that “there was no room in the boat” or because they thought the “boat might sink” with the extra weight.¹⁴¹

In 2017 countless migrants reported being victims of abuse by smugglers, traffickers or armed forces whilst travelling towards Europe.¹⁴² Sadly, many of those who had departed from Libya and were headed to Europe were detained for months on end, kept in inhumane conditions, tortured for ransom, repeatedly sexually violated or forced into modern slavery.¹⁴³ Women and underage girls often fall prey to sexual and gender-based violence (SGBV) when trying to cross the Mediterranean Sea, and 2017 was no exception.¹⁴⁴ The risk of SGBV on the way to Greece was high, more so for women travelling by themselves and children who were travelling alone.¹⁴⁵ Despite the fact that SGBV is often not reported, there were reports in excess of 300 SGBV incidents that showed a high degree of sexual assault, rape and human trafficking.¹⁴⁶ The bulk of women and girls travelling to Italy in 2017 were believed to have faced major risks of SGBV and as a result, there were a number of reports of incidents among them, however, the reports also included incidents where adult males and underage boys were also victims.¹⁴⁷

¹³⁷ F Düvell (2018) at 7.

¹³⁸ D Lutterbeck (2014) at 129.

¹³⁹ D Lutterbeck (2014) at 130.

¹⁴⁰ ‘Desperate Journeys: January 2017-March 2018’ *United Nations High Commissioner for Refugees (UNHCR)* March 2018, available at <https://data2.unhcr.org/en/documents/details/63039>, accessed on 20 August 2018.

¹⁴¹ J Freedman (2016) at 576.

¹⁴² ‘Desperate Journeys: January 2017-March 2018’ *United Nations High Commissioner for Refugees (UNHCR)* March 2018, available at <https://data2.unhcr.org/en/documents/details/63039>, accessed on 20 August 2018.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ ‘Desperate Journeys: January 2017-March 2018’ *United Nations High Commissioner for Refugees (UNHCR)* March 2018, available at <https://data2.unhcr.org/en/documents/details/63039>, accessed on 20 August 2018.

¹⁴⁷ *Ibid.*

2.5.2 Safety Risks

As previously mentioned, irregular migrants have been forced to transit new routes over the years, often meaning longer journeys and more dangerous encounters.¹⁴⁸ The different types of vessels used also plays a crucial role in the risk faced. For example, there is a high risk of suffocating for migrants being held in sealed containers on cargo ships; similarly, the lives of migrants that are forced into propeller bays or engine masts, are in danger because of the machinery as well as suffocation.¹⁴⁹ Being at sea carries a wide range of risks, some that are inherent in seaborne transportation, and others that are more specific to smuggling of irregular migrants.¹⁵⁰ The risks of sea-borne travel are generally rough seas, unstable weather patterns and poor visibility, however, for irregular migrants these travel risks are much more hazardous than for the average seafarer.¹⁵¹

Boats carrying irregular migrants are at a greater risk of losing direction, as explained below, and of running out of food supplies or water, this is owed to the fact that smugglers ensure that all the extra space on their boat is set aside for more migrants, at the expense of everything else, including fuel.¹⁵² The boats are generally run by inexperienced “captains” who double as smugglers, with little to no navigation equipment, resulting in the likelihood of getting lost at sea being high.¹⁵³ These boats are also substandard because smugglers choose not to invest in their upkeep, with the knowledge that the increase in maritime surveillance means that the boats are likely to get confiscated by State authorities if found.¹⁵⁴ Furthermore, an inexperienced captain and crew coupled with the boat’s unseaworthiness, are all reasons why unforeseen leaks and motor problems are frequent occurrences; there is also a heightened risk of capsizing due to overloading of the vessel, as is more often the case than not.¹⁵⁵

¹⁴⁸ M G Jumbert ‘Control or rescue at sea? Aims and limits of border surveillance technologies in the Mediterranean Sea’ (2018) 42(4) *Disasters* 689. See also J Freedman (2016) at 571. See also generally C Mainwaring & N Brigden ‘Beyond the Border: Clandestine Migration Journeys’ (2016) 21(2) *Geopolitics* 243-262.

¹⁴⁹ T Brian & F Laczko (2014) at 90.

¹⁵⁰ T Brian & F Laczko (2014) at 91.

¹⁵¹ *Ibid.* See also M G Jumbert (2018) at 677, where she states that “The risk of drowning and vulnerability to weather are even more pressing issue for inexperienced seafarers in unseaworthy vessels, frequently deprived of lifejackets and with little, if any, swimming ability. Illustrative of this is how climate affects migration flows across the Mediterranean, which reportedly increase in the second quarter of every year with the beginning of spring and a calmer sea”.

¹⁵² *Ibid.* See also D Lutterbeck (2014) at 128.

¹⁵³ *Ibid.* See also A Klug ‘Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing’ (2014) 26(1) *International Journal of Refugee Law* 49.

¹⁵⁴ T Brian & F Laczko (2014) at 91. See also D Lutterbeck (2014) at 128.

¹⁵⁵ *Ibid.* See also D Lutterbeck (2014) at 127.

Being lost at sea has its fair share of risks all in its own. For instance, boats heading from West Africa towards the Canary Islands can miss their mark and end up on the Atlantic instead.¹⁵⁶ When boats run out of fuel they can float helplessly for weeks, leading to a slow death for migrants resulting from either starvation, dehydration, sun stroke or hypothermia.¹⁵⁷ Rescue operations are also much more dangerous to take on in bad weather, as it is difficult to transfer migrants from one vessel to the other without injury.¹⁵⁸ In addition to bad weather, overloading of migrant boats coupled with poor stewardship, makes rescuing migrants aboard tricky.¹⁵⁹ Instead of being rescued, however, irregular migrants are more likely to be the target of interceptions, which are even riskier than rescues because border patrol personnel are generally not trained to perform rescue operations and lack the rescue equipment.¹⁶⁰ To make matters worse, some irregular migrants are afraid of State officials and also cannot swim, adding to their panic and inevitably to some rescue and interception operations ending with lives lost.¹⁶¹

As aforementioned in this chapter, disputes between States over where rescue and disembarkation responsibilities lie, often means that migrants are at risk of their distress calls going unanswered or ignored and consequently not being rescued.¹⁶² When found in interception operations, instead of being rescued, boats carrying migrants are “pushed back” to international waters or to a different coast; this is common between Italy and Libya today.¹⁶³ Being “pushed back” means that migrants are often subjected to prolonged exposure that could lead to death because the chances of running out of food, water and fuel, and getting lost at sea, are high.¹⁶⁴ Commercial vessels sometimes turn away from migrant boats in distress because of the risks and financial losses, but more often than not because of fear that their assistance could result in being arrested for “assisting” or “facilitating” smuggling of migrants.¹⁶⁵

¹⁵⁶ T Brian & F Laczko (2014) at 91. *See also* M Hernández-Carretero & J Carling ‘Beyond “Kamikaze Migrants”: Risk Taking in West African Boat Migration to Europe’ (2012) 71(4) *Human Organization* 407-416.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* *See also* A Klug (2014) at 51.

¹⁶³ *Ibid.* *See also* G Garelli, A Sciarba & M Tazzioli ‘Introduction: Mediterranean Movements and the Reconfiguration of the Military-Humanitarian Border in 2015’ (2018) 50(3) *Antipode* 666. In this article the authors acknowledge that the “military-humanitarian frontier in the Mediterranean has evolved from rescuing migrants at sea to attacking the maritime fleet they use for crossing.” They argue that today, traditional humanitarian actors play a marginal role, as opposed to the “protagonist role of military forces deployed to manage transnational movements of large groups of people, rescuing and/or blocking them in their attempt to reach Europe.”

¹⁶⁴ T Brian & F Laczko (2014) at 91-92.

¹⁶⁵ *Ibid.*

Although there is a legal obligation to rescue people at sea, recently, this legal duty to rescue has been undermined and discouraged by a number of regulations, laws, policies and practices that have come about on international, national and even regional levels and that seems to be increasing.¹⁶⁶ Although rescue at sea is a legal obligation on seafarers and is anchored in international and national law, it has unfortunately been undermined and made to target irregular migrants, through recent legal sanctions.¹⁶⁷ Most of these laws that effectively discourage the duty to rescue at sea are the result of failed attempts to prevent, criminalise and penalize those who are involved in smuggling, assistance and facilitation.¹⁶⁸ These laws and policies have led to the ‘securitisation’ of rescue, and as a result, has weakened the international rescue regime as a whole, as well as international obligations to rescue at sea, in particular.¹⁶⁹

2.6 Conclusion

It is quite clear from this chapter that irregular migration remains a major problem in the world today. It has been shown that irregular migrants are dying in the Mediterranean Sea, trying to traverse the waters, often fleeing conflict and with no other choice. This is made clear by the fact that most irregular migrants originate from war-torn countries and are forced to either flee the conflict or do nothing and die. Despite news coverage far and wide, that highlight the risks and fatalities associated with irregular migration today, migrants continue to make these dangerous journeys across the sea. Whilst the numbers may have risen in 2015, the rate of death today is still alarmingly high. Statistics prove that there is a high risk of death across the Mediterranean Sea and the number of migrants attempting to cross the sea has not decreased, despite this fact.

It is almost impossible to get across the Mediterranean Sea unscathed as safety and security risks faced by irregular migrants are so immense, that it begs one to question why these journeys are undertaken at all. The answer to that question is clearly, because migrants have no other option but to put their lives at risk, with a glimmer of hope of a better life and asylum in Europe. This chapter identified and discussed in detail, the main safety and security risks faced by irregular migrants on the sea-leg of their voyage across the Mediterranean Sea. To summarise, the security risks faced are: abuse and exploitation by smugglers and state officials,

¹⁶⁶ T Basaran ‘Saving Lives at Sea: Security, Law and Adverse Effects’ (2014) 16 *European Journal of Migration & Law* 367.

¹⁶⁷ T Basaran (2014) at 377.

¹⁶⁸ T Basaran (2014) at 367.

¹⁶⁹ *Ibid.*

human trafficking, forced labour, sexual and gender-based violence, being detained, torture, and lastly being subjected to cruel, inhuman and degrading treatment. The safety risks faced by irregular migrants are: ocean perils, unseaworthy and overcrowded vessels, safety of life, interception operations, being “pushed back” to transit countries, rescue operations, and lastly disembarkation in a place of safety once rescued.

A holistic assessment of this chapter also shows that irregular migration is still a major problem and requires us to look at the existing legal framework. Thus, the following chapter, Chapter Three, will set out, as well as critically analyse, the current international legal framework that seeks to protect irregular migrants from the safety and security risks faced during their voyage in the Mediterranean Sea.

CHAPTER THREE:
THE INTERNATIONAL LEGAL FRAMEWORK

3.1 Introduction

Chapter Two identified the safety and security risks faced by irregular migrants on the sea-leg of their voyage across the Mediterranean. To recap, the security risks that were identified are: abuse and exploitation by smugglers and state officials, human trafficking, sexual and gender-based violence, being detained, tortured, and lastly being subjected to cruel, inhuman and degrading treatment. The safety risks faced by irregular migrants are: ocean perils, unseaworthy and overcrowded vessels, safety of life, interception operations, ‘refoulement’ or being ‘pushed back’, rescue operations, and lastly disembarkation in a place of safety once rescued.

This chapter will set out the international legal framework that protects irregular migrants from these safety and security risks faced during their voyage across the Mediterranean Sea. The reason for the focus on international law, treaty law and maritime law, is because most of the safety and security risks occur at sea and are faced by irregular migrants who come from different countries all over the world. Thus, although European laws and policies are mentioned briefly, a discussion of Europe’s regional and domestic laws as well as European policies, is beyond the scope of this chapter. This chapter will begin by examining the security risks and the laws that apply to them and then move on to the safety risks.

3.2 Security Risks

3.2.1 Migrant Smuggling

During the 1990s, as trafficking increased, the United Nations Crime Commission agreed that there was a need to develop a treaty on ‘trafficking of migrants’, following which there was a keen interest towards developing one for ‘smuggling’ as well.¹⁷⁰ Thus, the UN decided on two instruments: one that dealt with the movement of people into exploitation (human trafficking) and one that dealt with facilitation of illegal movement of migrants (migrant smuggling).¹⁷¹

¹⁷⁰ A Gallagher ‘Whatever Happened to the Migrant Smuggling Protocol?’ in M McAuliffe and MK Solomon (Conveners) *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration* (2017) 2.

¹⁷¹ *Ibid.*

These two instruments were adopted in 2000 and have since come to be known as the *Protocol against the Smuggling of Migrants by Land, Sea and Air*¹⁷² and the *Protocol against Trafficking in Persons, especially Women and Children*, supplementing their parent instrument, the *United Nations Convention against Transnational Organized Crime*.¹⁷³

The term ‘smuggling of migrants’ was coined fairly recently and before being detached by its own definition, this term was often incorrectly and interchangeably used with ‘migrant trafficking’ when referring to facilitating a migrant’s illegal entry into a country.¹⁷⁴ The *Smuggling Protocol* defines ‘smuggling of migrants’ in Article 3(a) 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.” Thus, migrant smuggling is underway if a wrongdoer obtains the “illegal entry” of another, who is not a “national or permanent resident” into a State Party, and this is done with the intention of gaining a “financial or other material benefit”.¹⁷⁵ Article 6 of the *Smuggling Protocol* adds that State Parties are required to criminalise smuggling and smuggling-related “production and possession of fraudulent travel or identity documents” and enabling of illegal stay when committed with the intention of gaining a “financial or other material benefit”.¹⁷⁶

In 2016, Gallagher led a study by the United Nations Office on Drugs and Crime, examining how closely States had kept to the *Smuggling Protocol’s* definition of ‘migrant smuggling’ in their national law, more specifically the ‘benefit’ element of it.¹⁷⁷ None of the 13 States

¹⁷² *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*. Adopted by the United Nations General Assembly under Resolution 55/25 on 15 November 2000 and entered into force on 28 January 2004 (hereinafter referred to as the *Smuggling Protocol*).

¹⁷³ A Gallagher (2017) at 2. See also *United Nations Convention against Transnational Organized Crime* (hereinafter referred to as *UNTOC* or the *Organized Crime Convention*), along with the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (hereinafter referred to as the *Trafficking Protocol*). The Convention and its Protocols, targeting specific areas of organized crime, were adopted by the United Nations General Assembly Resolution 55/25 of 15 November 2000. The Convention entered into force on 29 September 2003 and the *Trafficking Protocol* on 25 December 2003.

¹⁷⁴ A Gallagher (2017) at 1.

¹⁷⁵ A Gallagher (2017) at 2.

¹⁷⁶ *Ibid.* See also Article 6(1) of the *Smuggling Protocol* which states “Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit: (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; (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”.

¹⁷⁷ A Gallagher (2017) at 3. “The study examined national legislation and case law and interviewed 122 practitioners from 13 States.” The 13 states surveyed were: “Australia, Canada, Germany, Greece, Indonesia, Italy, Malaysia, Mexico, Morocco, Sri Lanka, Tunisia, the United Kingdom and the United States of America.”

surveyed, had stuck to the exact definition in the *Smuggling Protocol's* when enacting their domestic law.¹⁷⁸ The EU *Council Directive 2002/90/EC* is one such example.¹⁷⁹ Article 1(a) defines the facilitation of unauthorised entry as “any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens”. It is evident that the ‘benefit’ element is excluded from the above definition.¹⁸⁰ However, the EU added in Article 1(2), that reads:

‘Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.’

Article 1(2) grants the EU the choice of excluding individuals facilitating illegal entry for humanitarian purposes from persecution.¹⁸¹ This is clearly a stricter definition of smuggling than described in the *Smuggling Protocol*, as the burden of proof now rests on those who allege that their actions were undertaken for humanitarian or altruistic reasons.¹⁸² In addition to this, the use of the wording “may decide” means that each and every European Union Member State is granted a discretion to either prosecute those who claim that their actions are for humanitarian reasons or not, as they see fit.¹⁸³

Although the *Smuggling Protocol* necessitates criminalising smuggling and related conduct and cooperation in preventing and combating smuggling, these obligations are subject to a

¹⁷⁸ A Gallagher (2017) at 3. She adds: “Only two of the 13 countries included ‘financial benefit’ as an element of the offence of facilitated entry, meaning that 85% of surveyed States have chosen to prosecute facilitated entry that is not motivated by financial reward. The deviations from the international legal definition were typically defended as necessary to ensure that States retained the flexibility to respond to all situations of facilitated illegal entry and stay. Practitioners interviewed for the study pointed to the heavy evidentiary burden that would result from the inclusion of the financial element in smuggling offences.”

¹⁷⁹ *Council Directive 2002/90* of 28 November 2002 defining the *Facilitation of Unauthorised Entry, Transit and Residence* (OJ L328/17) in combination with the *Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence 2002/946* (OJ L328/1) implemented by December 2004.

¹⁸⁰ A Aljehani ‘The Legal Definition of the Smuggling of Migrants in Light of the Provisions of the Migrant Smuggling Protocol’ (2015) 79(2) *The Journal of Criminal Law* 129.

¹⁸¹ Aljehani at 130.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

number of caveats and limitations.¹⁸⁴ Article 5 prohibits State Parties from prosecuting migrants for the fact that they have been smuggled by stating “migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.”¹⁸⁵ As the *Smuggling Protocol’s* drafters so aptly exclaim: “smuggled migrants are victims and should therefore not be criminalized.”¹⁸⁶ The *Smuggling Protocol*, in fact, encourages states in Articles 6(3)(a) and (b) to “adopt legislative and other measures” to protect the smuggled migrant in circumstances where smuggling has “endangered or is likely to endanger the life or safety” of that migrant, or in circumstances that entail “inhuman or degrading treatment” of the smuggled migrant.¹⁸⁷

Protecting migrants’ rights is recognized as one of the three aims of the *Smuggling Protocol*, and thus, State Parties are clearly obligated to do everything in their power under international law to ensure that the rights of smuggled migrants are protected and upheld.¹⁸⁸ This is reiterated by Article 16, which protects many migrant rights, such as the right not to be subject to torture or other cruel, inhuman, or degrading treatment or punishment; the right to life; and the right to consular access.¹⁸⁹ State Parties are also required to protect migrants against smuggling related violence and offer them appropriate assistance if their “lives or safety are endangered” through the smuggling process.¹⁹⁰

¹⁸⁴ A Gallagher (2017) at 3.

¹⁸⁵ See also Article 4 of the *Smuggling Protocol*, which states: “This Protocol shall apply, except as otherwise stated herein, 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”.

¹⁸⁶ A Gallagher (2017) at 3.

¹⁸⁷ C Brolan ‘An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective’ (2002) 14(4) *International Journal of Refugee Law* 591. See also Article 6(3)(a) and (b) of the *Smuggling Protocol* which reads “Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances: (a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.”

¹⁸⁸ A Gallagher (2017) at 3. See also Article 16(1) of the *Smuggling Protocol*, which states “In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment”.

¹⁸⁹ *Ibid.* See also Article 16(5) of the *Smuggling Protocol*, which states “In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers”.

¹⁹⁰ *Ibid.* See also Article 16(2) and (3) of the *Smuggling Protocol*, which states that: “2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon

The *Smuggling Protocol* includes a very specific Savings Clause in Article 19(1) which states:

‘Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.’

The Savings Clause is significant as it provides protection to all migrants, specifically mentioning that humanitarian law, human rights law and the principle of ‘non-refoulement’ will apply and shall not be affected by any of the provisions in the *Smuggling Protocol*.¹⁹¹ This will be discussed as the chapter progresses.

3.2.2 Human Trafficking

The *Trafficking Protocol* has proved to be a game-changer, triggering unprecedented levels of action nationally and especially internationally.¹⁹² States very quickly began to incorporate its core provisions into their national laws and today, ‘trafficking’ is criminalised in just about every country.¹⁹³ Most national anti-trafficking legislation contain comprehensive provisions on victim protection and support that go beyond the minimum standards and obligations set out in the *Trafficking Protocol*.¹⁹⁴ This trend has been influenced by international and regional laws and policies that uphold the central tenets of the *Trafficking Protocol* in addition to expanding its human rights provisions.¹⁹⁵ The protection offered to irregular migrants in the *Trafficking Protocol* can be seen by the definition of ‘trafficking in persons’ in Article 3(a), which states:

them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol. 3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.”

¹⁹¹ There are key treaties that also convey rights to migrants. This includes the Valletta Summit on Migration Action Plan and the EU Emergency Trust Fund for Africa. See ‘2015 Valletta Summit on Migration’ *The Africa-EU Partnership* 18 November 2015, available at <https://www.africa-eu-partnership.org/en/stay-informed/news/2015-valletta-summit-migration>, accessed on 12 June 2019. The Valletta Summit addressed the current challenges of migration; it is where the EU Emergency Trust Fund was launched to deal with these issues.

¹⁹² A Gallagher (2017) at 2.

¹⁹³ *Ibid*

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid*.

‘The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’

From this definition it is evident that the *Trafficking Protocol* provides protection to those who are trafficked, including protection against threats and exploitation. Although Article 3(a) above does not define the term ‘exploitation’, it does list different forms of exploitation, such as forced labour or services, sexual exploitation and so on.¹⁹⁶ Furthermore, “at a minimum” is used as a catch-all phrase, meaning that the list is not exhaustive and ensuring that new or alternate forms of exploitation are not excluded.¹⁹⁷ However, it must be noted that some forms of ‘exploitation’ that are present during migrant smuggling, does not also constitute human trafficking. For instance, in cases involving the inhuman or degrading treatment of smuggled migrants, such as those mentioned in Chapter 2, the fact that there is an element of ‘exploitation’ does not change the act of smuggling into trafficking.¹⁹⁸

While smugglers and traffickers both prey on the vulnerabilities of people in search for better lives, the UNHCR has separated the two by conceding that “victims of trafficking are distinguished from migrants who have been smuggled by the protracted nature of the exploitation they endure, which includes serious and ongoing abuses of their human rights at the hands of traffickers.”¹⁹⁹ This means that the relationship between migrant and smuggler generally stops when the migrant has reached their destination, however, for a trafficked person the destination is just the start of a journey of abuse.²⁰⁰ This is in line with academic literature, where the majority view is echoed by Gjerdingen, who asserts that cases that are classified as ‘smuggling’ are often not as exploitative or severe as opposed to those classified as

¹⁹⁶ Aljehani at 135.

¹⁹⁷ *Ibid.*

¹⁹⁸ Aljehani at 135-136.

¹⁹⁹ R Moser ‘Addressing the Failures of International Asylum Law in Regard to Victims of Human Trafficking’ (2018) 4 *Journal of Global Justice and Public Policy* 22.

²⁰⁰ *Ibid.*

‘trafficking’.²⁰¹ Hathaway aligns with Gjerdingen stating that while smuggled migrants are prone to abuse, this is surpassed by the amount of abuse that occurs in trafficking cases.²⁰²

Baer claims that the *Trafficking Protocol* comprises 3 subsections of trafficking regulations, aptly labelled the “3-P Index”, and they are recognized globally as a starting point in drafting anti-trafficking legislation.²⁰³ First is the ‘prosecution’ of trafficking offenders, second is the ‘protection’ of victims of trafficking and third, is the ‘prevention’ of any future offences.²⁰⁴ First, the prosecution of trafficking crimes is a crucial component and is dealt with in Article 5(1) of the *Trafficking Protocol*, which states: “each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.” Article 5(2) also explicitly condemns traffickers, accomplices, and anyone organizing or directing other persons to commit an offence.²⁰⁵

Second, the protection of victims is also an integral part of any anti-trafficking legislation.²⁰⁶ Article 6 addresses the rights of victims to privacy and confidentiality, victim protection, any help needed to testify against their traffickers, information regarding court proceedings, information on their legal rights and counselling, housing, employment and educational prospects and medical support.²⁰⁷ Critics, such as Gallagher, have argued that this section lays

²⁰¹ E Gjerdingen ‘Suffocation inside a Cold Storage Truck and Other Problems with Trafficking as “Exploitation” and Smuggling as “Choice” Along the Thai-Burmese Border’ (2009) 26 *Arizona Journal of International & Comparative Law* 718.

²⁰² J C Hathaway ‘The Human Rights Quagmire of Human Trafficking’ (2008) 49(1) *Virginia Journal of International Law* 9.

²⁰³ C J Baer ‘A Firm Foundation: A Defense of the UN Trafficking Protocol’ (2012) 3(1) *Grove City College Journal of Law and Public Policy* 112-113.

²⁰⁴ *Ibid.*

²⁰⁵ Baer (2012) at 113. *See also* Article 5(2) of the *Trafficking Protocol* which states: “Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.”

²⁰⁶ Baer (2012) at 114.

²⁰⁷ *Ibid.* *See also* Article 6 of the *Trafficking Protocol* which reads: “1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential. 2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases: (a) Information on relevant court and administrative proceedings; (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence. 3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of: (a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims

out a general framework for individual state legislation, but it does not specifically oblige states involved because they are merely required to provide assistance to victims “in appropriate cases and to the extent possible under its domestic law”.²⁰⁸

Third, and often considered the most important factor when seeking to attack and combat human trafficking, is prevention.²⁰⁹ As is identified by the *Trafficking Protocol* under Article 9(1)(b): “States Parties shall establish comprehensive policies, programmes and other measures: (b) To protect victims of trafficking in persons, especially women and children, from revictimization.” The re-trafficking of victims is a major problem in many areas as victims often have no other place to turn for a job than back to their traffickers.²¹⁰ Many NGOs and humanitarian organizations, such as the Red Cross, supplement the *Trafficking Protocol* by both prosecuting traffickers to the full extent of the domestic laws in place, as well as providing assistance to rescued victims and offering protection from being re-trafficked.²¹¹

3.2.3 International Human Rights and Refugee Law

Apart from the protections offered in the two Protocols, several international treaties and conventions also protect irregular migrants’ basic human rights. One such instrument is the *International Covenant on Civil and Political Rights*²¹² which protects the right to life;²¹³ the right not to be subjected to torture, or to cruel, inhuman and degrading treatment;²¹⁴ the right not to be held in slavery or forced labour;²¹⁵ and the right not to be arbitrarily detained or arrested,

of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities. 4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care. 5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory. 6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”

²⁰⁸ Baer (2012) at 114. See also A Gallagher ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 990.

²⁰⁹ Baer (2012) at 116.

²¹⁰ Baer (2012) at 117.

²¹¹ *Ibid.*

²¹² *The International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations on 19 December 1966 (hereinafter referred to as the *ICCPR*).

²¹³ Article 6(1) of the *ICCPR* states that “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”.

²¹⁴ Article 7 of the *ICCPR* states “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”.

²¹⁵ Article 8(1) of the *ICCPR* reads “No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3. (a) No one shall be required to perform forced or compulsory labour”.

to name a few.²¹⁶ Similar provisions can also be found in the regional laws of the EU, such as the *European Convention of Human Rights*²¹⁷ under Article 2, the right to life, Article 3, prohibition of torture and Article 4, prohibition of slavery and forced labour. Lastly, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,²¹⁸ as its name suggests, provides a definition of torture and protection against all forms of torture.²¹⁹

Apart from the international human rights laws mentioned above, international refugee law also provides protection to irregular migrants. A state may decide who may enter and remain in its territory, however, this aspect of state sovereignty is contrasted with the body of international law concerned with the rights and protection of refugees, i.e. international refugee law.²²⁰ The *1951 Convention Relating to the Status of Refugees* and its *1967 Protocol Relating to the Status of Refugees* reflect certain customary international law rules, which requires compliance even by States that are not a party to the above instruments.²²¹ The first important rule that now forms part of international customary law, is that refugees should not be punished

²¹⁶ Article 9 of the *ICCPR* states “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” See also Article 10(1) which states “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

²¹⁷ As amended by the provisions of Protocol No. 14 (CETS no. 194) entered into force on 1 June 2010 (hereinafter *ECHR*).

²¹⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Entered into force 26 June 1987, in accordance with article 27 (1) (hereinafter referred to as *CAT*)

²¹⁹ Article 1 of *CAT* reads as follows: “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

²²⁰ M 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?’ (2015) 33 *Australian Year Book of International Law* 107.

²²¹ *1967 Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (hereinafter referred to as the *Refugee Protocol*); and the *1951 Convention Relating to the Status of Refugees*, opened for signature on 28 July 1951, 189 U.N.T.S. 137 (hereinafter referred to as the *Refugee Convention*).

for entering another state illegally.²²² This is enshrined in Article 31(1) of the *Refugee Convention*, which states:

‘The Contracting States 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 in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’

This Article essentially prohibits the penalisation of refugees for unauthorised entry or presence, as long as they have arrived directly from countries where their lives were “threatened” and show “good cause” for violating the immigration laws.²²³ Article 31(1) is significant as it is in line with the *Smuggling Protocol*, and as will be shown, other international laws not to penalise irregular migrants for the fact that they have entered a country illegally. The second significant rule that can be found in Article 33(1) of the *Refugee Convention*, codifies the principle of ‘non-refoulement’ and is considered to be the cornerstone of international refugee protection.²²⁴ ‘Non-refoulement’ requires States to avoid sending refugees back to their persecutors and is now complemented by ‘non-refoulement’ obligations in international human rights treaties such as the *ICCPR* and *CAT*, as well as regional human rights instruments such as the *ECHR*.²²⁵ This principle will be discussed in detail later in this chapter.

3.3 Safety risks

3.3.1 The Duty to Rescue

The duty to rescue people at sea is a fundamental rule of international maritime law and is incorporated in international treaties, in addition to constituting a norm of customary international law.²²⁶ Under international human rights law, the duty to rescue people claiming

²²² Brolan (2002) at 563.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ Ratcovich at 108. *See also* Miltner (2006) at 97-99.

²²⁶ I Papanicolopulu ‘The duty to rescue at sea, in peacetime and in war: A general overview’ (2016) 98(2) *International Review of the Red Cross* 491. *See also* R L J Kilpatrick & A Smith ‘The International Legal

distress at sea forms part of every States' positive duty to protect the lives of the people within their jurisdiction.²²⁷ In maritime law, the duty to save life at sea can be found in Article 98 of the *United Nations Convention on the Law of the Sea*²²⁸ which goes on to state that:

- ‘1. 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:
 - a) to render assistance to any person found at sea in danger of being lost;
 - b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - ...
2. 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 neighbouring States for this purpose.’

The above duty contains two separate obligations; the duty incumbent on flag States to oblige masters to rescue people at sea, and also the duty of coastal States to start-up and maintain search and rescue operations.²²⁹ Dealing with the first obligation, it should be noted that the territorial range of the duty on masters to assist those citing distress, extends to every maritime zone.²³⁰ Thus, while Article 98 of *UNCLOS* is a part of Part VII, the High Seas, it applies equally to the Exclusive Economic Zone (EEZ), resulting from of the cross-reference in Article 58(2).²³¹ Similarly, for the territorial sea the duty to rescue can be inferred by the use of the word “assistance” in the case of danger or distress, as stated in Article 18(2).²³²

Obligation to Rescue during Mass Migration at Sea: Navigating the Sovereign and Commercial Dimensions of a Mediterranean Crisis’ (2015) 28(2) *University of San Francisco Maritime Law Journal* 144.

²²⁷ M Frigo *Migration and International Human Rights Law: A Practitioners Guide 2* ed (2014) 102.

²²⁸ *United Nations Convention on the Law of the Sea*, 1833 UNTS 3, adopted on 10 December 1982 and entered into force 16 November 1994 (hereinafter *UNCLOS*). *UNCLOS* is currently ratified by the European Union.

²²⁹ Papanicolopulu at 493.

²³⁰ Papanicolopulu at 495.

²³¹ *Ibid.* See also Article 58(2) of *UNCLOS* which reads “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.”

²³² *Ibid.* See also Article 18(2) of *UNCLOS* – ‘Meaning of Passage’ reads “Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.”

The second duty combined in Article 98 above necessitates coastal States establishing and operating effective search and rescue services.²³³ Since *UNCLOS* does not define “search and rescue services”, this is clarified by several international maritime law treaties, such as the *Convention for the Safety of Life at Sea*²³⁴, the *International Convention on Salvage*²³⁵ and the *International Convention on Maritime Search and Rescue*.²³⁶ The *SAR Convention* orders State Parties to distribute and allot areas where they have search and rescue jurisdiction, and these designated areas at sea are now known as “SAR regions”.²³⁷ Additionally, State Parties are directed to launch ‘Rescue Coordination Centres’ (RCC’s) to handle initial medical services, monitor distress signals and communicate with public and private vessels, including private airplanes and commercial vessels.²³⁸

The *SAR Convention* defines the terms ‘search’ and ‘rescue’. ‘Search’ is defined as “an operation, normally co-ordinated by a rescue coordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress”, while ‘rescue’ is “an operation

²³³ Papanicolopulu at 498.

²³⁴ *International Convention for the Safety of Life at Sea*, 1184 UNTS 278, adopted on 1 November 1974 and entered into force on 25 May 1980, as amended (hereinafter *SOLAS*). The 2004 amendments regarding rescue were rejected by Malta and Finland. Article VIII(b)(vi)(2)(bb) of the *SOLAS* Convention states that the amendments came into force on 1 July 2006, but they do not bind the States that have not accepted them. *SOLAS* Chapter V, Regulation 33.1 reads “The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly.” See also Chapter V, Regulation 7.1 mandating search and rescue services by stating “Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around their coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons”.

²³⁵ *International Convention on Salvage*, 1953 UNTS 165, adopted on 28 April 1989 and entered into force on 14 July 1996. Article 10 reads “1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea. 2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1. 3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1”.

²³⁶ *International Convention on Maritime Search and Rescue*, 1405 UNTS 118, adopted on 27 April 1979 and entered into force on 22 June 1985, as amended (hereinafter *SAR* or *SAR Convention*). The 2004 amendments were rejected by Norway and Malta. Article III(2)(b) of the *SAR Convention* states that the amendments came into force on 1 July 2006, but they do not bind the States that have not accepted them. See also Regulation 2.1.1 of the *SAR Convention* which provides that “on receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided.”

²³⁷ Kilpatrick & Smith at 146 & 165. They state: “the *SAR Convention* divides the oceans into 13 regions, which are then further subdivided through negotiation between coastal states.”

²³⁸ Kilpatrick & Smith at 146.

to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”.²³⁹ *SAR* also states in Chapter 2.1.10 that “parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found”. This means whether people are associated with any illegal actions or not, should not influence the duty to rescue them in any way; this is also in line with the customary law rule not to penalise refugees for their unauthorised entry, found in Article 31(1) of the *Refugee Convention*, as discussed in 3.2.3 above.²⁴⁰

One of the main problems with the duty to provide search and rescue services is centred around disembarkation of those who have been rescued. As discussed in Chapter 2, States have disagreed on where to disembark those rescued, thus resulting in delays that are unnecessary and at times life-threatening.²⁴¹ Consequently, because of frequent incidents of non-compliance and disagreement over where to disembark, the *SAR* and *SOLAS* Conventions were amended in an attempt to clarify this issue.²⁴² The amendments state that “the State responsible for the *SAR* region in which such assistance is rendered” must now “exercise primary responsibility” to make certain that the States involved co-ordinate and co-operate so that survivors are disembarked and then “delivered to a place of safety”.²⁴³ At a close reading of the 2004 amendments in *SAR* and *SOLAS*, however, the fundamental question of which State should disembark those rescued, remains unanswered and while *SAR* obliges seafarers to retrieve persons in distress and deliver them to a “place of safety”, this is not defined or clarified in the *SAR* or *SOLAS* conventions.²⁴⁴ These issues will be discussed further in Chapter 4.

²³⁹ *SAR Convention*, Chapter 1, 1.3.1 and 1.3.2.

²⁴⁰ Papanicolopulu at 495.

²⁴¹ Papanicolopulu at 499. *See also* Moreno-Lax (2017) at 6-7.

²⁴² Moreno-Lax (2017) at 7.

²⁴³ *SAR Convention* Annex 3.1.9 which reads “Parties 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 ships’ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable” and *SOLAS* Ch V Reg 33 (1–1) which contains analogous wording.

²⁴⁴ Papanicolopulu at 501.

3.3.2 The ‘Non-Refoulement’ Principle

The ‘non-refoulement’ principle is recognized as a binding EU obligation.²⁴⁵ As previously mentioned, the principle is enshrined in Article 33(1) of the *Refugee Convention*. Article 33(1) states: “no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” This ‘non-refoulement’ obligation means that States are required to give rescued migrants who have possible refugee claims the opportunity to establish these asylum claims.²⁴⁶ Article 1A(2) of the *Refugee Convention* outlines a refugee to be a person who:

‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, or membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.’

This definition is the foundation of the *Refugee Convention*, however, having been enacted over 65 years ago, the current problems faced were not what the legislators had in mind at that time and unfortunately, this reflects in the failure of the *Refugee Convention* to protect a large chunk of those in need of international protection today.²⁴⁷ Sadly, today asylum-seekers are only recognized as refugees if their claims are linked to the exhaustive list in the definition.²⁴⁸ Considering the above and to ensure the effectiveness of the ‘non-refoulement’ obligation, Ratcovich infers that the ‘non-refoulement’ principle should also be applied to those who have not formally been recognised as ‘refugees’ and to those with a presumptive or *prima facie* claim to refugee status, namely, asylum-seekers.²⁴⁹

When irregular migrants are intercepted at sea, which will be discussed in the next point, it may involve being ‘pushed back’ into international waters and so it is relevant to consider if the ‘non-refoulement’ obligation entails ‘screening’ to determine the status of asylum-seekers before such ‘push-backs’ occur.²⁵⁰ Logically, since the obligation prohibits a state from

²⁴⁵ Kilpatrick & Smith at 149.

²⁴⁶ Kilpatrick & Smith at 148.

²⁴⁷ Brolan (2002) at 565.

²⁴⁸ *Ibid.*

²⁴⁹ Ratcovich at 109.

²⁵⁰ Ratcovich at 112.

returning ‘refugees’ and the only way to determine who is a refugee is through refugee status determination, this is included in the obligation.²⁵¹ Accordingly, in situations where the return of the asylum-seekers would leave them with no other choice but to return home (*de facto* refoulement), or to a third country where they would be sent back home (‘chain’ or ‘indirect’ refoulement), there is an obligation to first determine refugee status.²⁵²

3.3.3 Maritime Interception

There are terms that are often used interchangeably with ‘interception’, such as ‘push-backs’, ‘non-admission’, ‘interdiction’ and ‘non-entrée’, however, this chapter will refer only to the word ‘interception’, as its definition is all encompassing of the terms listed above.²⁵³ There are various meanings of the term ‘interception’ in international law, however, the focus in this chapter will be on intercepting vessels that carry irregular migrants at sea and preventing them from entering their destination country.²⁵⁴ This type of ‘physical’ interception involves boarding a vessel to inspect, confiscate, or destroy it and also includes ‘push-backs’, in which intercepted vessels are forced back either to another coast or the high seas, in an effort to prevent those on board from disembarking in a specific State.²⁵⁵

Though irregular migrants who manage to reach a State are still at risk of being deported through immigration proceedings, these proceedings are often quite lengthy and the results are uncertain.²⁵⁶ Therefore, States are motivated to prevent irregular migrants’ arrivals in the first place.²⁵⁷ Aside from the fact that the *Refugee Convention* is silent about its extraterritorial reach, Moreno-Lax concludes that there is general consensus that ‘refouler’ means to drive back or repel, which does not take for granted a presence in-country.²⁵⁸ This supports the view that ‘non-refoulement’ includes rejection in transit or ‘excised’ zones, at the border, and anywhere at sea.²⁵⁹ As mentioned, interception can take different forms such as confiscating, boarding and ‘pushing back’ a vessel, which includes handing asylum-seekers over to other States.²⁶⁰ If the effect of the measure is to prevent migrants from reaching the borders of a

²⁵¹ Ratcovich at 113.

²⁵² *Ibid.* See also B Frelick, I M Kysel & J Podkul ‘The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants’ (2016) 4(4) *Journal on Migration and Human Security* 198-199.

²⁵³ Miltner (2006) at 78-79.

²⁵⁴ Wagner at 304.

²⁵⁵ Miltner (2006) at 84.

²⁵⁶ Kilpatrick & Smith at 171.

²⁵⁷ *Ibid.*

²⁵⁸ Moreno-Lax (2017) at 9.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

State, thus exposing them to serious harm, then the ‘non-refoulement’ obligation applies, preventing States from ‘pushing back’ irregular migrants.²⁶¹

Despite the various names and forms of interception, the most famous definition is by the Executive Committee (ExCom) of UNHCR when they issued a Conclusion in 2003, that defines interception as:

‘One of the measures employed by States to:

- (i) prevent embarkation of persons on an international journey;
- (ii) prevent further onward international travel by persons who have commenced their journey; or
- (iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;

where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the traveling public as well as persons being smuggled or transported in an irregular manner.’²⁶²

It is evident from the ExCom definition that interception encompasses a wide range of activities, including intercepting boats at sea when there is a suspicion of migrant smuggling, which will be discussed below. The ExCom definition of interception is so wide, however, that it distorts the line between interception and rescue by asserting that interception also serves to “protect the lives and security” of irregular migrants.²⁶³ However, interception, unlike rescue, is motivated principally by securitisation and migration control.²⁶⁴ This point is recognized by the International Organization for Migration, when it observed that States “which have the ability to do so find that intercepting migrants before they reach their territories is one of the most effective measures to enforce their domestic migration laws and policies”.²⁶⁵ Portraying interception as a ‘humanitarian’ act actually conflates these migration control activities with

²⁶¹ Moreno-Lax (2017) at 9.

²⁶² UNHCR ExCom, *Conclusion on Protection Safeguards in Interception Measures*, No. 97 (LIV) (10 October 2003). Executive Committee’s 54th session. Contained in United Nations General Assembly Document A/AC.96/987 and Document 12A (A/58/12/Add.1).

²⁶³ Miltner (2006) at 82.

²⁶⁴ *Ibid.* See also P Mallia ‘The Challenges of Irregular Maritime Migration’ in *Jean Monnet Occasional Papers* No. 4 (2013) 5-6.

²⁶⁵ Miltner (2006) at 83.

humanitarian acts of rescue when in reality the two are on opposite ends of the spectrum; this problem that will be discussed further in Chapter 4.²⁶⁶

3.3.4 Limitations to Maritime Interception

Maritime interception is limited by several international laws, one being *UNCLOS*. *UNCLOS* categorises different zones of water based on their proximity to the coastal state. The territorial sea, the contiguous zone, and the high seas will be discussed, as these have differing levels of jurisdiction in relation to the control a coastal state has over vessels.²⁶⁷ The territorial sea covers 12 nautical miles from a State's coastline and is the zone at sea in which States enjoy the most sovereignty.²⁶⁸ As previously mentioned, in territorial waters a State has jurisdiction and is obliged by international human rights law to ensure that they protect the lives of those present within these waters.²⁶⁹ Under Article 17 of *UNCLOS*, the territorial sea is where vessels of all countries enjoy a right of innocent passage including stopping when deemed necessary due to distress or to offer assistance.²⁷⁰

Article 19 of *UNCLOS* states that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State".²⁷¹ Thus, passage may not be considered innocent if a vessel loads or offloads people, in direct violation of the immigration laws and policies of the coastal State.²⁷² *UNCLOS* allows States to take 'necessary steps' to prevent passage that is not innocent²⁷³, however, this is limited by Article 27, which does not allow for

²⁶⁶ Miltner (2006) at 83.

²⁶⁷ Wagner at 307.

²⁶⁸ Miltner (2006) at 100.

²⁶⁹ Frigo (2014) at 102.

²⁷⁰ Article 17 of *UNCLOS* reads "Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea". This is supplemented by Article 18(1) and (2) which reads "1. Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility. 2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress".

²⁷¹ Article 19 of *UNCLOS* states "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law."

²⁷² Article 19(2)(g) of *UNCLOS* states: "Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: (g) 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".

²⁷³ Article 25 of *UNCLOS* reads: "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent".

the arrest or any other form of criminal authority over vessels during passage, with the exception of the exhaustive list contained therein.²⁷⁴

Some authors argue that a vessel is not exactly regarded as “innocent” if it is transporting irregular migrants who intend to apply for asylum in the coastal State.²⁷⁵ Pallis supports this view by saying that while seeking asylum accords with international law, passage with asylum seekers aboard may not be considered “innocent”.²⁷⁶ However, Moreno-Lax convincingly asserts that Article 19 should not be applied at all, except if there is physical ‘loading’ or ‘unloading’ of people and this is in breach of immigration laws.²⁷⁷ She also solidifies her arguments by stating that her stance is reinforced by Article 31(1) of the *Refugee Convention*, which plainly states that refugees must not be penalised for their unauthorised entry into a country and that anti-smuggling/anti-trafficking laws must be interpreted in accordance with, and subject to Refugee Law, as stated in the *Smuggling and Trafficking Protocols*.²⁷⁸

The contiguous zone follows the territorial sea and covers a further 12 nautical miles beyond the territorial sea, where the coastal State enjoys a ‘limited right of police’.²⁷⁹ This area does not allow for as much state sovereignty and for most purposes, is akin the high seas.²⁸⁰ Article 33(1) of *UNCLOS*, allows the coastal State to exercise only such control as is necessary to prevent the infringement of its immigration regulations within its territory or territorial sea, which requires proportionality in each case.²⁸¹ Moreno-Lax argues that contrary to EU Member States’ assumptions, exercising the authority to escort migrants to another port, forcibly returning them to their countries, or even detention are not included within the meaning of this

²⁷⁴ Article 27(1) of *UNCLOS* states: “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) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances”.

²⁷⁵ Moreno-Lax (2017) at 4. *See also* G S Goodwin-Gill & J McAdam *The Refugee in International Law* 3 ed (2007) 274.

²⁷⁶ *Ibid.* *See also* M Pallis ‘Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes’ (2002) 14 *International Journal of Refugee Law* 329-357.

²⁷⁷ V Moreno-Lax ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23(2) *International Journal of Refugee Law* 174.

²⁷⁸ Moreno-Lax (2017) at 4.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.* *See also* Article 33(1) of *UNCLOS* which reads: “In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.”

provision.²⁸² She adds that when exercising jurisdiction in this zone, this exercise of power is subject to “other rules of international law”.²⁸³

Lastly, state authorities are not allowed to engage foreign-flagged vessels on the high seas without the consent of the flag State, as ships are entitled to freedom of the high seas.²⁸⁴ *UNCLOS* only recognises a ‘right of visit’ which allows for warships to board foreign-flagged vessels on the high seas, if there is a “reasonable suspicion” that the vessel is “engaged in piracy, the slave trade, or unauthorized radio broadcasts”.²⁸⁵ Irregular migrants are known to use ships that are not flying a flag, or are ‘flagless’ and in these instances all States enjoy a ‘right of visit’; which means a right to board the vessel in order to verify its nationality.²⁸⁶ Whether further powers of ‘arrest’ or ‘interception’ are included within this remains contentious, however, most authors agree that these powers are not included, except where expressly conferred by treaty, such as the *Smuggling Protocol*.²⁸⁷

The *Smuggling Protocol* allows for “appropriate measures” to be taken where “evidence confirming suspicion” of migrant smuggling is found, however, it must be borne in mind that these measures must take account of the other rights, obligations and responsibilities of States and individuals under international law, including international human rights law, the *Refugee Convention* and the principle of ‘non-refoulement’ as contained therein.²⁸⁸ Thus, it is clear that although asylum-seeker boats may be ‘flagless’, this does not grant States infinite powers of enforcement or arrest.²⁸⁹

²⁸² Moreno-Lax (2017) at 5.

²⁸³ *Ibid.* See also Article 2(3) of *UNCLOS* which states: “The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law”.

²⁸⁴ Kilpatrick & Smith at 174.

²⁸⁵ *Ibid.* See also Article 110(1) of *UNCLOS* which states: “Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109; (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship”.

²⁸⁶ Moreno-Lax (2017) at 5.

²⁸⁷ *Ibid.*

²⁸⁸ Article 8(7) of the *Smuggling Protocol* reads: “A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law”. See also Article 19(1) of the *Smuggling Protocol*, the Savings Clause.

²⁸⁹ Moreno-Lax (2017) at 5.

3.4 Conclusion

The discussion of security risks faced by irregular migrants has shown that the *Smuggling Protocol* and *Trafficking Protocol* were designed specifically to criminalise and prevent migrant smuggling and human trafficking. There are protections to victims of smuggling and trafficking in both these Protocol's, however, these protections have not always been incorporated into domestic laws in the EU. The international human rights laws also protect to irregular migrants' basic human rights, such as the right not to be subjected to torture. These human rights have also been incorporated in the EU in the *ECHR*. Lastly, international refugee law provides protection to irregular migrants by forbidding them from being penalised for entering a country illegally. The 'non-refoulement' principle also obliges all States, even those not a party to the *Refugee Convention*, to screen for asylum claims when intercepting a vessel with possible asylum-seekers and not to simply return these people to a place where they have a "well-founded fear of being persecuted".

Similar protection is evident in the safety risks discussed, particularly with the duty to rescue at sea. This duty is a fundamental part of international law and provides protection to irregular migrants by obliging States and master's to rescue all people in need of assistance. The duty to rescue ensures that those irregular migrants who are lost or in need of assistance are taken to a place of safety. However, it has been noted that disembarkation at a place of safety is not defined in international law. Maritime interception is allowed in certain instances, such as in the *Smuggling Protocol*, however, irregular migrants are protected by all other international laws that the *Smuggling Protocol* is subject to and that seek to limit interception at sea, such as *UNCLOS* and the 'non-refoulement' principle.

Having discussed the protection available to irregular migrants under the international legal framework, Chapter 4 will discuss the protection gaps in this framework. A critical analysis of the protection gaps and shortcomings that exist in the international legal framework will be undertaken. This will be done in order to evaluate if the international legal framework provides adequate protection to irregular migrants during their voyage across the Mediterranean Sea.

CHAPTER FOUR:
PROTECTION GAPS AND SHORTCOMINGS

4.1 Introduction

Chapter Three discussed the international legal framework that protects irregular migrants from the safety and security risks faced on their voyage across the Mediterranean Sea. The *Smuggling Protocol* and the *Trafficking Protocol* were both identified as the main sources of protection from the security risks faced by irregular migrants, along with international human rights law and international refugee law. *UNCLOS*, *SAR*, *SOLAS* and the *Salvage Convention* were identified as the main sources of protection from the safety risks faced by irregular migrants, together with international refugee law and the principle of ‘non-refoulement’, as contained therein.

Having discussed the international legal framework that provides protection to irregular migrants, this chapter will set out the protection gaps and shortcomings that exist therein. This chapter will first discuss the protection gaps that exist in the international framework regarding the security risks, and then move on to the protection gaps that exist in the international framework regarding the safety risks faced by irregular migrants in the Mediterranean Sea. A critical analysis of the protection gaps and shortcomings will be done in concluding the chapter, to determine if the protection available to irregular migrants under the international legal framework is sufficient.

4.2 Security Risks: Protection Gaps in the Legal Framework

4.2.1 Migrant Smuggling

In Chapter 3, the *Smuggling Protocol* and the definition of ‘smuggling of migrants’ were discussed. Gallagher argues that the inclusion of the smuggler’s intention “to obtain a financial or other material benefit” as an element of the crime of smuggling was specifically added to narrow its scope and to exclude humanitarian acts of rescue and those for family reunification reasons.²⁹⁰ Gallagher’s view corresponds with that of Basaran, who submits that the ‘benefit’

²⁹⁰ A Gallagher (2017) at 2. See also A S Hartati ‘Criminalization of the Smuggling of Migrants in Accordance with the United Nations Convention against Transnational Organized Crime and Protocol against the Smuggling of Migrants by Land, Sea and Air’ (2013) 11(1) *Indonesian Journal of International Law* 30.

element, as alluded to above, is crucial to the definition of smuggling.²⁹¹ He also asserts that humanitarian and/or other similar acts lack this crucial element and so even if they enable the irregular entry of migrants, they do not fall under the definition of ‘migrant smuggling’ in the *Smuggling Protocol*.²⁹² In the official records of the proceedings, drafters of the *Smuggling Protocol* also affirmed that: “It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations”.²⁹³

However, *UNTOC* and its provisions apply when interpreting the *Protocols* and thus must be read together with the *Smuggling Protocol*.²⁹⁴ Article 34(3) of *UNTOC* provides that “each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime”. This means that State Parties are free to create offences that are stricter and as a result require less onerous elements than the smuggler’s ‘intention’, such as recklessness or negligence.²⁹⁵ This has led to problems as many domestic laws, especially in the EU, have become so strict that they essentially criminalise: (i) humanitarian acts of rescuing migrants and (ii) migrants for having been smuggled. The laws and practices relating to (i) and (ii) will be elaborated on below.

In practice, the ‘benefit’ element has been misrepresented by criminals in court proceedings, claiming that their acts of migrant smuggling were not done for any benefit.²⁹⁶ Consequently, a public prosecutor is saddled with proving intention or some arrangement of payment between the parties, in order to meet this element; proving that there was a ‘benefit’ is almost impossible to establish because it is invisible and proof of its existence is extremely hard to find.²⁹⁷ It is for this reason that many States have chosen not to include the element of ‘benefit’ in their domestic laws, a perfect example of which is the EU in their *Council Directive 2002/90/EC*. The directive evidences a gap in the protection of irregular migrants by criminalising

²⁹¹ Basaran at 381.

²⁹² *Ibid.*

²⁹³ A Gallagher (2017) at 2 and 3. See also Basaran at 381-382. Quotations adopted from the text of the United Nations General Assembly, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the *United Nations Convention against Transnational Organized Crime* and the Protocols thereto (A/55/383/Add.1), para 88.

²⁹⁴ Article 1(1) and 1(2) of the *Smuggling Protocol* state: “This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention” and “The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein”.

²⁹⁵ Hartati at 29.

²⁹⁶ Aljehani at 128.

²⁹⁷ *Ibid.*

humanitarian acts of rescue, thus dissuading rescue, resulting in irregular migrants being left to their fates at sea.

Migrants and seafarers' testimonies at the Strait of Sicily confirm that there is a propensity to turn away from irregular migrant vessels and avoid rescuing them, so as to avoid costly investigations, arrest or detention.²⁹⁸ Though all the defendants were eventually acquitted, the case of *Cap Anamur*²⁹⁹ compellingly illustrates how anti-smuggling laws have transformed humanitarian rescue efforts into a sanctioned enterprise.³⁰⁰ The case was against three members of an organisation called *Cap Anamur*, a humanitarian organization created in 1979 to assist boat people.³⁰¹ On 20 June 2004 the German-flagged *Cap Anamur*, owned by the eponymous organisation, discovered a rubber dinghy with 37 African men in distress between Libya and Italy, claiming to be fleeing the crisis in Darfur, Sudan or Sierra Leone.³⁰² Three days later the *Cap Anamur* rescued another migrant boat with eleven people on board in Maltese territorial waters and escorted them to the nearest Maltese port; the first rescued group did not disembark as they wished to apply for asylum in Germany.³⁰³

Cap Anamur heads towards Sicily, Italy but is denied permission to dock at the port.³⁰⁴ Italy stated that the vessel had passed through Malta and those rescued should apply for asylum there; Germany also agreed with this view.³⁰⁵ After a twelve day wait, *Cap Anamur* cites distress on the vessel and proceeds to the port, where police rapidly identified the men rescued as Nigerians and Ghanaians, and not Sudanese.³⁰⁶ The captain, director and first officer were arrested for assisting irregular migration upon their arrival, and their vessel seized as well.³⁰⁷ In November 2006, two years after their arrest, their trial began and continued for another three years.³⁰⁸ The prosecution insisted on a fine of €400 000 for each person and four years in prison for “assisting irregular entry” under the aggravated circumstances clause contained in Italian Legislation 286/1998, however, as mentioned the parties were acquitted of all charges.³⁰⁹ The case demonstrates that there is a fine line between acts that are “for-profit” and “non-profit”

²⁹⁸ Basaran at 373.

²⁹⁹ *Cap Anamur*, Tribunale di Agrigento, I Sezione Penale, I Collegio, 954/2009, Case No. 3267/04 R.G.N.R.

³⁰⁰ Basaran at 374.

³⁰¹ Basaran at 374-375.

³⁰² D Guilfoyle *Shipping Interdiction and the Law of the Sea* (2009) 214.

³⁰³ Guilfoyle (2009) at 215.

³⁰⁴ Basaran at 375.

³⁰⁵ Guilfoyle (2009) at 215.

³⁰⁶ *Ibid.* See also Basaran at 375.

³⁰⁷ Basaran at 375.

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

and as a result, between criminals and humanitarians.³¹⁰ Holistically it has been shown that there is a level of conflict in the ‘benefit’ element under the definition of smuggling of migrants.³¹¹ While this element is a necessity so as to exclude humanitarian acts of rescuing migrants or rescuing them because of close family ties, smugglers are also able to abuse the ‘benefit’ element to escape being held criminally liable for their actions.³¹²

It is clearly stated several times in the *Smuggling Protocol* that migrants’ rights should be protected, however, many states have failed in implementing these protections into their domestic laws. The wording in the Savings Clause makes it clear that if any State Party, in applying the *Smuggling Protocol*, fails to act in accordance with international law, as well as international refugee law, they are in stark violation of one of the Protocol’s fundamental provisions.³¹³ Gallagher remarks that:

‘Very few States would be able to defend their actions against migrant smuggling as conforming to the letter and spirit of the Protocol with regard to smuggled persons rights under that instrument including their right to consular access; to assistance; and to protection from inhuman or degrading treatment.’³¹⁴

What must be emphasised is that along with smugglers, refugees who are in need of asylum are also present on unseaworthy boats, and are forced to deal with so-called ‘criminals’, simply because smugglers seem to offer the only passage to their asylum.³¹⁵ Brolan argues that because refugees and economic migrants end up consorting with the ‘criminal’, the public tend to conflate all three of the above and so, sadly, refugees, economic migrants, and migrant smugglers become assimilated.³¹⁶ The fallout is that States exploit this public fear by stereotyping refugees as a burden and danger to the public, a social “threat” and of course economically motivated.³¹⁷ Thus, States emphasise the connection between smuggled migrants and transnational organized crime in order to characterise migrants as a “threat” to the public

³¹⁰ Basaran at 375.

³¹¹ Aljehani at 128.

³¹² *Ibid.*

³¹³ A Gallagher (2017) at 4.

³¹⁴ *Ibid.*

³¹⁵ Brolan (2002) at 594.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

and the State's security; this justifies the State's measures against irregular migrants, including externalisation of border controls and militarisation of migration management, which would normally come across as extreme.³¹⁸

Frontex is an EU border management agency, amongst various other roles. The agency defines risk as “a function of threat, vulnerability and impact”, or “the likelihood of a threat occurring at the external borders, given the measures in place at the borders and within the EU, which will impact EU internal security and/or the security of the external borders”.³¹⁹ Here, the border is described as “vulnerable” while irregular migrants crossing it are defined as a “threat”.³²⁰ Furthermore, separation of the term ‘smuggling’ from ‘trafficking’ has had the effect of influencing the public that migrant smuggling is a crime against the State and irregular migrants, complicit in this crime and therefore do not deserve protection.³²¹ While international rules acknowledge the exploitation of migrants and the need to protect their rights, these have not changed the entrenched perceptions of irregular migrants.³²² Accordingly, the protections that should be available to smuggled migrants are seldom incorporated and enforced through national laws and practices, resulting in a significant gap in irregular migrants’ protection.³²³

While there are problems with the *Smuggling Protocol*, the *Trafficking Protocol* has proven itself to be a game-changer, as mentioned. A well-resourced, dynamic anti-trafficking ‘industry’ ensures that how States choose to respond to trafficking is scrutinised and there is persistent and intense pressure on States to keep their laws and policies in line with international standards; the same, however, cannot be said for the anti-smuggling ‘industry’.³²⁴ In comparing the Protocols, while the *Smuggling Protocol* has attracted substantial ratification, the response to it could not have been more different.³²⁵ The *Smuggling Protocol* has not led to or been a model for any further legal development; additionally, there is no anti-smuggling ‘industry’ or suitably funded organizations that concentrate on what States are doing about smuggling and holding them accountable for their actions.³²⁶ As a result, in implementing their

³¹⁸ A Gallagher (2017) at 4.

³¹⁹ R Andersson ‘Europe's failed ‘fight’ against irregular migration: ethnographic notes on a counterproductive industry’ (2016) 42(7) *Journal of Ethnic and Migration Studies* 1061.

³²⁰ *Ibid.* See also Brolan (2002) at 578.

³²¹ A Gallagher (2017) at 4. See also Frigo (2014) at 100.

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ A Gallagher (2017) at 2. See also Baer (2012) at 120.

³²⁵ *Ibid.* Note: The Smuggling Protocol has 146 State Parties and the Trafficking Protocol has 172 State Parties, as at 16 October 2017.

³²⁶ *Ibid.* She adds: “The very different fates of the migrant smuggling and trafficking protocols reflect a multitude of factors. The ethics of human exploitation for private profit are not ambiguous or contested. Without compromising their core interests, all States can promise to support and protect victims. This has been further

legislative and policy responses, States have significantly moved away from the central tenets of the *Smuggling Protocol*, leading to a lack of uniformity.³²⁷

It is clear that it is ultimately the discretion of States whether and how closely they wish to adhere to the provisions of the *Smuggling Protocol* and incorporate them into their domestic laws.³²⁸ It is necessary for States to adhere to the wording of the *Smuggling Protocol*, because this helps create a standardised and uniform approach towards smugglers and migrants, whilst also upholding the protections available in international refugee and humanitarian law.³²⁹ However, as has been shown thus far, States have chosen to incorporate only the parts of the *Smuggling Protocol* that best suit them and to ignore the protections granted to irregular migrants. Consequently, most EU national laws significantly lack protection to irregular migrants, despite EU member states being parties to the *Smuggling Protocol*.

4.2.2 Human Trafficking

Although irregular migrants are generally smuggled into a country and not trafficked, they can also fall prey to traffickers throughout their journeys.³³⁰ Acknowledging this, most women and children are so afraid of opening themselves up to the risk of rape and/or sexual abuse that they are deterred from using smugglers on their journeys.³³¹ Therefore, smuggling and trafficking can be interconnected, as people who willingly seek a smuggler's assistance to cross a border, may also be subject to serious human rights violations in the process.³³² However, smuggled people are distinguished from trafficked people in that their participation in the illegal entry process is voluntary, though they may nevertheless be subjected to exploitation, ill-treatment or other violations of their human rights by smugglers.³³³

In contrast to trafficking, however, it must be stressed that smuggling involves at least a moment in which the migrant 'consents' by undertaking a voluntary decision to participate in

encouraged by abundant funding for anti-trafficking interventions; vigorous civil society involvement; and the existence of multiple external compliance mechanisms – such as the annual United States *Trafficking in Persons* report that evaluates the response of every country. None of these factors has been at play in relation to the Migrant Smuggling Protocol. The result is unsettling if unsurprising: a perceptible shaping of the Protocol and expectations around its implementation to meet the evolving policy preferences of States.”

³²⁷ A Gallagher (2017) at 2.

³²⁸ Brolan (2002) at 596.

³²⁹ *Ibid.*

³³⁰ Brolan (2002) at 579.

³³¹ *Ibid.*

³³² Brolan (2002) at 579-580.

³³³ Frigo (2014) at 100.

being smuggled.³³⁴ Accordingly, the element of ‘consent’ could be regarded as a default element in the definition of ‘smuggling of migrants’ in the *Smuggling Protocol*, even though it is not expressly included therein.³³⁵ Apart from the ‘consent’ element, as mentioned in Chapter 3, the element of ‘exploitation’ also distinguishes trafficking from smuggling. The distinction between those who are smuggled and those trafficked is crucial because they are both treated in a different way and afforded different protections in the *Trafficking and Smuggling Protocols*.³³⁶ Aljehani states that trafficked individuals are entitled to “rights within the scope of criminal investigations and proceedings, compensation for damages suffered, temporary or permanent residence, accommodation and employment, educational and training opportunities”, however, in contrast, the *Smuggling Protocol* contains scant rights and protections for smuggled migrants.³³⁷

There are many advantages to being classified as ‘trafficked’ and in the same token many disadvantages to being deemed ‘smuggled’; therefore, a mix-up between being trafficked or smuggled would result in the State applying an inadequate legal framework and the person concerned would be offered meagre protection.³³⁸ In addition, the *Trafficking Protocol* imposes a greater financial and administrative burden on States and this establishes a strong incentive for State authorities to categorize migrants as smuggled instead of trafficked.³³⁹ The fact that the *Smuggling Protocol* and the *Trafficking Protocol* fail to acknowledge the link between trafficking and smuggling and address their possible overlap, has led to a significant gap in the protection offered to those who are trafficked, as many can be incorrectly identified as smuggled migrants.³⁴⁰

³³⁴ Frigo (2014) at 100.

³³⁵ Aljehani at 131.

³³⁶ Aljehani at 134.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ A Gallagher (2001) at 1000.

4.3 Safety Risks: Protection Gaps in the Legal Framework

4.3.1 The Duty to Rescue

I. Disembarkation

One of the core issues with the duty to rescue concerns disembarkation. Although *SOLAS* and *SAR* govern rescue and rendering of assistance on the high seas, problems arise once seafarers render assistance, only to find that the nearest coastal State is refusing to disembark the rescued migrants.³⁴¹ Coastal states allowing smuggled migrants to disembark are saddled with several responsibilities such as screening for refugee or asylum-seeker claims.³⁴² Thus, in an attempt to avoid this and other onerous financial and legal obligations, such as long-term resettlement, some States are reluctant to grant permission to disembark rescued migrants.³⁴³

When coastal States started to refuse disembarkation permission, rescuing vessels and more specifically, the commercial shipping industry, were then burdened with this issue.³⁴⁴ This created a drain on financial resources and crew members for caring for those rescued, coupled with interruptions to commercial shipping schedules because vessels were forced to move from port to port, seeking permission to disembark those rescued.³⁴⁵ As mentioned in Chapter 3, because of these frequent incidents of non-compliance and disagreements over disembarkation, the *SOLAS* and *SAR* Conventions were amended to clarify the disembarkation of those rescued.³⁴⁶ The 2004 amendments deal with some problems with disembarkation, namely: masters of ships are to be released from their obligations with minimum further deviation from the ship's intended voyage and relevant parties are to arrange for disembarkation as soon as reasonably practicable.³⁴⁷

³⁴¹ F Attard 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas' (2016) 47(2) *Journal of Maritime Law & Commerce* 235.

³⁴² *Ibid.*

³⁴³ *Ibid.* See also Miltner (2006) at 89.

³⁴⁴ Miltner (2006) at 89.

³⁴⁵ *Ibid.*

³⁴⁶ Moreno-Lax (2017) at 7.

³⁴⁷ Ratcovich at 102. See also *SOLAS* Chapter V, Regulation 33(1-1) and *SAR Convention* Annex, Chapter 3, para 3.1.9. which reads: "Parties 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 ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable".

In addition, the amendments require that “the State responsible for the SAR region in which such assistance is rendered” must now “exercise primary responsibility” to make certain that the States involved co-ordinate and co-operate so that survivors are disembarked and then “delivered to a place of safety”.³⁴⁸ The amendments entered into force in 2006 and now binds all State parties, except for Malta which had objected to them.³⁴⁹ While the State responsible for the SAR region has “primary responsibility”, this responsibility relates only to “ensuring such co-ordination and co-operation occurs”.³⁵⁰ The text is silent about what should be done or what happens if no agreement is reached and fails to explicitly impose an obligation on the SAR State to disembark if and when no agreement is reached.³⁵¹ The disembarkation problem creates a critical protection gap for refugees rescued at sea by exposing them to serious risks of harm on board vessels; in addition, they may be abandoned at sea by those unwilling to risk the onerous costs involved in being refused permission to disembark.³⁵²

Disputes over disembarkation have escalated to the point that they have tested relationships between States, as was the case in the *M/V Pinar E* incident.³⁵³ The *M/V Pinar E*, a vessel flying the Turkey flag, had rescued around 140 people from the coast of Lampedusa (an Italian island), however, this island falls part of Malta’s SAR region; this led to a deadlock between Malta and Italy as to which one of the two should permit disembarkation of the migrants.³⁵⁴ Malta argued that the migrants should disembark at the nearest port, that being Lampedusa, however, Italy countered this argument by stating that because the migrants were rescued within Malta’s SAR region, Malta ought to be responsible for their disembarkation.³⁵⁵ In the end, Italy chose to accept the migrants only because of ‘humanitarian’ reasons and made sure to emphasize that this was an exception should not be regarded as a norm.³⁵⁶ Thus, without a

³⁴⁸ *SAR Convention* Annex 3.1.9 which reads “Parties 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 ships’ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable” and *SOLAS* Ch V Reg 33, 1–1 which contains analogous wording.

³⁴⁹ Ratcovich at 90.

³⁵⁰ Papanicolopulu at 501.

³⁵¹ *Ibid.* See also Mallia (2013) at 11 and Attard at 239.

³⁵² Miltner (2006) at 90-91.

³⁵³ Attard at 237.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ Attard at 237-238.

specific treaty that obligates the SAR State to accept disembarkation of those rescued, their duty extends only to coordinating of rescue operations.³⁵⁷

This incident is one of many between Italy and Malta in recent years and these disputes occur as result of Malta objecting to the amendments of *SAR* and *SOLAS*, in addition to the *IMO Guidelines*.³⁵⁸ These disputes expose a key weakness in the international maritime law framework and the consequences are that commercial ships that choose to rescue migrants in the Maltese SAR region off Lampedusa, are given contradictory orders by Malta and Italy on where to disembark them.³⁵⁹ Malta has stuck to the argument that disembarkation should take place at the closest safe port to the rescue, which in Malta's SAR areas is generally an Italian port.³⁶⁰ Legally, both States are not wrong as Italy has accepted the *SOLAS* and *SAR* amendments and Malta has not.³⁶¹ The result of this is that two co-operating States are governed by two conflicting laws, making a uniform and co-ordinated decision to a shared problem impossible.³⁶²

Another disembarkation issue is centred around delivering those rescued to a “place of safety”. The 2004 *IMO Guidelines* were drafted to supplement the *SAR Convention*, acknowledging that *SAR* does not provide a definition of “place of safety”.³⁶³ According to the *IMO Guidelines*, a “place of safety” is:

‘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.’³⁶⁴

It is clear from this definition that the rescuer may need to consider the character of the intended place of disembarkation and how this is related to the rescued migrants, to determine whether

³⁵⁷ Attard at 238.

³⁵⁸ Mallia (2013) at 11. *See also* Attard at 239.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ Resolution 167(78) of the IMO Maritime Safety Committee's *Guidelines on the Treatment of Persons Rescued at Sea*, IMO Doc. MSC 78/26/Add.2, 20 May 2004 (hereinafter referred to as the *IMO Guidelines*).

³⁶⁴ *IMO Guidelines*, Article 6.12.

it is indeed a safe place.³⁶⁵ The *IMO Guidelines* also emphasise that “the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea”.³⁶⁶ This wording coincides with the ‘non-refoulement’ principle, meaning that international refugee law ties into the interpretation of ‘place of safety’.³⁶⁷ Ratcovich asserts that given the general and open-ended character of ‘place of safety’, the parties’ common intention upon conclusion of the 2004 amendments was to give the concept a meaning that reflects obligations enshrined in other relevant and applicable rules of international law.³⁶⁸ He adds that the ‘non-refoulement’ obligation is an integral aspect of the concept of place of safety and that this is supported by references to ‘non-refoulement’ in the *IMO Guidelines*, as discussed above.³⁶⁹ One noteworthy problem with the *IMO Guidelines* – *IMO Guidelines* are not binding.³⁷⁰

In light of the above, a smuggled migrant who has been rescued at sea is also entitled to disembarkation at a place of safety, pursuant to the disembarkation rules under the *SOLAS* and *SAR Conventions*, but pursuant to the *Smuggling Protocol*, is not to be liable to criminal prosecution for the fact of having been the object of smuggling.³⁷¹ Hence, it may not be lawful for State Parties to the *Smuggling Protocol* to disembark smuggled migrants at a ‘place of safety’ where their treatment will amount to a penalty or punishment, such as a place where they are held in indefinite detention equal to imprisonment.³⁷² As discussed, the *Smuggling Protocol* entitles smuggled migrants to protection from violence that may be inflicted upon them for having been smuggled, and to assistance when their lives or safety are endangered.³⁷³ This will be discussed further under 4.3.2 below.

II. Disincentives of Rescue

A major problem that adversely affects rescue at sea and may negatively impact the willingness of seafarers to actually rescue refugees and migrants, is the possibility of being held criminally liable after doing so.³⁷⁴ In some instances, the master and crew who rescued migrants and

³⁶⁵ Kilpatrick & Smith at 148.

³⁶⁶ Annex 6.17 under ‘Place of safety’ in the *IMO Guidelines*.

³⁶⁷ Ratcovich at 114.

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ Miltner (2006) at 111.

³⁷¹ Ratcovich 116-117.

³⁷² Ratcovich at 117.

³⁷³ *Ibid.*

³⁷⁴ Papanicolopulu at 503. *See also* Basaran at 373.

disembarked them, have subsequently been charged with going against Italian domestic law rules regarding aiding irregular migration, as the case of *Cap Anamur* illustrates.³⁷⁵ Even if charges are eventually dropped and the parties are declared innocent, as in the *Cap Anamur* case, bringing charges against them is likely to deter others from rescuing migrants at sea; being arrested and then further detained pending the outcome of a trial will almost certainly result in loss of wages if not loss of a job.³⁷⁶ As Captain Schmidt of the *Cap Anamur* states: “if seafarers at sea notice a refugee boat, they know, that we stood trial for three years. The acquittal does then perhaps not play an important role anymore. The process amounts to punishment.”³⁷⁷

Apart from the possibility of criminal charges, using commercial ships for rescue leads to substantial economic loss, during and then subsequent to rescue efforts at sea.³⁷⁸ To name a few, there are the costs of fuel, wages and stores as a result of unscheduled navigation, food, water and medical supplies for the rescued migrants, port charges when delivering rescued migrants to a place of safety, and other substantial indirect losses linked to delays.³⁷⁹ These strong commercial disincentives to comply with the duty to rescue prove that some commercial vessels may want to avoid these onerous costs and obligations by choosing to turn off electronic tracking equipment when near migrant vessels.³⁸⁰ Kilpatrick and Smith have added that there have been complaints from surviving migrants who state that vessels intentionally ignored their pleas for assistance.³⁸¹

III. Enforcement of Rescue Obligations

Another significant limitation to the duty to rescue is the lack of enforcement.³⁸² This is an issue that is created in the case of ships flying under ‘flags of convenience’. While on the high seas, vessels are under their flag State’s jurisdiction.³⁸³ States used in ‘flags of convenience’ have no link to their vessels and are used to reduce costs and curb regulation.³⁸⁴ The problem

³⁷⁵ Papanicolopulu at 503.

³⁷⁶ *Ibid.* See also Basaran at 376.

³⁷⁷ Basaran at 376-377.

³⁷⁸ Kilpatrick & Smith at 154.

³⁷⁹ Kilpatrick & Smith at 154-155.

³⁸⁰ Kilpatrick & Smith at 160-161.

³⁸¹ Kilpatrick & Smith at 161.

³⁸² Papanicolopulu at 501.

³⁸³ Article 92(1) of *UNCLOS* which reads “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.”

³⁸⁴ Kilpatrick & Smith at 162.

with ships sailing under ‘flags of convenience’ is that many of these flag States either do not possess the drive or the resources to regulate their vessels and because they are unable or unwilling to enforce existing standards, any violation of these standards goes unpunished.³⁸⁵

In addition to the above, international law obligations are sometimes not incorporated into domestic laws.³⁸⁶ Incorporation of the duty to rescue is of grave importance as it is generally accompanied by sanctions for non-compliance, and given their dissuasive force, lack of sanctions will only further encourage seafarers to look away.³⁸⁷ Lack of incorporation into the domestic laws of a State also results in lack of competence by their domestic courts and as a result, any matters regarding non-compliance with the duty to rescue will not be admissible because of the court’s lack of competence to hear these matters.³⁸⁸ Still on the point of lack of competence by domestic courts, additionally no competent judicial authority exists to deal with such claims; domestic judges may not be competent to hear cases of non-compliance of the duty to rescue sea and there is sadly no international judge that can deal with these matters.³⁸⁹

UNCLOS offers a complex system of “dispute settlement”, but this was drafted to deal mostly with inter-State disputes, where a claim for non-compliance is brought by one State, on behalf of the migrant, against another State, representing the vessel’s flag State or the coastal State.³⁹⁰ However, pragmatically, it is improbable that a State will take the chance of threatening its relationship with another State only to prosecute a master who has not complied with the duty to rescue and as such, there are no known instances of this taking place.³⁹¹ This is another gap in irregular migrants’ protection, as victims of these maritime incidents do not have any tool at their disposal to dissuade shipmasters from failing to comply with their duty to rescue.³⁹²

Although migrants can sue seafarers for failing to rescue them, it must be borne in mind, especially in the context of the Mediterranean Migration crisis, that litigation sought by penniless migrants is highly unlikely.³⁹³ These plaintiffs would face several barriers along the way; they would first and foremost need to survive, despite not being rescued, then manage to identify the vessel that did not rescue them, and finally spend a significant amount of money

³⁸⁵ Mallia (2013) at 7. *See also* Papanicolopulu at 502 and Kilpatrick & Smith at 163.

³⁸⁶ Papanicolopulu at 502. *See also* Kilpatrick & Smith at 162.

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ Papanicolopulu at 503. *See also* Kilpatrick & Smith at 163.

³⁹² *Ibid.*

³⁹³ Kilpatrick & Smith at 166.

in suing the master and crew in a court that has jurisdiction over these matters.³⁹⁴ Despite these significant barriers, the recent case of *Hirsi Jamaa and others v Italy*³⁹⁵ demonstrates that migrants attempting to cross the Mediterranean Sea have actually gone this route and used litigation as a means to force compliance with the duty to rescue at sea, however, this case should not be viewed as the norm but rather, the exception.³⁹⁶ The case will be discussed further below.

4.3.2 Maritime Interception

As mentioned, it is only the *Smuggling Protocol* that allows for “appropriate measures” to be taken where “evidence confirming suspicion” of migrant smuggling is found, however, these measures must take account of the other obligations and responsibilities under international law.³⁹⁷ Actions such as confiscating a vessel and arresting and/or detaining all passengers; ordering a ship to change its course; escorting a vessel to a third country or handing it over to a third State’s officials, were not envisaged by the terms of the applicable treaties in each case.³⁹⁸

Italy’s attempts at creating bilateral agreements and treaties are particularly important, to illustrate the above. From the year 2000, Italy began initiating a sequence of agreements with Libya regarding irregular migration, which then concluded with the 2008 ‘Treaty of Friendship, Partnership and Cooperation’ between then Prime Minister Silvio Berlusconi and Colonel Muammar Qaddafi.³⁹⁹ In exchange for joint participation between Libya and Italy in interception operations that would occur in Libya’s territorial sea, Italy agreed to train Libyan officials and provide operational resources, together with general financial support to Libya.⁴⁰⁰

The bilateral agreement between Italy and Libya resulted in litigation in the European Court of Human Rights (ECHR), in the aforementioned *Hirsi* case. The case involved Eritrean and Somali migrants who were intercepted by the Italian Coast Guard and Revenue Police off the

³⁹⁴ Kilpatrick & Smith at 166.

³⁹⁵ *Hirsi Jamaa and others v Italy*, Application no. 27765/09, 55 European Court of Human Rights 627 (23 February 2012) (hereinafter referred to as the *Hirsi* case).

³⁹⁶ Kilpatrick & Smith at 166.

³⁹⁷ Article 8(7) of the *Smuggling Protocol* reads: “A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law”. See also Article 19(1) of the *Smuggling Protocol*, the Savings Clause.

³⁹⁸ Moreno-Lax (2017) at 5.

³⁹⁹ Kilpatrick & Smith at 181.

⁴⁰⁰ *Ibid.*

coast of Lampedusa and were handed over to Libyan authorities.⁴⁰¹ The migrants objected to being returned to Libya throughout the process, and when in court, they alleged that the Italian officials did not ask where they were travelling and just confiscated their personal belongings and documents of identification.⁴⁰² Italy argued that it did not have jurisdiction to perform asylum-seeker determinations because it was engaged in a “rescue” operation at the time.⁴⁰³ However, the ECHR rejected this by holding that Italy would not be able to avoid its responsibilities to perform refugee status screenings by characterising its “interdiction” activities in this way (as rescue operations).⁴⁰⁴

The agreement between Italy and Libya was carefully evaluated by the ECHR, taking into account international human rights law and other EU obligations as well.⁴⁰⁵ The court held that Italy had failed to comply with its legal obligations under international refugee law by not providing refugee screenings for the migrants in order to determine if they were refugees and added that Italy could not escape its obligations by choosing to enter into a bilateral agreement with Libya, as it had done.⁴⁰⁶ Furthermore, the court stated that the principle of ‘non-refoulement’ is a significant obligation of all EU member states and this principle prevented those intercepted at sea from being ‘pushed back’ and allowed them instead to request asylum, thus Italy was required to screen for asylum-seekers.⁴⁰⁷ The ECHR ordered Italy to pay 15,000 Euros to each of the plaintiffs plus court costs.

The *Hirsi* case proves that States cannot evade refugee law and human rights requirements by stating border control measures such as interception, are actually rescue operations.⁴⁰⁸ By professing an act to be a ‘rescue’ provides a legal basis to interfere with another boat, especially on the high seas, where a restricting ‘right of visit’ applies.⁴⁰⁹ Thus, the amalgamation of the remote high seas with ever-increasing State pressure to intercept, makes passing off an interception as a ‘rescue’ a more appealing explanation.⁴¹⁰ This trend is also gaining popularity because of the recent amendments to *SOLAS* and *SAR*, that now make sure that masters and crews of vessels that have rescued migrants are discharged of further responsibility for them as

⁴⁰¹ Wagner at 321. *See also* Kilpatrick & Smith at 182.

⁴⁰² *Ibid.*

⁴⁰³ Kilpatrick & Smith at 182.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Wagner at 321. *See also* Moreno-Lax (2011) at 174 & 220.

⁴⁰⁶ *Ibid.* *See also* Moreno-Lax (2017) at 11.

⁴⁰⁷ *Ibid.* *See also* Kilpatrick & Smith at 182.

⁴⁰⁸ Moreno-Lax (2017) at 9.

⁴⁰⁹ Miltner (2006) at 112.

⁴¹⁰ *Ibid.*

soon as is possible, which often means after disembarkation.⁴¹¹ Furthermore, a rescue operation on the high seas means that disembarkation is coordinated by a RCC, as opposed to interception operations on the high seas that does not have any clear responsibilities when it comes to disembarkation.⁴¹²

4.4 Conclusion

It is clear from the discussion above of security risks faced by irregular migrants that the protection gaps lie in lack of incorporation and implementation of international instruments. Most of the instruments discussed, such as the *Smuggling Protocol* and the *Trafficking Protocol*, provide adequate protection to irregular migrants, however, failure to incorporate these protections in domestic and regional laws, has resulted in lack of enforcement. State parties have begun to include migrants as part of the crime of smuggling in their domestic laws. This has led to irregular migrants being targeted as criminals, instead of offered protection as victims of smuggling. Humanitarian efforts to rescue migrants are also included and criminalised under States' anti-smuggling laws.⁴¹³ This has led to sanctioning of rescue that seeks to preserve the safety and security of irregular migrants at sea.⁴¹⁴ Consequently, there are significant gaps in the protection of irregular migrants against the security risks faced in the Mediterranean Sea.

Similar issues are evident in the safety risks discussed, particularly with the duty to rescue and disembarkation. The disembarkation of rescued people is generally quite urgent because the vessel could be overcrowded and may not have the necessary food and other such supplies to house the rescued migrants.⁴¹⁵ The confusion that is left by international treaties concerning identification of the State that should accept disembarkation in its ports poses a significant gap in the duty to rescue.⁴¹⁶ Apart from this, it has been proven that although this duty is a fundamental part of international law, the lack of incorporation is a significant shortcoming to the implementation of this duty. Lastly, maritime interception has resulted in States evading their duties under international human rights law, refugee law, as well as the 'non-refoulement'

⁴¹¹ Miltner (2006) at 112.

⁴¹² *Ibid.*

⁴¹³ Basaran at 373.

⁴¹⁴ *Ibid.*

⁴¹⁵ Papanicolopulu at 503.

⁴¹⁶ *Ibid.*

principle. As a result, there are also significant gaps in the protection available to irregular migrants with regard to the safety risks faced in the Mediterranean Sea.

Having discussed the shortcomings and gaps in protection that is apparent in the international legal framework, Chapter five will be the conclusion and recommendations. The new draft legislation of the United Nations will be critically analysed in order to determine if the gaps that exist under our current regimes are filled by this new draft legislation and whether or not this document will be sufficient to encourage change in domestic and regional laws on migration. This, along with other recommendations will be made before concluding this dissertation.

CHAPTER FIVE:
CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter will begin by providing a retrospective of the foregoing chapters and their findings. Following this, several recommendations will be made relating to the protection gaps and shortcomings in the international legal framework that seeks to protect irregular migrants from risk during their voyage across the Mediterranean Sea.

5.2 Summative Assessment of Chapters

Chapter 1 briefly discussed the background and history of this study. The terms ‘irregular migration’ and ‘irregular migrant’ were then defined and explained, followed by the research objectives, research questions, parameters and research methodology, and the architecture of the dissertation. This chapter provided an overview of the entire study and elaborated on the focus and limitations of the study, such as the geographical and temporal parameters.

Chapter 2 began with an account of the Kurdi family, shedding some light on the ‘Mediterranean Migration Crisis of 2015’. The crisis was then broken down and explained before looking at the situation in the Mediterranean Sea today. A few recent incidents were then discussed, proving that irregular migration is still a major problem in the Mediterranean Sea today. A statistical analysis was done using graphs and available data to compare irregular migrant attempted crossings and arrivals from the years 2014-2016 and then 2017-2018. This clearly shows that although the crisis of 2015 led to spikes in the death toll, the Mediterranean Sea is still a deadly route for irregular migrants today.

The chapter then looked at what the safety and security risks faced by irregular migrants who attempt to cross the Mediterranean Sea are. The security risks identified were: abuse and exploitation by smugglers and state officials, human trafficking, sexual and gender-based violence, being detained, tortured, and lastly being subjected to cruel, inhuman and degrading treatment. The safety risks identified were: ocean perils, unseaworthy and overcrowded vessels, safety of life, interception operations, ‘refoulement’ or being ‘pushed back’, rescue operations, and lastly disembarkation in a place of safety once rescued. These risks were discussed in detail before concluding the chapter.

Chapter 3 began with the security risks faced by irregular migrants, and looked specifically to the *Smuggling and Trafficking Protocols*, to see the international standards that States had to meet to adequately protect irregular migrants. A brief discussion of international human rights laws as well as international refugee law was done, to show all protections available to irregular migrants. Having discussed the legal framework relating to security risks, safety risks are then discussed, beginning with the duty to rescue at sea. The international refugee law principle of non-refoulement was explained before a discussion on maritime interception. The limitations to interception were then discussed, clearly proving that interception is not an absolute right of States and that they are bound by other rules of international law.

Chapter 4 started off by looking at the laws dealing with the security risks and more specifically, at the *Smuggling Protocol*. The definition of ‘migrant smuggling’ proved to be problematic in practice, leading to most States departing from the definition in the *Smuggling Protocol*. This was discussed in detail, along with all the problems that occur as a result of States adopting stricter definitions in their domestic laws. The protection gaps and shortcomings were analysed by comparing this to the *Trafficking Protocol* and the effectiveness of anti-trafficking law as opposed to anti-smuggling laws. The *Trafficking Protocol* was then analysed, noting that in practice irregular migrants who have been trafficked are vulnerable to being labelled as smuggled instead. This is a protection gap as anti-smuggling laws view irregular migrants in a negative light and offer little to no protection.

Moving on to the safety risks, the duty to rescue was broken down into practical problems that exist due to disembarkation and finding a place of safety. This is another significant gap in the legal framework, as it can lead to irregular migrants being pushed back to other countries. In addition to this, there are numerous disincentives to the duty to rescue that results from anti-smuggling laws. The case of *Cap Anamur* was discussed, highlighting that anti-smuggling laws target humanitarian acts of rescue and sanction the duty to rescue. This then leads to seafarers turning away and ignoring distress calls made by irregular migrants at sea.

5.3 Key Findings

5.3.1 What safety and security risks do irregular migrants face at sea?

As discussed above, Chapter 2 identified all the safety and security risks faced by irregular migrants in the Mediterranean Sea. The security risks were highlighted first and were discussed in detail, including several accounts of irregular migrants’ experiences. As mentioned, the

security risks identified were: abuse and exploitation by smugglers and state officials, human trafficking, sexual and gender-based violence, being detained, tortured, and lastly being subjected to cruel, inhuman and degrading treatment. The safety risks were then highlighted and once again, a few accounts of irregular migrants were discussed. The safety risks identified were: ocean perils, unseaworthy and overcrowded vessels, safety of life, interception operations, ‘refoulement’ or being ‘pushed back’, rescue operations, and lastly disembarkation in a place of safety once rescued. These risks were discussed in detail before concluding the chapter. The research question above was answered in this Chapter, as the chapter clearly identified all the safety and security risks faced by irregular migrants on their voyage across the Mediterranean Sea.

5.3.2 Are there any laws or regulatory measures in place to protect irregular migrants from the safety and security risks faced at sea?

Chapter 3 began by discussing each security risk and then safety risk that is faced by irregular migrants in the Mediterranean Sea and the international legal framework that is in place surrounding these risks. All the relevant international conventions and treaties were identified and discussed to prove the protection that is available to irregular migrants from these safety and security risks faced at sea. The research question above was adequately dealt with and answered in this Chapter, as it clearly proves that there are laws and regulatory measures in place to protect irregular migrants from the safety and security risks faced in the Mediterranean Sea.

5.3.3 Are irregular migrants adequately protected by the current legal framework?

Chapter 4 dealt specifically with this research question and sought to answer it by critiquing and analysing the international legal framework and regulatory measures in place to protect irregular migrants from the safety and security risks faced at sea. The gaps and shortcomings of the legal framework were discussed in detail, clearly proving that the protection available to irregular migrants is not adequate. There are significant gaps in the current legal framework, as discussed. In addition to these gaps, States have failed to incorporate and implement the existing legal obligations in their domestic laws and practice. This chapter highlights the reasons why States have failed to implement and incorporate existing legal protections and the problems that arise for irregular migrants as a result.

5.4 Recommendations

It is recommended that an anti-smuggling industry needs to be created to ensure that States adhere to the protections set out in the *Smuggling Protocol* and implement them into their domestic laws. Checks and balances need to be in place to ensure that States are accountable for their actions when going against the obligations in the *Smuggling Protocol*. This can be done by creating an ad hoc committee to deal with such discrepancies and keep States in line with their international obligations. It is also recommended that an international court or forum should be created to deal with disputes and violations of international standards. The United Nations Global Compact for Safe, Regular and Ordinary Migration together with the Global Compact for Refugees, provide excellent guidelines in this regard, however, their status as non-binding is not ideal, and it is recommended that binding legislation should be implemented.

States are well aware of their obligations under international law, such as the duty to rescue and the principle of ‘non-refoulement’ when intercepting vessels on the high seas, however, as has been shown, because these obligations can be burdensome States try to sidestep them. It is thus recommended that creating a new binding legislation may be necessary and if not, then the existing legal framework should be amended, as recommended below. The framework should be amended so that it is more comprehensive and clarifies the definitions and content of certain key terms. One of the duties that should be further clarified is the duty to disembark. As discussed throughout this study, this obligation can be found in several maritime conventions, but the actual criteria for disembarkation and the State responsible for this, have not been established. Thus, it is recommended that suitable criteria should be included in a binding maritime convention.

Although the *IMO Guidelines* define a place of safety, this definition cannot be found in any of the legally binding maritime treaties or conventions. It is recommended that this definition be included in a binding maritime convention. The definition should establish that a place of safety envisages a place on land, in a country that is a party to the *Refugee Convention*. This not only provides clarification of a place of safety, it also safeguards irregular migrants in need of international protection. The difference between a rescue operation and an act of interception also needs to be clarified in a legally binding maritime convention. It is thus recommended that the maritime conventions should be amended to include a provision explaining what a rescue operation is and what an act of interception is, so as to differentiate between the two.

5.5 Final Remarks

The final conclusions reached in this study prove that irregular migrants are not adequately protected by the laws in place and that there are significant gaps and shortcomings in the international legal framework. The research undertaken in this study clearly illustrates the gaps and shortcomings in the protection available to irregular migrants. The recommendations provided above allow for these gaps and shortcomings to be dealt with and remedies the problems faced. It is submitted that new binding international legislation needs to be made to remedy the significant gaps in the international legal framework.

‘While irregular migration has come to be seen in many European countries, as a “threat” to their security, the security of migrants is also equally under threat. This also means that any attempt at addressing the current “migration crisis” in the Mediterranean in a comprehensive manner should take into account not only the security of the receiving states, but also the “human security” of the migrants seeking to reach Europe.’⁴¹⁷

⁴¹⁷ D Lutterbeck (2014) at 131.

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20 December 2018

Ms Sharkirah Khan 212532551
School of Law
Howard College Campus

Dear Ms Khan

Protocol reference number: HSS/2220/018M

Project title: Irregular migration across the Mediterranean Sea: An analysis of safety and security regulatory measures.

Full Approval – No Risk / Exempt Application

In response to your application received on 30 October 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number. PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully


.....
Dr Shamila Naidoo (Deputy Chair)

/px

cc Supervisor: Dr V Surbun
cc Academic Leader Research: Dr F Mnyongani
cc School Administrator: Mr P Ramsewak