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Refugees at Sea

Constance MacIntosh

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The Future of Ocean Governance and Capacity Development

Essays in Honor of Elisabeth Mann Borgese (1918–2002)

Edited by the International Ocean Institute - Canada

Dirk Werle – Paul R. Boudreau – Mary R. Brooks –
Michael J.A. Butler – Anthony Charles – Scott Coffen-Smout –
David Griffiths – Ian McAllister – Moira L. McConnell –
Ian Porter – Susan J. Rolston – Peter G. Wells



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Refugees at Sea

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Deadly and Desperate Crossings

In April 2015, over 1,000 would-be migrants drowned in a single week while trying to cross the Mediterranean Sea.¹ Most had started their journey in Sub-Saharan Africa, where gross human rights violations and civil break-down were, and remain, rampant. Because Turkey had enhanced its border control measures to try to quell the flow of asylum seekers fleeing from Syria, it had become harder to reach the safety of European states via a land corridor. Opportunities for smugglers and traffickers increased, who routed tens of thousands of displaced people to the coastal state of Libya. Here, many migrants found themselves sold to criminal gangs or to other traffickers. They were subjected to torture, to sexual abuse by armed forces, and to forced labor and long incarcerations underground.² In short, they found themselves enslaved or subsisting in conditions of extreme vulnerability, and ultimately directed onto large wooden boats by the smugglers and traffickers. Once well into the Mediterranean, the people were often forced onto small rafts or dinghies, to (hopefully) be picked up by European coastal patrols or otherwise make it to shore alive.

In the first half of 2015, one in 16 persons drowned trying to make the crossing. This was due to the poor condition of the boats, the lack of safety equipment, overcrowding, and the inherently perilous character of ocean crossings. It was also due to the decision by the European Commission and Italian government to end funding for the humanitarian initiative *Mare Nostrum*. This initiative, launched due to mass drownings of trafficked migrants trying to reach Europe in 2013, had been effectively co-ordinating search and rescue operations near Libya during 2013 and 2014. The program was cancelled because of concerns that the increase in safety which it offered was incentivizing displaced people to take to the sea, as well as the refusal of other countries to contribute to its costs despite—or perhaps because of—having rescued

¹ Human Rights Watch, *Europe's Refugee Crisis: An Agenda for Action* (December 2015), 5.

² Amnesty International, "Refugees and Migrants Fleeing Sexual Violence, Abuse and Exploitation in Libya" (1 July 2016), <https://www.amnesty.org/en/latest/news/2016/07/refugees-and-migrants-fleeing-sexual-violence-abuse-and-exploitation-in-libya/>.

over 100,000 people during its year of operations.³ It was replaced by Frontex's Operation Triton, which focused on Italian coastal border protection. With this refocus on coastal security change came a modest decrease in the number of migrants arriving in Europe from the Libyan coast, and a nine-fold increase in known deaths at sea.⁴

The Scope of Humanitarian and Legal Obligations to Rescue

Seas are unpredictable and dangerous, and have long taken lives. The vulnerability of anyone who is out on the water—from fishermen to pleasure-craft sailors to cargo ship crew—has since time beyond memory been recognized as triggering a moral duty to aid those in distress. In the last one hundred years or so, this humanitarian imperative came to be written into international laws that almost all coastal nations have agreed to. One such law states:

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.⁵

After a rescue, such laws commonly require the rescuer to ensure that those who they have assisted are taken to a place of safety. The obligation to provide assistance to those in distress at sea would seem complimentary to the key obligation under the 1951 Convention Relating to the Status of Refugees (Refugee Convention), which is to assist those who are fleeing persecution. Both obligations are essentially ones of offering salvation, through responding to a person's actual situation of risk, and apply regardless of the nationality, sex, or race of the person in need. These are humanitarian laws grounded in fundamental principles about promoting human security, and are triggered by externalized threats to individual lives.

But in practice their relationship is more complicated. The Refugee Convention has a very narrow definition for who qualifies for assistance. For example, the only persecution that counts is that motivated by religious, political, racial, ethnic, or social group membership, and there must be no place in the person's

3 Amnesty International, *A Perfect Storm: The Failure of European Policies in the Central Mediterranean* (London: Amnesty International, 2017), 10.

4 A. Denti, "Hundreds Drown Off Libya, EU Leaders Forced to Reconsider Migrant Crisis," Reuters, 19 April 2015.

5 International Convention for the Safety of Life At Sea, 1 November 1974, 1184 *U.N.T.S.* 3, as amended, Chapter v, Regulation 33.

home state where it is reasonable to believe they could be safe. And refugees have more and more often come to be swept into larger flows of would-be migrants, on the move because of some combination of human rights violations, gut-wrenching poverty, and environmental degradation. This description certainly covers those who have been and continue to flee from Sub-Saharan Africa, where life has become grossly unsafe due to on-going violent civil unrest and the presence of warlords, coupled with drought and famine. However, international law does not, generally speaking, impose an obligation on states to accept and shelter such displaced individuals. Instead, it sanctions viewing them as migrants who are trying to evade being held to a state's normal immigration policies and practices.

There are also gaps in maritime law that leave room for vulnerability. It requires that ship masters rescue, but does not require states to send boats to waters where they suspect unseaworthy boats may be being launched. It requires that rescued persons be brought to safety, but is not explicit about the obligation of states to permit disembarkation. Historically, when the rescued people were largely shipwrecked sailors, there seems to have been no dispute that the rightful course of action was to permit disembarkation at the next safe port of call. States have taken a more narrow reading in recent years, because if a rescuee claims refugee protection, the state becomes obliged to shelter the person while the protection claim is determined, and may be required to permit the individual to remain if they cannot be safely returned to their state of citizenship. And so we witness states refusing to allow the landing of rescued asylum seekers, with the most famous being the 'Tampa Affair' of 2001 when Australia refused to allow a Norwegian boat to disembark 438 Afghan refugee claimants. And we witness intentional interceptions in international waters by state agents, where the intercepting state denies they are bound to any of the obligations set out in refugee law while in international waters, and so return the claimant to their home state. The United States Supreme Court has found that this is a permissible interpretation of international and maritime law,⁶ and so validates their practice of forcibly returning Haitian asylum seekers to Haiti without determining their protection needs. This practice is roundly condemned as violating international law by others, who argue that upon a state intercepting a boat and taking control of its passengers, that state has assumed *de facto* jurisdiction over the people on board, and must ensure that their protection claims are heard.⁷ And so the generousities, limitations, and vagaries of

⁶ *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

⁷ J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 337.

both maritime and international humanitarian law, especially when coupled with state concerns about migration control, may result in a rescue ultimately returning a person to vulnerability, cycling them back into the hands of traffickers, or to the desperate situation that made them decide that risking death at sea was safer than staying on land.

Coastal Border Security Is a Dangerous Substitute for Human Security

After the massive drownings in the Mediterranean in the spring of 2015, the European Union responded by increasing resources for rescuing migrants at sea and putting measures in place to facilitate safe and quick disembarkation of the migrants in Europe, where their protection needs were assessed. These immediate humanitarian acts, however, came to be overshadowed by national security interests and concerns about managing migration. In June 2015, the European Union established EUNAVFOR Med ('Operation Sophia'). Operation Sophia's primary mandate was to disrupt traffickers' and smugglers' ocean-based operations by arresting the smugglers and destroying the boats. Operation Sophia was also to train the Libyan coast guard in rescue operations, so that unseaworthy crafts would be intercepted before they left territorial waters. With these two shifts in emphasis—each entirely consistent with maritime law concerning rescue, and international law which condemns smugglers and traffickers—came consequences that ironically increased human insecurity both on the water and on land.

Operation Sophia proved quite successful at intercepting boats, rescuing the trafficked or smuggled occupants, and then destroying the boats. Recognizing that ship masters could not determine if a person met the terms of the Refugee Convention, all rescuees were transported to Europe to determine whether they could be returned or if they were at risk of persecution. By June 2017, over 452 boats had been destroyed.⁸ Business as usual had indeed been disrupted. But once again the smugglers and traffickers adapted and, in particular, adopted riskier tactics for getting their human cargo into European hands. With most of the large wooden boats that had been used to get migrants close to Italy's shore gone, they were largely replaced by small inflatable boats. These boats could not be expected to actually make the crossing—passengers became effectively in need of rescue quickly after they set out. In 2016 this

⁸ House of Lords, European Union Committee, *Operation Sophia: A Failed Mission*, 2nd Report of Session 2017–19, HL Paper 5, 12 July 2017, para. 18.

translated both into 52 percent more rescues than 2015 and a 42 percent increase in recorded casualties. The numbers from 2017 threaten to show further increases. On top of this, the migrant flows trying to escape to Europe did not decrease, because the situation in Sub-Saharan Africa remained, and remains, grossly violent with the threat of starvation ever present.

Efforts to train the Libyan coast guard to intercept and rescue potential migrants while still in Libyan territorial waters have drawn considerable criticism. Reports were published in *The Times* in February 2017 of coast guard officers whipping and threatening to kill the migrants they had rescued, consistent with UN reports from 2016 of Libyan coast guard members engaging in gross human rights violations of intercepted migrants. Not surprisingly, the United Nations High Commission for Refugees has rejected designating Libya as a state that meets the criteria for being a place of safety for disembarking following a rescue at sea.⁹ So while it would violate international law for the European Union to return any migrants they rescue to Libya for disembarkation, or even shipwrecked sailors, such a fate awaits those who are intercepted by the EU-trained Libyan coast guard.

Refugees at sea—and others fleeing gross human rights violations and environmental disasters by ocean routes—find themselves caught in an incomplete legal regime. Their security turns not just on whether the ocean is kind to them, but also on the ever shifting relationship between funding, state security, and border interests. It is these relationships which permeate the gaps in the legal regime, inserting policies and programs that shift with political interests. Responding to a refugee crisis by trying to manage ocean transiting routes is bound to fail, with this failure being highlighted by waves of predictable mass drownings. Ironically, it is these mass drownings that trigger the humanitarian high points, points which seem to be held until too many people are rescued at sea, and then other political interests rise to the surface.

9 United Nations Support Mission in Libya and United Nations Human Rights Office of the Office of the High Commissioner, *Detained and Dehumanized: Report on Human Rights Abuses Against Migrants in Libya* (13 December 2015), 8.