

'Let them drown': rescuing migrants at sea and the non-refoulement obligation as a case study of international law's relationship to 'crisis': Part II

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This post is part of the *ESIL Interest Group on International Human Rights Law* [blog symposium](#) on 'The Place of International Human Rights Law in Times of Crisis'.

In the [first half](#) of this two-part post, I reviewed the argument to the effect that sea-rescues of migrants, allied to the extraterritorial application of the *non-refoulement* obligation in human rights law, incentivize dangerous smuggler-enabled journeys. In this second half of the post, I will appraise the merits of this argument.

Why do People make Dangerous Crossings?

People only take dangerous routes because regular routes are closed off to them, through migration law-enabled *non-entrée* restrictions backed up by robust carrier sanctions in general, and an absence of will, on the part of many states who could potentially provide protection, to realize this potential through organized resettlement, in particular.

Some have argued—as I did in a [presentation](#) at the American Society of International Law Annual Meeting in 2016—that a key causal factor in creating the conditions for smuggler-enabled perilous sea crossings is the *non-entrée* measures of those states whom individuals wish to obtain protection from.

These measures—strict immigration controls, including border checks, visa restrictions and the posting of extraterritorial immigration officials—are rooted in the general entitlement of states in international law to control their borders, and backed up specific legal regimes whereby states impose hefty fines on carriers such as airlines if the carriers transport individuals into their territories who do not have a right to enter there. (For a discussion of the ethics of this, see e.g. Linda Bosniak's ['Wrongs, Rights and Regularization'](#)).

It is the existence of these legally-enabled arrangements that necessitate the dangerous and illegal journeys, involving smugglers, which place people in danger at sea (see also Itamar Mann and Umut Özsü [here](#)). (For the argument that, because of this, in some cases the smuggling of refugees is justified, see [this](#) by Jim Hathaway.) Here, then, we see how one area of international law can be seen as part of the cause of the 'crisis'.

In this light, sea-rescues allied to the extraterritorial operation of the *non-refoulement* obligation in human rights law are not so much causing perilous sea crossings as dealing with the consequences of the *non-entrée* measures adopted by some of those states who would engage in such rescues and, when doing so, be subject to the *non-*

refoulement obligation. In other words, in some cases the rescues and the consequences of the operative protection obligations involve states addressing a situation they are partially to blame for (on the general case for mitigating the 'constitutive violence' of border enforcement through human rights ideas, see Itamar Mann's *Humanity at Sea*, Chapter 3). They are not the charitable acts of innocent bystanders. Indeed, this places into question the validity of using the word 'rescue' itself, given that in some cases the term risks obscuring the causal chain between the original acts of the rescuing state and the situation that gives rise to the need for a rescue.

The policy of rescue twinned with an ongoing protection obligation in human rights law fits with this scenario of culpability, and can, therefore, be viewed as a redress mechanism. On this view, it would not be necessary to understand this policy and the applicable protection obligation in terms of selfless notions of charitable humanitarianism; there is a more direct underpinning based on liability (for a similar discussion by David Miller, see [here](#)).

From the vantage point of international law and crisis, then, we might see this as a situation of contest, where the policy of rescues allied to the ongoing protection obligation in human rights law mitigates the causal effect of another area of law when it comes to the crisis of dangerous sea crossings. Law is at once a cause and (when the rescue policy is implemented, triggering the *non-refoulement* obligation) a partial remedy.

The Limits to the Remedial Nature of Human Rights Law

But the remedial nature of human rights law here is extremely limited. Foregrounding the partial culpability of *non-entrée* states in the context of such states being subject to extraterritorial *non-refoulement* obligations brings into sharp relief the inadequacy of human rights law extraterritorially more generally, as extraterritorial applicability is conventionally understood.

The *non-refoulement* obligation is only triggered extraterritorially if the operation of human rights law more generally is applicable. According to the usual approaches here, for much of treaty law, that operation only occurs in circumstances of direct effective control over areas or people, the paradigmatic examples in the case law being such situations as military occupation or the operation of state-run facilities such as embassies (for an overview, see [here](#)). There is of course considerable debate and disagreement here on the contours of the test, in terms of how broad or narrow it is, but fundamentally this is all within a spectrum that is itself only small when one thinks of the realities of how the actions and omissions of states have an impact on human rights beyond their borders.

To give one illustration: the extraterritorial operation of immigration checks, such as St Pancras train station in London, where French and Belgian immigration officials decide who is able to travel to their countries before the individuals affected can get on the train and leave London (equivalent reciprocal arrangements operate in Paris and Brussels). Even if the test for the application of *the non-refoulement* obligation in

human rights treaty law can be considered to be met in the case of the individual decisions of those officials, the effect of these decisions on the individual travellers directly affected is, of course, only part of the picture. More broadly, they have a potentially exemplary disincentivizing effect to a much wider group of people, putting them off from even attempting the route in the first place. The causal relationship here is not covered by most of human rights treaty law as conventionally understood, since apart from anything else, the people who are affected do not fall within the test—direct, effective control—that triggers the operation of this law.

But where the *non-refoulement* norm does apply extraterritorially—clearly rescuing people at sea brings such individuals within the state’s effective control—it can be argued, as has been said, that in the context of dangerous, smuggler-enabled journeys, it amounts to states being required to face up to the consequences of their *non-entrée* actions. Even here, though, there has to be a rescue in the first place. Human rights treaty law as conventionally understood extraterritorially presupposes the pre-existence of a control relationship before it becomes operative. States can seek to avoid this by keeping their vessels well away from areas where migrants are at peril in the first place (on the obligations related to rescue in the law of the sea, see e.g. the forthcoming chapters by Efthymios Papastavridis and Douglas Guilfoyle [here](#), and the EJIL *Talk!* blog entry by Efthymios Papastavridis [here](#)).

Assuming states are engaged in a maritime rescue (including when this is legally required by the law of the sea), and so subject to the *non-refoulement* obligation, however, the argument that this arrangement involves them taking responsibility for the consequences of their *non-entrée* actions has to reckon with the counter-argument that it is placing blame in the wrong place: that first and foremost it is the originators of the abuses which people are seeking protection from who are responsible for creating the protection need. In the case of Syria, for example, it is argued that the Assad government, the anti-government rebels and IS are the ultimate cause of the civil war in and therefore the forced migration from that country, and that, therefore, these actors are the cause of the perilous sea crossings, which would not be happening at all if people hadn’t been driven out in the first place. To place the blame on the *non-entrée* measures of other states—and the role of international law in enabling these measures—is to miss this more fundamental causal factor.

So, then, the relationship between international law and the migration crisis is simpler than suggested earlier: it no longer plays a causal role; it is only to be understood in a positive light as a partial solution.

The first thing to say here is that issues of causation are of course complex, and usually not a matter of either/or. Even if the movement of Syrians that the perilous sea crossings form part of would not be happening but for the civil war in Syria, of course this does not mean that other states are off the hook if their responses are making a bad situation worse.

But in any case this argument ignores the broader structural and historical factors that tie other states to the actions of Assad, the anti-Assad rebels and IS, from food insecurity to climate change, the legacy of the Iraq war, and the partially determinative

involvement that some of these states and their proxies have in the region in general and within Syria in particular. In doing so, it also conceals the role of international law as sometimes an enabler of these matters, either positively or in its failure to prevent.

To give one of many examples that could be invoked here: one only has to think about the legally-enabled international arms trade, as a matter of generality and in the specific case of the US and UK defence industry relationship with Saudi Arabia and the role of Saudi Arabia in supporting extremist Wahhabi and Salafist Sunni Islam, and then bear in mind how all of this is linked in multiple ways to what is happening in Syria.

In his 1983 book *Spheres of Justice*, Michael Waltzer, in the context of the then contemporary Vietnamese refugee situation, argued that:

Toward some refugees, we [Walzer is a US national] may well have obligations of the same sort that we have towards fellow nationals. This is obviously the case with regard to any group of people whom we have helped turn into refugees (p. 49).

This idea is given sustained treatment in James Souter's recent [argument](#) for a

...special obligation on the part of states to provide asylum to refugees for whose lack of state protection they are responsible, whether through their military interventions, support for oppressive regimes or imposition of damaging economic policies. Asylum should be conceived not only as playing a 'palliative' humanitarian role or as expressing condemnation..., but also as potentially providing a means by which states can rectify the harm they caused to individuals by turning them into refugees (326, reference omitted).

(For David Miller's invocation of this argument, and application of it in the context of rescuing migrants from Libya, see [here](#)). This moral case for a duty to provide asylum implicates Linda Bosniak's more general, related [discussion](#), through the concepts of 'supercession,' of how irregular migration can in certain circumstances be ethically transformed to be justified, and 'corrective override', whereby migration should not be considered irregular at all if destination states bear historical responsibility for wrongs which 'are causally related to the subsequent process of irregular out-migration of individuals to' [such states] (at 210). It would also be relevant to the earlier treatment of the causal role played by states not in the original harm that led people to flee, but (through *non-entrée* measures) in the harm such people risk in making dangerous crossings.

Ultimately, in an acutely interdependent and unequal world it is naïve to regard the phenomenon of forced migration as not in one way or another structurally linked to the actions of developed states and their economic, military and geopolitical activity.

The crisis language enables this to be ignored, because, as Benjamin Authers and Hilary Charlesworth [observe](#), 'crises are understood culturally to be unique...the consequence of anomalous actions and events, rather than inherent' (p. 23).

If, however, the policy is to end dangerous and smuggler-enabled sea crossings by forced migrants, then the starting point for critical analysis should be these structural links and the various ways international law nurtures them. The common failure to

take such an approach and instead to foreground relatively marginal issues, reflects the broader trope of international law and crisis identified by Hilary Charlesworth, that international lawyers,

are preoccupied with great crises, rather than the politics of everyday life. In this way international law steers clear of analysis of longer-term trends and structural problems' (p. 389) [and]...becomes simply a source of justification for the status quo' (p. 391).

Equally, it reflects the way in which, as Benjamin Authers and Hilary Charlesworth observe,

...crises act as both catalysts and distractions in law's production and application. One effect of this is that the lack of crisis language can make some human rights violations appear quotidian...and less urgent to redress than crisis-generated rights. Economic, social and cultural rights, for example, are only infrequently depicted as the subjects of legal crisis. This separation centres on a crisis-driven hierarchy of urgency that has pervasive consequences, casting economic, social and cultural rights as potentially deferrable... (p. 21).

These tropes are manifest in the aforementioned limited extraterritorial scope of human rights treaty law as generally understood, which addresses the extraterritorial projection of power only insofar as it is unusual in frequency and exceptional in nature, not commonplace and widespread.

In this context, then, and to conclude, sea-rescues twinned with the extraterritorial application of the *non-refoulement* obligation are perhaps more helpfully viewed not in terms of their causal role in relation to dangerous sea crossings but, rather, as a marginal, partial gesture of responsibility that fits within a much broader, but legally and politically absent, liability, in which international law plays a key role, and reflecting the way in which, as Authers and Charlesworth observe, 'the language of crisis...can both prompt action and obscure responsibility' (p. 21).