# IRREGULAR MIGRATION BY SEA: CONTEMPORARY INCIDENTS IN THE MARE NOSTRUM – THE TRANSITION FROM STATE-BASED ACTION TO HUMANITARIAN-DRIVE REGIONAL CONTROLS

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**ABSTRACT:** *Irregular sea migration has proven to be a popular means of escaping violence and armed conflict. Events after the Arab Spring in 2011 caused a lot of irregular sea migration over the Mediterranean to Europe. This created serious problems and concerns. The purpose of this research is to examine the rights of irregular sea migration in international law, constraints of states in accepting these irregular migrations and propose a solution to the problem. The paper identifies that the right to life is a fundamental legal provision that irregular sea migrants have. Therefore, it is imperative for all state and non-state actors to honor this. This can best be done by viewing the sea in a regional rather than national context. This way, states can unite and share the challenges of dealing with common issues within a regional context.*

**KEYWORDS:** Migration, Irregular, International Law, Human Rights, Dublin III, Mare Nostrum, Mediterranean

## INTRODUCTION

On July 26, 2017, the European Court of Justice in Luxemburg ruled that in a case where asylum seekers move through one European state to a second Member State, the second state can deport those asylum seekers to the first country under the Dublin III Regulation[1]. The Dublin III Regulation indicates that an asylum seeker must seek asylum in the first safe country[2]. This creates a major complication for nations with coastal boundaries that are accessible by people from continents with widespread armed conflict. This is because such coastal states like Italy and Greece are likely to be flooded by asylum seekers from regions replete with armed conflicts who will would not be accepted by other countries. This creates a problematic situation which will inevitably cause nations with high-risk waters might want to turn their backs on asylum seekers since they are likely to have huge populations of refugees, which could cause serious political, demographic and economic crises.

In light of these circumstances, this research examines the case of irregular migration by sea. This article will first examine the conceptual framework of international law as it relates to irregular migration by sea. This will include discussions about the rights of these migrants – like the fundamental right to life and protect. It will also examine the obligations of the states bordering

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[1] A.S. v Slovenian Republic and C-646/16 Khadija Jafari and Zainab Jafari

[2] Maria Fletcher, Ester Herlin-Karnell& Claudio Mantera. *The European Union as an Area of Freedom, Security and Justice* London: Routledge, 2016) np.

the seas these irregular migrants and/or asylum seekers use as well as the obligations of the international community towards such persons.

Secondly, the paper will take an approach of realism to examine what actually occurs in relation to states' interests and attitudes in dealing with irregular migration by sea. This will include the actual information about drowning and the role of human traffickers in these dangerous crossings. Also, political trends within the potential host countries of these irregular migrants will be examined in various regions around the world

Thirdly, the research will undertake a synthesis of aspects of liberalism and realism relating to irregular migration by sea. To this end, there will be a critical analysis of both the idealistic rules and realism in order to deduce the possible approaches to dealing with the issue. This will lead to discussions in the fourth segment of the paper, which will present recommendations based on possible arrangements to protect irregular migrants and asylum seekers who enter states by sea. This will include the evaluation of push and pull factors in order to draw inferences on the best strategy to manage irregular migration by sea in the international community.

**Purpose of the Research**

The rationale behind conducting this research is to examine the problem caused by maritime refugees and irregular migration by sea. It also extends to discussing the effects it has on persons who move via the Mediterranean see routes to Europe. The paper further provides an academic examination of contemporary incidents at the sea and the role of nation states and international law in dealing with the challenges.

**Implications of the Research**

The findings from this research help to identify and determine why irregular migrants choose Europe and Australia as a destination and what protection the international law and host countries offer them. These findings have several significant implications for both the international community and the nation states' that receive these irregular migrants. Therefore, this research provides information and facts on irregular migration and examines how international law has responded to the challenges. The research also attempts to address the knowledge and research gaps focusing on the irregular migration process. It brings to the fore the obligations of nations to manage their borders in a way and manner that will provide protection to the refugees. Thus, this research "makes sense in terms of informing an immediate policy priority".

Against this background, the international community must find a balance between their obligations to protect irregular migrants and the necessity to manage their borders in a humanitarian manner. The research further shows that the issue of managing irregular migration poses a fundamental political challenge for many countries which grapple to articulate laws and policies that can address the challenge of irregular migration into their domain by sea. By implication, the research shows that a nexus exist between border management and refugee protection.

## International Law and Irregular Migration by Sea

International Law gives every state the right to national sovereignty and territorial integrity[34]. This means every state has the right to make laws, which are binding on entities within the state, and also allows states to have definite boundaries which they can protect. National sovereignty implies that states can make laws on everything including who can enter their territory and who cannot[5]. This gives impetus for the definition of standards for admission into the country which manifests in terms of visa rules and migration laws. The doctrine of territorial integrity allows states to enforce these entry rules by way of border patrols and immigration law enforcements.

In spite of this, individuals from foreign countries might want to bypass specific migration laws and enter other countries illegally through irregular migration routes. Irregular migration is a serious problem and constitutes a popular means of intercontinental migrations[6]. One of the most popular means of illegal migration is through the sea. This is fundamentally premised on the fact that the coastline of every state is difficult to control and international law lacks the framework to effectively put in place limits to irregular migration by sea[7].

Apart from being difficult to control, the process of migration by sea is extremely dangerous. Huge numbers of irregular migrants have drowned in the seas and oceans around the world, mainly in the North Africa and the Middle East seeking to enter Europe through the Mediterranean Sea as well as from Asia to Australia and from the Caribbean to the United States[8]. These deaths are often difficult to handle in the legal sense because most of these individuals are persons who seek asylum or a better economic life in other parts of the world. And in international waters, there are no clear responsibility lines that holds any nation directly responsible for the safety of such persons.

On the other hand, the states that these migrants enter – Europe, United States and Australia also go through serious economic, social and demographic change due to such migrations. For instance, illegal maritime crossing over the external borders of Europe constitutes 7% of migration into the European Union[9]. According to the United Nations, 360,000 migrants from the Middle East and North Africa region survived crossings into Europe in 2016 alone[10]. This creates major problems for these countries who are not prepared to host such migrants including security concerns, and demographic as well as economic concerns[1112].

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[3]  Christian Marxsen. "Territorial Integrity in International Law – Its Concept and Implications for Crimea" *Max-Planck-InstitutfürausländischesöffentlichesRecht und Völkerrecht* 75 p8

[4]  John Agnew. "Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics", *Annals of the Association of American Geographers*. 95 (2) p.443

[5]  Hans Vollaard. 'The Logic of Political Territoriality', *Geopolitics*. 14 p. 691

[6]  Ales Zavrsnik. *Drones and Unmanned Aerial Systems: Legal and Social Implications*. (London: Springer. 2015) p102

[7]  Mariagiulia Giuffre. "State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?" *International Journal of Refugee Law* 24 (4) p701

[8]  Alessandro Colombo & Paolo Magri. *The Age of Uncertainty: Global Scenarios and Italy*. Rome: Edizioni Epoke, 2017) np

[9]  Ales Zavrsnik. *Drones and Unmanned Aerial Systems: Legal and Social Implications*. (London: Springer. 2015) p102

[10] Zavis, Alexandra. "Dangerous sea crossings drive sharp increase in migrant deaths" [Online] Available at: www.latimes.com/world/la-fg-migrant-deaths-20170317-story.html Retrieved: July 27, 2017

[11] Michael Bommes, Heinz Fassmann&WiebkeSievers. *Migration from the Middle East and North Africa to Europe: Past Developments, Current Status and Future Potentials* (Amsterdam: Amsterdam University Press, 2014) p34

[12] Jeffrey Cohen & Ibrahim Sirkeci. *Cultures of Migration: The Global Nature of Contemporary Mobility* (Austin: University of Texas Press, 2011) p72

However, international law does not only protect the family of nations and the rights of sovereign states. International law is ultimately designed to protect the rights of individuals and due to this, there are various right provisions that protect people even in unregulated international spaces like the high seas. For instance, in 2011, when serious political crises rocked the Middle East and North Africa region, there was a significant push for people to leave these countries and cross over to Europe to seek asylum and become refugees. Due to the humanitarian crisis caused by so many deaths in the Mediterranean Sea, the Italian government launched *Operation Mare Nostrum*between October 2013, and ended in October 2014[13]. This is because the Italian government realized the need for some kind of intervention to save human lives which is something that is protected under international law. The European Commission set up the "Task Force for the Mediterranean" to "tackle" the issue of deaths at sea on its southern border[14]. This shows that there is some recognition of the rights of these irregular sea migrants who risk their lives in search for asylum or better economic opportunities.

Indeed the rights of such persons is enshrined in the United Nations Declaration of Human Rights, which is known as the Universal Declaration on Human Rights. Article 14 indicates that everyone has the right to seek and enjoy protection from protection in another country and this must be granted as long as a person has not committed political crimes against the principles of the United Nations[15]. This includes serious crimes like genocide and mass murder, which is rare for anyone to commit in today's world.

Therefore, anyone who attempts to enter another territory by sea has a right to be heard and a right to be given audience in another country. Hence, there is a moral and potentially legal obligation under international law for states to take responsibility for migrants crossing into their territory by sea. This is because such irregular migrants have rights which are regulated by the UN Convention Relating to the Status of Refugees 1951 amended by the 1967 Protocol. This Convention is ratified by 145 States and it defines the term 'refugee' and outlines the rights of the displaced, as well as the legal obligations of States to protect them.[16] This means there are some rights that are to be enjoyed by asylum seekers which must not be negated.

Furthermore, the UN Convention on Refugees supports the principle of non-refoulement which asserts that in situations where a person faces torture and possible death on return to his country of origin, a state where he seeks asylum must not send such a person back to that country[17]. This provision has been integrated into subsequent human rights treaties whichmakes it difficult for

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[13]   Rino Coluccello& Simon Massey. *Euroafrican Migration: Legal, Economic and Social Responses to Irregular Sea Migration*. (London: Springer, 2016) p1

[14]   Euro-Mediterranean Human Rights Network. "Violations of the Rights of Migrants and Refugees at Sea" [Online] Available at: www.statewatch.org/news/2014/jul/eu-migrants-at-sea.pdf Retrieved: 27 July 2017

[15]   Article 14 (1) and (2) United Nations Declaration on Human Rights 1948

[16]   UN High Commission for Refugees. *Refugee Convention*. [Online] Available at: www.unhcr.org/1951-refugee-convention.html Retrieved: 27th July, 2017

[17]   Sylivie Da Lomba. *The Right to Seek Refugee Status in the European Union* (Oxford: Hart Publishing, 2004) p5

states to deport asylum seekers[18][19]. Therefore, anyone with a case for asylum claim has the right to protection at sea since that individual enjoys some privileges under international law.

Furthermore, international maritime law creates new obligations for ships to rescue helpless people on the sea with a high risk of drowning. The UN Convention on the Law of the Sea (1982) and the International Convention on Maritime Search and Rescue (1979) makes it compulsory for ship owners, ship masters, coastal nations and flag states to render assistance to persons in grave danger on the sea irrespective of their nationality, status or circumstances[20]. This means that the right to protection on the high seas is universal and it covers everyone – from criminals to asylum seekers. Thus, there is a minimum standard that every country must pursue and they must act in good faith to accept and protect persons who are in their national waters and rescue them.

In a landmark case of *Ruddock v Vadarlis*[21](also called the Tampa Case), a Norwegian ship – *MV Tampa* found and rescued 433 Afghan migrants in August 2001 outside Australian waters. When the ship entered Australian waters, the Norwegian crew asked for help for these refugees from the Australian government as per international law. However, since Australia was on the verge of a federal election and the admission of refugees was a major political issue, the Australian Prime Minister ordered Australian special forces to board the ship. The government of Norway claimed that Australia had neglected its obligations under international law of accepting persons in distress. The issue was presented to an Australian federal court which determined whether the asylum seekers had to be released from the ship or not. The court decided on whether rescuees from sea migration routes were to be granted entry to Australia or not. The minority view showed that Australia had an obligation under international law to rescue stranded irregular migrants, but there was no obligation to accept them into Australia since the government had executive power to reject such foreigners from entering the nation[22].

The argument of the minority in the *Tampa Case* showed that there was a loophole in the legal system which meant that the state could not promptly deport irregular migrants by sea. Thus, the Australian government introduced the Border Protection Bill which was passed into law by the House of Representatives a few months after the *Tampa* incident[23]. The bill was passed into an Act that became the "Pacific Solution" which made it imperative for irregular sea migrants to be sent to Nauru for refugee status determination. This is in line with Article 14 of the Universal Declaration of Human Rights which requires states like Australia to give persons temporary protection in order to prevent non-refoulement[24]. At the same time, there is the ability to honor the

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18    Article 33 of the Convention Relating to the Status of Refugees

19    David Weissbrodt& Isabel Hortreiter. "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties." *Buffalo Human Rights Law Review* 1 p3

20    Kathleen Newland. "Troubled Waters: Rescue of Asylum Seekers and Refugees at Sea" [Online] Available at: www.migrationpolicy.org/article/troubled-waters-rescue-asylum-seekers-and-refugees-sea Retrieved: 26 July, 2017

21    [2001] FCA 1297

22    The Migration Act, 1958 of Australia authorizes the deportation of people in Australia who did not fit into the migration rules

23    This led to the Border Protection (Validation and Enforcement Powers) Act 2001 which determined who gave the government officials the right to determine who could stay in Australia and who could not

24    Seline Trevisanut. "The Principle of Non-Refoulment at Sea and the Effectiveness of Asylum Protection" *Max Planck Yearbook of the United Nations Law* 12 p246

principle of *mare liberum*, which involves providing minimum protection at sea for irregular migrants[25].

The principle of *mare liberum*does not directly negate states' rights to sovereignty. States have the rights to prevent abusive asylum claims and also prevent human trafficking and smuggling[26]. Hence, it is permissible to undertake extra territorial border control to prevent the entry of undesirable persons. There is the right to undertake strong screening measures and the control of migration through national policies[27][28]. Therefore, state sovereignty in international law allows nations to instrumentalize their laws in order to deal with aspects of migration of persons who enter their territories illegally but have genuine claims to protection from death and refugee claims[29]. However, this is a complex game of law and politics which might sometimes be problematic[30]. And this sometimes have regional implications which could be problematic and have complications like varying reasons for migration and various teleological indicators[31].

In the quest for nations to protect their boundaries against irregular sea migrations, they engage in various international agreements, which lay the foundation for various novel methods of preventing the flow of migrants into their territory. One of such approaches is the Dublin III regulation adopted by the European Union which creates rules for accepting refugee applications amongst member states. The fundamental idea is to ensure that people seek asylum in the first country of entry into the European Union and through this, they are able to prevent "orbiting" asylum seekers who might pose a threat to the regional order[32]

## Realities of Irregular Sea Migration – Spatial Controls and the *Mare Nostrum*

The elements of Dublin III shows the regional effect of irregular migration by sea. This is because such migrations could have serious implications and could affect order in a given nation. Mare nostrum is therefore a concept in international law that examines spatial control within a regional context[33]. *Mare nostrum* is a concept linked to the Roman Empire and its relationship to the Mediterranean region. It provides a distinct case study in regional and maritime law that shapes the elements of international law and how irregular sea migration can be conceptualized and regulated.

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[25]     Patricia Mallia. *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security Through the Creation of a Cooperative Framework* (Leiden: Martinus Nijhoff Publishers, 2010) p65

[26]     Alessandra Annoni & Serena Forlati. *The Changing Role of Nationality in International Law*. (London: Routledge, 2013) p107

[27]     Martin Van der Velde& Ton Van Naerssen. *Mobility and Migration Choices: Thresholds to Crossing Borders*. (London: Routledge, 2016) np

[28]     Jenna Loyd& Alison Mountz. "Managing migration, scaling sovereignty on islands" *Island Studies Journal* 9 (1) p37

[29]     Tanja Aalberts&Thomas  Gambeltoft-Hansen. "Sovereignty at sea: the law and politics of saving lives in mare liberum" *Journal of International Relations and Development* 17 (4) p439

[30]     Alessandra Annoni& Serena Forlati. *The Changing Role of Nationality in International Law*. (London: Routledge, 2013) p107

[31]     Gloria Agyemang. "Perilous Journeys across the Seas: The Accounting Logic in Europe's Agenda for Migration" *Advances in Public Interest Accounting* 19  p1

[32]     European Commission. "Country Responsible for Asylum Application" [Online] Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en Retrieved: 27 July, 2017

[33]Carl Schmitt. *Land and Sea* (New York: Telos Press Publishing, 2015) p3

Modern international law and law of the sea is strongly premised on the basis of the conflicts fought for the control of the Mediterranean region since the 17th Century[34]. This set a lot of precedents for conflict about space, mines, escape routes, graveyard and waste disposal in international law[35]. Professor Orford identifies that the main reason why the Mediterranean is important in international law is that it is the cradle of modern civilization and it is an enclosed space bordered by 21 sovereign states with the UK's strong naval interests and presence. Thus, it is an area of geopolitical contests since many regional bodies are represented on the Mediterranean with 9 European Union states, 8 Arab League nations, 4 African Union states and 8 NATO members[36]. As such, there are multiple claims, competing and overlapping judicial controls and various expansionist ambitions in the Mediterranean which shapes and informs international law.

Today's international legal order is influenced by NATO's control of most parts of the world. This was cemented during the invasion of Iraq and Afghanistan, which went deeper than the areas and regions that NATO normally controls. The NATO interventions in Kosovo (1999) and Libya in 2011 showed that NATO indeed wants to move beyond its traditional periphery and this creates important clues and information about the control of the spatial zone of the Mediterranean and this has legal implications for the rights of irregular sea migrants in international law[37].

The international legal order and its metamorphosis in relation to the rights of irregular migrants can be traced etymologically to the word "Nostrum" in *Mare Nostrum*. Nostrum is a Latin word for "our". Who is "our" in the context of the Mediterranean? This is a definition that changes with circumstance, reflecting the abstract nature and excessive flexibility inherent in international law[38]. Obviously, the 2013 drowning of 366 migrants from Libya to the Italian island of Lampedusa caused the definitions to change significantly when Operation Mare Nostrum to save lives in the Mediterranean Sea. However, after that, there have been a lot of changes in attitudes reflecting different dimensions of the concept of sea laws and obligations.

Throughout the Cold War, the Mediterranean was a zone under the control of NATO which was a regional security arrangement to formulate a military union for the common defense of Europe and North America. In this process, the Mediterranean has been seen as a sea that had to be patrolled and protected from unwanted forces that could influence the interest of NATO member states. This is in the context of collective security initiated in the UN Charter of 1945.

The concept of regionalism and common defense in modern international law goes back to the Monroe Doctrine of 1823[39]. In this pronouncement, the US President declared that all European colonies in Latin America and the Caribbean that gained independence during the Napoleonic wars are to remain independent. Therefore, any armed campaign by a European power into the western

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[34]Hans Gunter Brauch, Ursula Spring Oswald &CzeslawMesjasz. *Globalization and the Environmental Challenges*. (London: Springer, 2008) p21

[35]  Anne Orford. "Mare Nostrum: International Law, Spatial Order and the Mediterranean" *Queen Mary University of London School of Law*

[36]  Mark Gasiorowski. *The Government and Politics of the Middle East and North Africa*. (London: Hachette Publishing, 2016) np

[37]  Anne Orford. "Mare Nostrum: International Law, Spatial Order and the Mediterranean" *Queen Mary University of London School of Law*

[38]  Joseph Nye. *Soft Power: The Means to Success In World Politics*. (London: Hachette, 2009) np

[39]  Anne Orford. "Mare Nostrum: International Law, Spatial Order and the Mediterranean" *Queen Mary University of London School of Law*

hemisphere was to be considered an attack on the United States and the entire region[40]. Through this common defense agreement for the states in the Americas, a precedent was set to protect the seas and the oceans of continents against undesirable foreign elements. Indeed the Monroe Doctrine was recognized by the League of Nations which clearly stated that "Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace"[41].

Collective security and regionalism was also essential for the limitation of colonialism. And many nations in Latin America, Africa and Asia have relied on these arrangements to protect their sovereignty. This is because sea power keeps political peace and political security. Colonization involved the establishment of good communication that linked areas with naval power and influence in order to attain regional dominance[42].

In likewise manner, maintaining independence of former colonies required similar naval competencies. Thus, at the insistence of Latin American nations that were still weary of European recolonization, Article 51 of the UN Charter gave impetus to the power to self-defense of the state and collective self-defense arrangements. This was by nature, something that led to regionalism[43].

Therefore, in dealing with irregular sea migration, the only way around it is to view the seas as regional areas and then provide a regional responsibility to protect[44]. This is because the national approach is naturally designed to fail since this is problematic in the utilitarian sense. This is because precedents like the *A.S v Slovenian Republic* case[45] show that the nation that allows in a refugee will have to take responsibility for that refugee. The next move of nations might be to turn a blind eye on dealing with irregular see migrants, which would prove fatal and cause the deaths of thousands of people.

The intensity of irregular sea migration gives room for new principles for transforming the international sea space and its conception under international law. Thus, there is the need for a regional approach since sovereignty in the 21st Century is highly limited by regionalization and globalization[46]. Emerging trends of the law of the sea as having the potential to move the sea space out of the anachronistic social and legal isolation into internationalization and globalization[47].

**Contemporary Incidents of Irregular Migration by Sea**

The realities of dealing with the incidents relating to irregular sea migration brings about several implications for proper controls and limits. This is because there are some harsh realities and

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[40] George Herring. *From Colony to Superpower: U.S. Foreign Relations since 1776* (Oxford: Oxford University Press, 2008) p308

[41] Covenant of the League of Nations, 1924 Article 14

[42] Alfred Thayer Manhan. *The Influence of Sea Power Upon History: 1660-1783* Boston: Little Brown Company, 1890) p16

[43] Article 51 of UN Charter

[44] Anne-Marie Slaughter. "Security, Solidarity and Sovereignty: The Grande Themes of UN Reform." *The American Journal of International Law* 99 (3) p622

[45] A.S. v Slovenian Republic and C-646/16 Khadija Jafari and ZainabJafari

[46] Daniel Bethlehem. "The End of Geography: The Changing Nature of the International System and the Challenge to International Law." *European Journal of International Law* 25 (1) p18

[47] Allot, Philip. "Mare Nostrum: A New International Law of the Sea" *The American Journal of International Law* 86 (4)

difficulties that negate the essence of international law in these processes and places. There is the need for an established policing system and process through which international maritime spaces will be checked for irregular sea migrants who might have a reason to take the risks they take.

The Mediterranean case provides interesting insights. According to NATO, their actions relating to the patrolling of the Mediterranean sea is to protect Europe from irregular sea migrants[48]. This is clearly not in the spirit of international law and the notion of a family of nations that is touted by the United Nations. As many as 3,770 migrants died in the Mediterranean in 2015 alone and this is because of the blindness of NATO and other European navies who do not see these irregular sea migrants[49]

Aside the Mediterranean region and its challenges and problems, there are numerous regions around the world where specific problems and issues have shown up in dealing with irregular migration. This includes Asia, Australia and the Caribbean, which provide important guidelines on how to streamline controls for irregular migrations by sea.

**Asia**

In May, 2015, Asian countries met in Bangkok to intensify search-and-rescue efforts for migrants, mainly fleeing Burma where the Rohingya minority are persecuted[50]. Myanmar's persecution of Rohingyas is premised on the view that they are foreigners from Bangladesh. Hence, there is a sense of hostility towards these Muslims in a Buddhist-majority country, which has serious human rights problems. Thus, a rise in the number of Rohingyas fleeing Burma created a humanitarian crisis since most of the nearby nations were also Buddhists and had their own human rights and economic challenges.

Thailand's military undertook a major crackdown on human trafficking in mid-2015. This was given as an excuse against accepting the fleeing Rohingyas from Burma. Thailand's argument was that Rohingyas were paying human traffickers huge amounts of money and as such, they were committing a crime.

The Thai Foreign Minister TanasakPatimaprakorn stated that "Irregular migration has become increasingly complex and demands comprehensive solutions. We must not solve one problem just to find later that it has in fact created another"[51]. This statement was in reference to the possibility of encouraging human traffickers to abuse irregular sea migration routes. After all, if the human traffickers were making a profit, and the Rohingyas were guaranteed an asylum on arrival in Thailand or other neighboring nations, the cycle would continue.

[48]    Anne Orford. "Mare Nostrum: International Law, Spatial Order and the Mediterranean" *Queen Mary University of London School of Law*

[49]    Nadia Khomami. "More than 30 drown as hundreds fall from migrant boat off Libya." *The Guardian* [Online] Available at: https://www.theguardian.com/world/2017/may/24/dozens-drown-as-hundreds-fall-from-migrant-boat-off-libya    Retrieved: July 27, 2017

[50]    Ron Corben. "SE Asian Nations Agree to Step Up Help for Migrants at Sea" *VOA News* [Online] Available at: https://www.voanews.com/a/boat-people-in-southeast-asia/2797005.html Retrieved: 27 July, 2017

[51]    Justine Drennan. "Southeast Asia's Migrant Crisis Explained, in Maps" *Foreign Policy* [Online] Available at: foreignpolicy.com/2015/05/18/southeast-asias-migrant-crisis-explained-in-maps-rohingya-boats/ Retrieved: July 27, 2017

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It is a known fact that human traffickers and smugglers exploit, mislead, extort, enslave or sell their charges in the region[52]. With that position, Malaysia, Thailand and Indonesia all refused to open their shores to ships with thousands of Rohingyas. This created a humanitarian crisis in 2015 and the trend continues to-date.

## Australia

By 2010, Australia maintained the strict policy of rejecting irregular sea migrants. However, when bodies of asylum seekers washed off the shores of Christmas Islands in 2010, Australia needed to take action[53]. In a five-year period, Australia expanded its refugee detention facilities across the Pacific in Nauru and Papua New Guinea with the view of resettling its refugees out there[54]. This is because in each year, Australia grants legal visas to just a few thousands of resettled refugees from various parts of the world with armed conflicts[55].

Australia's policy is straightforward – no irregular migrant would be settled in mainland Australia. In spite of this, there have been numerous evidence that have shown time and again that the human rights situation in the Australian detention camp in Nauru and Papua New Guinea are really bad. It is identified that there is a nightmarish condition for the over 1,000 people who were sent for processing with allegations of physical, and sexual abuse of inmates[56]. This creates fresh problems and challenges that Australia will need to deal with in terms of maintaining relationships with its neighbors[57].

## Caribbean and the Americas

There were some 175 deaths of irregular sea migrants in Central America, another 27 in South America and 105 in the Caribbean Sea in 2015[58]. Migrations from these regions are often inspired by brutal regimes and poverty. Just like Africa, the people in these regions seek a better life and sometimes, political asylum in foreign countries.

Cuba has been known to have a lot of defectors who sought to leave the island for a better life in the United States. The Cuban government limits this by patrolling its coastlines to prevent such defectors. This trend halted significantly but in 2014, after the US government announced attempts

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[52] Justine Drennan. "Southeast Asia's Migrant Crisis Explained, in Maps" *Foreign Policy* [Online] Available at: foreignpolicy.com/2015/05/18/southeast-asias-migrant-crisis-explained-in-maps-rohingya-boats/ Retrieved: July 27, 2017

[53] Paul Farrell. "Could Australia's 'stop the boats' policy solve Europe's migrant crisis?" *The Guardian* [Online] Available at: https://www.theguardian.com/world/2015/apr/22/could-australia-stop-the-boats-policy-solve-europe-migrant-crisis Retrieved: July 27, 2017

[54] Emma Larking. "Controlling Irregular Migration in the Asia-Pacific: Is Australia Acting against its Own Interests?" *Asia & The Pacific Policy Studies* 4 (1) p85

[55] Elibritt Karlsen. "Refugee resettlement to Australia: what are the facts?" *Parliament of Australia* [Online] Available at: www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/RefugeeResettlement Retrieved: July 27, 2017

[56] PBS Newshour. "Migrants to Australia by sea face harsh conditions, reports find" *PBS* [Online] Available at: www.pbs.org/newshour/bb/migrants-australia-sea-face-harsh-conditions-reports-find/ Retrieved: July 27, 2017

[57] Emma Larking. "Controlling Irregular Migration in the Asia-Pacific: Is Australia Acting against its Own Interests?" *Asia & The Pacific Policy Studies* 4 (1) p85

[58] Zavis, Alexandra. "Dangerous sea crossings drive sharp increase in migrant deaths" [Online] Available at: www.latimes.com/world/la-fg-migrant-deaths-20170317-story.html Retrieved: July 27, 2017

to normalize relations with Cuba, nine Cuban migrants died and another 18 were rescued by US cruise ships whilst they tried to make it across to the United States[59].

Haiti on the other hand, has a major economic problem and is the poorest nation in the Western hemisphere. It is estimated that each would-be migrant pays as much as $1,500 to cross in crammed boats to Bahamas or the British Overseas Territories of Turks and Caicos Islands[60]. This is often in an attempt to escape the poverty and hardships that members of the island nation have to endure each day.

**Africa**

Irregular sea migration from Africa is in two folds – the first is the irregular migration from Sub-Saharan Africa, often due to economic reasons and the second involve people fleeing armed conflict, north of the Sahara[61]. Groups of migrants are known to have moved from Sub-Saharan African countries like Nigeria, Ghana and Senegal to countries like Libya and Morocco with the hope of crossing over to Europe. The recent political crises in North Africa – the Arab Spring caused sovereign states to lose control over the coastlines along the Mediterranean and this caused human traffickers to take advantage of the situation to allow these migrants from further south to cross into Europe.

The turmoil in these North African states induced the movement of migrants from these countries across the Mediterranean into Europe[62]. This involve the movement of native Arabs in these North African countries who were fleeing the armed conflict in the region. These citizens of such nations were not positioned to take such perilous journeys by sea before 2011, but after the armed conflict, many have taken such risks with the hope of seeking asylum in Europe.

On the other side of the African continent, more people from Ethiopia and Somalia have sought to cross from Africa to Yemen through the Gulf of Aden and this increased significantly in 2015[63]. In this situation, there are multiple routes because many of the irregular sea migrants move from Africa to Yemen and a significant number of people also move in the opposite direction – from Yemen to Africa. This is quite difficult to control since the countries in the region are numerous and have had histories of armed conflicts for many decades.

The African migration is inspired both by poverty and immediate need for protection against political tensions. There are many African states that are actively involved in conflict. Yemen has

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[59]   The Associated Press in Miami. "Nine Cubans die at sea and 18 rescued off Florida, US coast guard reports" *The Guardian* [Online] Available at: https://www.theguardian.com/us-news/2016/mar/19/cuba-migrants-florida-us-coast-guard-obama Retrieved: July 27, 2017

[60]   Nick Davis. "Haiti migrants risk sea journey for better prospects" *BBC News* [Online] Available at: www.bbc.com/news/world-latin-america-27469513 Retrieved: July 27, 2017

[61]   Michael Bommes, Heinz Fassmann&WiebkeSievers. *Migration from the Middle East and North Africa to Europe: Past Developments, Current Status and Future Potentials* (Amsterdam: Amsterdam University Press, 2014) p38

[62]   Gloria Agyemang. "Perilous Journeys across the Seas: The Accounting Logic in Europe's Agenda for Migration" *Advances in Public Interest Accounting* 19  p3

[63]   International Organization for Migration. "Irregular Migration in Horn of Africa Increases in 2015" *International Organization for Migration* [Online] Available at: https://www.iom.int/news/irregular-migration-horn-africa-increases-2015 Retrieved: July 28, 2017

also seen serious armed conflict in the past few years. Therefore, the situation is really bad and continues to intensify.

**Critical Analysis – Towards a Solution to the Illegal Migration Paradox**

Irregular sea migration is dangerous and people who undertake it do so with a risk of death. The international legal order is one that is steeped in the need to preserve the sanctity of human life and improve the quality of life of people in societies around the world. Therefore, it is necessary and vital for human life to be protected and preserved in all ways and forms.

Therefore, it is essential for the international political order to make it compulsory and essential to save human lives. Whatever the motive is, there must be provisions for the rescue of illegal migrants who use sea routes. This is because it is a fundamental human right for these migrants to be given the right to live and where necessary, the right to asylum. The need to protect the lives of irregular sea migrants must be the *prima facie* motive for any effort in dealing with this form of migration. This is because human life is important and vital in all forms and circumstnaces.

However, the process of irregular sea migration has various realities that make it imperative for states to take precaution. The current international political order still holds the nation-state as the fundamental actor in international relations. Although multinationals and non-governmental organizations play a role in the global political order, the nation-state still plays the lead role in dealing with all matters relation to the sea and other international arrangements. Thus, the realities of nations and states must be considered in dealing with the problem of irregular sea migration.

First of all, there are political factors which are essential. Every state is ruled by a government that is accountable in one form or the other to the people. As such, the will of the people towards irregular sea migration is important and it determines the way the governments must act. This is the case in Europe and Australia where most elections have been decided on the grounds of migration.

Secondly, race and ideological factors are important in defining the parameters of states as actors in the irregular sea migration process. Therefore, nations might not want to alter their compositions. A case in point is the South Eastern Asian countries that are predominantly Buddhist and do not want to accept Muslim refugees. Thus, race, religion and other forms of xenophobia play a role in the decisions of states in accepting or rejecting irregular sea migrants.

Thirdly, human trafficking and abuse of the asylum system is often cited by nations against accepting irregular sea migrants. This is in order because human trafficking is illegal and every irregular sea migrant would have to pay off such persons to board a dangerous boat. And since this is based on the dynamics of demand and supply, the trend is likely to continue until it is stopped. As long as there is an opportunity to seek asylum in another country, the demand for such services will continue to rise. As such, states see it as their prerogative and sometimes obligation to the family of nations to stop accepting irregular sea migrants.

In spite of all these cogent issues, human life remains central and will have to be treated with so much sensitivity in the case of irregular sea migration. Allot proposed a new international law based on fact that the sea is neither *mare liberum* (free sea) nor *mare clausum* (closed sea) but

*mare nostrum* – (our sea) collective sea for participation or reconceived sea space[64]. Therefore, a regionalized approach provides the best solution to the crisis of irregular sea migration.

The sea is not restricted to any nation. And the only solution that could be preferred to irregular sea migration is one of regional cooperation. Thus, it is necessary for nations in specific regions to accept the fact that there is a need for cooperation. This should be cooperation to:

1.    Save lives and
2.    Deal with illegalities like human trafficking and organized crime[65]

In this process, multinationals and non-governmental organizations have a role. This is because there is a stated objective and there are goals that could prompt specific actions. This way, a regionalized approach based on cooperation can be applied to streamline search-and-rescue efforts and provide solutions that would leverage the problems relating to irregular sea migration.

A possible approach is one that would be based on the presentation of safe harbors and refuge cities that would be demarcated as international zones[66]. This is because nations have special free zone areas that have international features. In dealing with irregular sea migration, such an approach could be triggered to deal with the resettlement and review of refugee cases. This way, the push factors relating to irregular sea migration would be checked. This is because most of the economic migrants would be prevented from making the perilous journey if they would be resettled in places that does not promise riches overnight.

Hence, there must be international zones for the detention and interview of refugees. These zones must be maintained collectively by regional powers in order to make them more effective in responding to irregular sea migrations. This can also help in limiting crimes like human trafficking and terrorism.

Various long-term plans like resettlement with aid and support from regional bodies could help to facilitate the rebuilding of conflict zones and return of irregular sea migrants. This way, they would be able to go back and reestablish themselves in their homes. A regional approach would be more productive and provide better alternatives and if possible, help to build various relations with these conflict-ridden zones.

## Justification for the Research

Since early 20th century, irregular migration by sea has increased. Irregular migration by sea will thus, remain an issue and a challenge to the international community. There is therefore, the need to put in place a holistic approach to the challenge, with a view to understanding the root causes. While this research is relevant and useful, further research is needed as "there are interrelated reasons why a person may choose to migrate irregularly, with persecution and security issues being one subset." Economic, environmental and human trafficking are also related issues that escalate

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[64]    Anne Orford. "Mare Nostrum: International Law, Spatial Order and the Mediterranean" *Queen Mary University of London School of Law*

[65]    Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 2000

[66]    Kathleen Newland. "Troubled Waters: Rescue of Asylum Seekers and Refugees at Sea" [Online] Available at: www.migrationpolicy.org/article/troubled-waters-rescue-asylum-seekers-and-refugees-sea Retrieved: 26 July, 2017

irregular migration by sea, thus, some scholars have argued that many irregular migrants does not qualify as such strictly speaking but are "economic migrants".

Generally, this research brings to the fore the need for a deeper understanding and research on the complex nature of irregular migration by sea.

## What are the Research Gaps?

This research focuses on the intricacy, control and procedure of irregular migration by sea and the contemporary incidents in the *mare nostrum* and the response of the international community through laws and policies. A number of research gaps exist and remain unresolved in the existing literature and can furnish the basis for advancing and evolving future research project. These gaps are:

- What causes the irregular migrants to leave their countries and travel by sea?

- What is the role of the country government on this?

- How can international, regional and national laws and policies restrain people from undergoing the dangerous journey by sea?

- How can international, regional and national laws protect irregular migrants "lawfully rather than unlawfully?"

Other significant gaps resulting from this research are:

- Why do irregular migrants choose Europe and Australia as their destination?

- What informs the choice of migration by sea and how can international law and policy intervene?

- How can irregular migrants by sea be protected against sea pirates and terrorists?

- What laws and policies should be put in place to encourage irregular migrants by sea to return to their countries voluntarily?

- How can the international community adopt a sustainable approach to curb irregular migration by sea?

Arising from the above gaps is the need for a strong international, regional and national co-ordinated responses to effectively tackle the challenge of irregular migration by sea. This research has presented a review of irregular migration by sea and identified specific research gaps and further research is therefore suggested.


## CONCLUSION AND RECOMMENDATIONS

Irregular sea migration is a major challenge for states. However, the biggest problem with it is the huge risk of fatalities through drowning. This is a problem because it negates the fundamental principle of protecting the most basic human rights in the international order – the right to life. In spite of this, most states do not have the will to rescue these irregular migrants because they are

not citizens and they are technically breaking the states' law. Therefore, it is imperative for some kind of international arrangement to be put in place to deal with the issue of irregular migration.

The doctrine of *mare nostrum* indicates that the seas are international spaces that require some degree of control. *Mare nostrum* asserts that states must cooperate and work in order to protect lives on the sea in a collective manner. This form of regionalized approach to managing the sea and saving irregular migrants is steeped in the Monroe Doctrine and international legal arrangements that promote collective security actions. This therefore makes it imperative for nations to come together in a regional arrangement to save lives and rescue irregular sea migrants.

On the other hand, states have constraints in dealing with irregular migrants. As such, the regional approach provides the best mechanism to gain a win-win result. This involves rescuing drowning irregular migrants and also providing a system through which regional safe harbors can be set up where international law can thrive in order to take initial submissions of these migrants and provide basic protection. This approach will also ease the strain on coastal states and through collectivized regional arrangements, discharge various short-term, medium-term and long-term actions to help to rebuild conflict zones and resettle irregular migrants who have genuine reasons to take the perilous boat trip to unknown destinations.

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