Migrant Crossings in the Channel: Non-Assistance, Securitisation, and Accountability Under International Law

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On Wednesday, 24 October 2021, 27 people lost their lives in the maritime area between the UK and France. A survivor provided a reconstruction of that night's events. Although several calls were made to both the French and the British Coastguards from the boat in distress, no rescue operation was promptly launched nor completed. Instead, French authorities continued to argue that the boat was in British waters, while British authorities consistently denied it. The result was that no authority took responsibility for the rescue. The boat sunk in the middle of the Channel. This is not the first deadly incident in the Channel and continues a pattern of loss of life observed elsewhere - including in the Mediterranean.

As news about the sinking began circulating, both the British and the French governments attempted to avoid responsibility for the events, seeking to shift the focus on 'people smugglers'. However, as more reconstructions emerged, it became clearer that the alleged chain of events leading to the loss of life could be understood as falling into the framework of a strategy of 'interdiction by omission'. Already observed in the Mediterranean - as well as in the US and Australia - 'interdiction by omission' is based "on the negation of rescue, including [inter alia] through outright abandonment at sea" (Moreno-Lax, 2020). It can also fall within the category described by the Office of the High Commissioner for Human Rights (regarding the Mediterranean context) as 'lethal disregard '.

This strategy must be seen within the context of previous indications of the UK preparing to deploy a tactic of 'direct pushbacks'. In September 2021, images and footage showing the UK Border Force carrying out drills to turn around packed dinghies in the Channel were released. These drills followed a statement by the UK Home Office hinting at the fact that Border Force staff were being trained to employ 'turn-around' tactics at sea. The current dynamics must also be seen within the broader context of fraught relations between the UK and France on both related and unrelated matters.

To ensure accountability for the events of October 24th, as well as to prevent further loss of life at sea, it is necessary to understand the legal framework in which British and French authorities are operating and the obligations that States are bound by.

Obligations Under the Law of the Sea

Article 98(1) of the UN Convention on the Law of the Sea creates a duty to provide assistance to people in distress at sea, proceeding "with all possible speed to the rescue of persons in distress, if informed of their need of assistance". The duty applies to all shipmasters, including private vessels, and is not premised on any connection with those in distress other than proximity. This duty applies to every person in distress, "regardless of nationality or status ... or the circumstances in which they are found". In addition, under the International Convention on Maritime Search and Rescue (SAR Convention), States have an obligation to disembark rescued individuals to a place of safety. Only then can a rescue operation be considered effectively concluded. According to the International Maritime Organisation's guidelines, "[a] place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination", thus suggesting that a place of safety other than on dry land can only be temporary. The current legal framework does not set out a default State of disembarkation but requires coastal States to cooperate in ensuring the prompt disembarkation of rescued persons.

As a UN High Commissioner for Refugees (UNHCR) spokesperson has highlighted, "once a boat enters UK territorial waters, the UK's primary responsibility for search and rescue is triggered." While primary responsibility to coordinate search and rescue activities falls on the State competent for the Search and Rescue (SAR) region, neighbouring coastal States are bound by a duty to cooperate under the International Convention for the Safety of Life at Sea (SOLAS) and the SAR Convention. French and British authorities, therefore, have a duty to cooperate to prevent loss of life at sea and ensure completion of a search and rescue mission.

While seeking accountability for failure to rescue or to cooperate under the Law of Sea is possible in theory, the regime remains

fundamentally a State-centred one - with individuals generally deprived of *locus standi* before the dispute resolution measures under UNCLOS including the International Tribunal on the Law of the Sea (ITLOS). Accountability gaps in such context can be, however, partially remedied through the provisions of International Human Rights Law.

Obligations Under International Human Rights Law

Failures to protect lives at sea and to cooperate in rescue activities may give rise to violations under International Human Rights Law, including under the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Rights at stake include the right to life and the prohibition of torture, cruel and inhumane treatment. Violations of these rights arise both directly (because of the failure to rescue) and indirectly, through the failure to cooperate with other coastal States (in this case France) to rescue people in distress at sea.

In January 2021, for example, the UN Human Rights Committee found Italy to be in violation of Article 6 (right to life), both alone and in conjunction with Article 2(3) (effective remedy), of the ICCPR, as it failed to cooperate in the rescue of more than 200 individuals who drowned in the Maltese SAR region, as Italian authorities did not intervene in due time despite they knew, or ought to have known, about the distress event. The complaint's authors argued that Italy "violated [its] relatives' rights under article 6 (1) of the Covenant due to [its] negligent acts and omissions in the rescue activities at sea, which endangered [the applicants' relatives'] lives and resulted in their death or disappearance." The substance of ICCPR's Article 6 is reflected regionally in Article 2 of the ECHR. The European Court of Human Rights (ECtHR) has held that Article 2(1) "enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction". The positive obligation under Article 2 to take appropriate steps to safeguard the lives of those within its jurisdiction has been found by the ECtHR to apply in the context of any activity, whether public or not, in which the right to life may be at stake (see e.g., *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*).

Authorities may attempt to justify their (in)actions on the basis that the Grand Chamber of the ECtHR has recently considered that the collective expulsion at the heart of the case of *ND and NT v Spain* did not amount to a violation of Article 4 Protocol 4 ECHR (which, it is worth noting, the UK has not signed) because of the 'own culpable conduct' of individuals who attempted to cross the Spanish border irregularly. However, such finding should be approached with caution. A careful reading of the ECtHR's exception to the prohibition of collective expulsions would in fact place the emphasis on the legal standard of 'genuine and effective access to legal means of entry', and would point to the fact that the reasoning of the ECtHR was applied in a very specific scenario - "situations in which the conduct of persons who cross a land border in an unauthorised manner, deliberately tak[ing] advantage of their large numbers and us[ing] force, [...] such as to create a clearly disruptive situation which is difficult to control and endangers public safety". Therefore, such reasoning cannot reasonably be applied a priori in the Channel context.

The 'First Safe Country' Concept and Changing Scenarios After Brexit

The UK has argued that asylum seekers arriving in the territory in boats should be returned to France, as they should claim asylum in the first safe country they get to. While returns to so-called 'first safe countries' were authorised under the Dublin III Regulation, after Brexit such regulation no longer applies. The UK cannot, therefore, rely on it to maintain that France ought to take responsibility for the assessment of potential protection claims. On the contrary, under general international law, the return to France of people within the jurisdiction of the UK can only be done with the agreement of the French authorities.

The UK cannot rely on pushback tactics to intercept and return migrant boats, including by 'omission', towards the shores of France. Once individuals enter UK territorial waters, or once they are subjected to the effective control of the British authorities, the UK becomes responsible for, *inter alia*, assessing international protection claims that people may submit. In this regard, the UN Special Rapporteur on the Human Rights of Migrants recently reaffirmed that every person has a right to have their protection claim individually assessed before removal, and that pushbacks are illegal.

The Adoption of a Securitised Lens: The 'Illegality' of Crossings and the Proposed Nationality and Borders Bill

The proposed Nationality and Borders Bill contains a clause effectively creating a distinction between asylum seekers and refugees who reach the UK via regular channels, and those that reach the territory 'irregularly'. The latter will not receive an automatic right to settle, but rather a new temporary protection status, and will have limited family reunification rights and reduced access to benefits. This attempt to distinguish between regular and irregular entry of asylum seekers disregards Article 31 of the 1951 Convention relating to the Status of Refugees, which provides for the non-imposition of penalties on refugees on account of their 'illegal' entry or residence. Besides violating the 1951 Refugee Convention, "[t]o impose penalties without regard to the merits of an individual's claim to be a refugee will likely [...] violate the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction."

Adding to the above securitisation element, in his letter to Emmanuel Macron of 25 November 2021, Boris Johnson sought to link the Channel crossings with actions of criminal gangs, or 'traffickers', and called for the adoption of a "bilateral agreement to allow all illegal migrants*(sic.)* who cross the Channel to be returned." The terminology of trafficking has been extensively used in both political and media discussions about the current situation (see also here). The focus on smuggling and trafficking is deployed strategically in the attempt to move away from more structural discussions around freedom of movement and border control. Indeed, such a focus shifts the attention from the (in)actions of the State towards the actions of individuals, thus shifting (also) responsibility.

It is in fact unclear from the facts as reported that the current dynamics in the Channel represent a situation of trafficking as defined, *inter alia*, in the UN Trafficking Protocol and in the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) - the recruitment of persons, through coercion, deceit or abuse of power or vulnerability for the purpose of exploitation. It is also unclear that they represent a situation of smuggling as defined in the UN Smuggling Protocol 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". Indeed, autonomous attempts have been recorded, without proof of facilitation by a third party.

It is worth noting that, if there was indeed sufficient evidence that there is an issue of trafficking in the Channel context, then both ECAT and ECHR place positive obligations on the State. These include, inter alia, obligations to prevent trafficking, to protect trafficked persons, and to investigate and prosecute traffickers. Such positive obligations would be triggered, if the State knew of ought to have known about a trafficking situation, as soon as the State exercises jurisdiction - or effective control - over the potentially trafficked persons. If trafficking is really suspected, States must abide by the full set of obligations which that entails, and they cannot simply pick and choose the ones they opt to adhere to. In absence of such evidence of trafficking, it would simply be a case of further conflation of legal concepts to weaponise the way in which the issue is perceived (as described above and as we are currently seeing also in the context of the Belarus/Poland border and as we have previously seen in the Mediterranean).

Towards a Sustainable Solution: The International Duty of Cooperation and the Need for Safe and Legal Migration Pathways

In July 2021, the governments of France and the UK signed a joint agreement, committing to prevent the entirety of crossings and to make the deadly Channel route unviable. In this context, the UK has agreed to pay £54m to France to improve its patrols on its northern coastline. While international cooperation is a duty under several International Law instruments, including - as cited above - the SOLAS and the SAR Conventions, the Vienna Convention on the Law of Treaties (VCLT) provides that treaties must be interpreted in light of their object and purpose, and implemented in good faith (Articles 26 and 31). This also applies to the duty to cooperate, meaning that cooperation should be understood and pursued in alignment with the aims and objectives of the treaties that are binding on the Parties. International cooperation agreements that contain clauses that are incompatible the aim and objectives of treaties binding upon the Parties, or that are the result of bad faith interpretations, would violate the principles contained in the VCLT.

A more systematic and comprehensive response is however needed, and in particular one that accords the right to leave, as enshrined in Article 12 ICCPR, to all, thus reshaping the status quo and preventing further lives from being lost at sea. Although the right to leave is not absolute, the Human Rights Committee's General Comment No 27 provides that Article 12(2) ICCPR applies to everyone, including non-nationals and stateless individuals, irrespective of the legality of their presence, and that it covers anything from a temporary trip to emigration as well as the necessary travel documents. In addition, the "permissible limitations which may be imposed on the rights protected under [A]rticle 12 must not nullify the principle of liberty of movement" (see also here and here). The Committee further specified that "[i]n adopting laws providing for restrictions [...] States should always be guided by the principle that the restrictions must not impair the essence of the right." In essence, not only does preventing departure by sea constitute an interference with the right to leave, but also measures providing for discriminatory and disproportionate restrictions of the right to leave - even more so taking into account that protection seekers may be concerned - would not meet the criteria of 'permissible restrictions'.

Alongside and as part of systematic responses, individualised solutions - such as humanitarian visas - are also essential. Legal pathways to protection can include resettlement schemes, humanitarian corridors, private and community sponsorship, humanitarian visas, as well as the use of existing migration pathways including student schemes, family (re)unification and labour mobility. Such schemes should be implemented with due regard to procedural standards, and whilst abiding by States' existing international obligations towards spontaneous arrivals (see here). These pathways, however, will not be fit to provide everyone in need with a safe route to the UK. Therefore, if individualised solutions only are pursued, rather than in combination with systematic responses, some individuals that will not be able to access these mechanisms will continue to embark in dangerous sea journeys.

This post has sought to highlight some of the legal dimensions to the issue of migrant crossings in the Channel. Away from emotive

political rhetoric, and despite the complexities of the specific situation, international law has much to say about what is happening in and beyond the Channel, what the obligations of different actors are, and how States may be held accountable for violations of their obligations. While the safety of life (at sea) must remain the top priority, a long-term 'solution' can only be achieved through a substantive paradigm shift in the way in which States design, implement and communicate migration policies - placing *bona fide* cooperation over responsibility shifting, setting adherence to international law as a goal, as well as prioritising good faith and protection over instrumentalization, and rights over rhetoric.

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