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“Pushback” of Migrants and the Duty to Rescue at Sea

The Nationality and Borders Bill 2021 has clearly exercised the mind and hearts of many. The Home Secretary, as to be expected, has come under severe criticisms for ignoring international and human rights law in the many proposals included in this 111 page long bill. A specific power the bill¹ seeks to introduce is one to be conferred on the authorities² to:

- a) stop the ship;
- b) board the ship;
- c) require the ship to be taken to any place (on land or on water) in the United Kingdom or elsewhere and detained there;
- d) require the ship to leave United Kingdom waters

where they have reasonable grounds to suspect that— (a) a relevant offence is being, or has been, committed on the ship, or (b) the ship is otherwise being used in connection with the commission of a relevant offence. In popular parlance, this relates to the so-called power to pushback migrants in small dinghies trying to enter the UK.

Given the recent incident of 24 November 2021 when 27 migrants had drowned in French territorial waters *en route* to Britain, the matter has remained high in the news agenda, both domestically and internationally. There is undeniably much debate about the rights and wrongs of the UK policy on migrants at sea.

The relevant legal context, as should perhaps be expected, is somewhat more textured and complex. There are several international law regimes which might be relevant, there being no international convention dealing specifically with the matter of migrants at sea.

In the press the focus has been on the International Convention on Maritime Search and Rescue (SAR) 1979. The core argument against the Home Secretary’s proposal is that the convention obliges signatory states, including the UK, to co-ordinate the delivery of the survivors to a place of safety. This may involve cooperating with other states³ – such as France – to allow the survivors to disembark at a place of safety. This duty to rescue is well established in customary international law and the Law of the Sea Convention 1982⁴. Pushing back migrants who are at risk of drowning at sea flies in the face of this duty to rescue, as the argument goes.

I argue however that the law is not as clear-cut as suggested in the media.

¹ The 2021 Bill seeks to insert a new Part A1 to Schedule 4A (enforcement powers in relation to ships) in the Immigration Act 1971.

² Described as an immigration officer or an enforcement officer in the proposed new s 28LA in the Immigration Act 1971.

³ Inter-state cooperation is required by the SAR convention (see, for example, Annex to the SAR Convention, paras 2.1.3 to 2.1.7)

⁴ Art 98(2)

First, it should be remembered that the coastal state's search and rescue duties apply in what the SAR convention deems the search and rescue area. This area can extend miles beyond the state's territorial sea – a body of water not under the state's sovereignty. Therefore, at the risk of being trite, we need to remember that acts done in the area outside the state's territorial waters cannot be deemed to be equivalent to acts done in its territory, for the purposes of international law.

The SAR convention does not call for the disembarkation of migrants to the coastal state, only to a "place of safety". This omission is important, as regards the Nationality and Borders Bill's proposals. Where the boat is pushed back and returned into the safety of a French coastguard vessel or a nearby place of safety outside the UK, that satisfies the duty in the SAR Convention. Of course, an impasse could well arise if the French coastguard refuses to take the migrants back.

In this connection, the onetime practice in Australia was to give the migrants seaworthy lifeboats when turning them back from the Australian search and rescue area. There is no definition in the SAR Convention as to what is meant by "place of safety". It is therefore difficult to say with absolute confidence that the practice would be illegal under the convention.

There are other uncertainties and gaps in the SAR convention which do not readily render unlawful the pushback provisions in the Nationality and Borders Bill 2021, in the context of the duty to rescue.

The duty to rescue depends on whether the boat in question is in a "distress phase". "Distress" is not specifically defined but "distress phase" is described as "a situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance". It thus follows that where the dinghy or vessel is not in **imminent** danger and requiring **immediate** assistance, it could not be said to be the distress phase. These are in the main questions of fact and judgment. It cannot also be claimed, as suggested by some quarters, that there is or must be a general presumption that small migrant dinghies are in imminent danger and requiring immediate assistance. It is certainly the case that many such vessels are unseaworthy for the channel crossing but lack of physical seaworthiness is not presumed to satisfy the high thresholds of imminence and immediacy.

In short, the SAR Convention is not the best legal instrument to rely on to test the legality of the provisions in the Nationality and Borders Bill.

Refugee and Human Rights Law

However, as has been stressed in the public domain, international maritime law is not the only relevant law in this regard. The bill must also pass the tests in **international refugee law** and **European human rights** law. In a case against Italy brought before the European Court of Human Rights

(*Hirsi Jamaa et al. v. Italy*), the court ruled that Italy had breached its human rights obligations by rescuing a boat carrying refugees and then returning them to Libya. Although the press reported this case as “pushbacks” being ruled illegal, that is not strictly correct. Italy did not push back the migrant boat at sea. In *Hirsi*, the migrants had actually been received onboard an Italian flagged ship before they went then sent back to Libya. Such an act constitutes *refoulement* under international refugee law.

There are recent reports about migrant leaving Turkey in small boats for Greece asserting that they had landed in Greek territory for a few hours before being arrested by the Greek authorities before being put back at sea towards Turkish waters. The Greek authorities have consistently refuted those allegations, especially so given the *Hirsi* rule.

On this point, there could be made a strong argument that under international refugee law and European human rights law the state’s legal obligations are not fully engaged until the migrant reaches the state’s area of territorial sovereignty. In our scenario, that would be the territorial sea, but it must be recalled that the SAR area can be wider than the state’s territorial sea.

Therefore, if the pushbacks occur in the search and rescue area but not the territorial waters, these international laws dealing with refugees and human rights may not apply. It might be observed that the Nationality and Borders Bill provides that

“An immigration officer or an enforcement officer may exercise the powers set out in Part A1 of Schedule 4A ... in relation to any of the following in United Kingdom waters, **foreign waters** or **international waters**.” (emphasis added)

It is plain that the bill makes it legally possible for the authorities to push back migrants before they enter UK territorial waters.

In conclusion, as regards general international law, pushbacks are not illegal *per se*. The Law of the Sea Convention 1982 allows coastal states to take “the necessary steps” to prevent the passage of any vessel that is not innocent. That includes a vessel seeking to unload persons “contrary to the immigration laws and regulations of the coastal State”⁵. Whilst the extent and scope of this exception to the right of innocent passage continue to be a matter of debate, it is safe to say that the law of the sea is less clear about the legality of pushbacks than the duty to rescue migrants at sea. The latter however operates in a limited way, as discussed.

⁵ Art 19(2)(g)