



**Submission to
International Relations and Defence Committee**

1982 UN Convention on the Law of the Sea (UNCLOS)

November 2021

Introduction

1. We provide this submission to assist the Committee in relation to the matter of human rights at sea, particularly in the context of:
 - a. migration, modern slavery and human trafficking; and
 - b. recent statements of policy or intention by Ministers relating to provisions of the Nationality and Borders Bill and Border Force activity at sea.

Human rights at sea and UNCLOS

2. Article 98 of UNCLOS establishes a *“duty to render assistance.”*
 - a. Paragraph 1 directly concerns States in two ways. States are to require masters of ships flying their flags *“to render assistance to any person found at sea in danger of being lost”* and *“to proceed with all possible speed to the rescue of persons in distress.”*
 - b. Paragraph 2 requires coastal States *“to promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.”*
3. It is important to note that UNCLOS is not the only relevant international agreement on these matters. The 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on Maritime Search and Rescue (SAR) are of particular significance. There have been amendments to each of these Conventions, including in 2004 to require States to co-ordinate and cooperate to ensure people rescued at sea can be disembarked as soon as reasonably practicable. The Maritime Safety Committee of the International Maritime Organization also

adopted Guidelines to accompany these amendments.ⁱ As summarised in our 2014 *Lives Adrift* report concerning the then situation in the Central Mediterranean, these amendments identify the State responsible for the search and rescue region in which people are rescued as responsible for providing them “*a location where their safety or life is no longer threatened, their basic human needs can be met and their lives and freedom will not be at risk.*”ⁱⁱ

Migration, modern slavery and human trafficking

4. The duties summarised above must also be understood in the context of other international agreements such as the following:
 - a. The 1951 UN Convention relating to the Status of Refugees enjoins States to share responsibility for providing asylum and expressly prohibits the *refoulement* of a refugee to a place where her, his or their life or liberty is at real risk (whether in that place or because of the risk of removal from that place to another).ⁱⁱⁱ
 - b. The 1950 European Convention on Human Rights provides for the right to life, prohibits torture, inhuman and degrading treatment and prohibits slavery (these rights include prohibition of the removal of a person to a place where there is a real risk to her, his or their life or of the prohibited treatment).^{iv}
 - c. The 2005 Council of Europe Convention on Action against Trafficking in Human Beings includes requirements upon States to take appropriate measures to enable lawful migration, to identify and assist victims of human trafficking and to provide them a reflection and recovery period and, in certain circumstances, a residence permit.^v
5. Every year many people die on journeys that have not been authorised by States, are facilitated by people smugglers or controlled by human traffickers.^{vi} In Europe, there is much attention on such journeys across the Mediterranean.^{vii} In the UK, there is much focus on a much smaller number of journeys across the Channel.^{viii} However, such journeys occur in many seas and waters across the world. Recorded data shows the death toll to be high but the number of people whose lives are lost is undoubtedly significantly greater. Many deaths are likely to be unknown or otherwise unrecorded. The physical and mental trauma suffered by many people on these journeys is also severe and can be long-lasting.
6. The following are uncontentious. The overall human cost, while not capable of precise calculation, is severe. The exploitation and abuse that accompanies this is substantial, including large financial profits that sustain other organised and harmful criminal activity.^{ix} It is both the duty of States and in their interests to seek to end or, at least, significantly reduce all of this. Despite considerable expenditure of financial, human and other resources by States, this exploitation continues to thrive and the human cost remains appallingly high.

7. The foregoing is from time-to-time cited in argument favouring review, renegotiation or withdrawal from various international agreements concerning human rights, including at sea. Not only is this a profoundly flawed basis for such argument. It risks exacerbating the very vices – the high human cost and the thriving exploitation – that is said to motivate such argument. In summary, the reasons for this are as follows:
- a. People who are trafficked are travelling involuntarily. They are not free to be influenced by whether the journey they are on is made more or less safe by States' willingness or failure to respect international laws for protecting life and human wellbeing.
 - b. People seeking asylum are either in the same position or a very similar one. Sometimes they too are being trafficked – a person seeking asylum is generally extremely vulnerable to exploitation including by people who will seek to enslave or traffick her, him or them. Even if not trafficked, the person seeking asylum is compelled to travel for reasons that are usually of overwhelming force, which may be or include some or all of the following – a fear of execution, disappearance, torture or other persecution; the risk to life or of other serious harm from war; the need to escape conditions of abject squalor, deprivation or abuse; and the urgency among people who are displaced to reunite with family or reach places to which they have other connections.
 - c. Immigration controls operated by many States make no provision for lawful journeys of people fleeing these various horrors and harms. The UK, like many States, makes no provision for anyone to secure a visa to reach its territory to seek asylum while requiring that any claim for asylum must be made from within its territory.^x Many people, therefore, make dangerous journeys in the hands of dangerous people, including at sea, because there is no alternative, let alone one that is accessible to them.^{xi}
 - d. The response of many States to migration by journeys that they have not authorised has increasingly become marked by criminalising and obstructing people making the journeys and criminalising and obstructing humanitarian action towards these people, including where that is necessary to save life at sea.^{xii} Laws, policies and practices of many States – at, within and outwith their borders – have increasingly been to avoid or refuse asylum and other responsibilities.^{xiii} We draw attention to the repeated warnings by UNHCR that Government policy and the Nationality and Borders Bill follows this same pattern and will further encourage the erosion of respect for and adherence to international law in ways that diminish safe space for refugees, encourage or necessitate more people to make more dangerous journeys and sustain human exploitation including in ways that sustain other harmful criminal activity.^{xiv} We also remind the Committee that the immediate consequence of the pressure upon Italy to abandon its search and rescue mission in the Central Mediterranean at the end of 2014 was a huge escalation in the death toll in those waters in the months that followed.^{xv}

- e. Most people displaced by war and conflict (or other causes) are to be found, often in extremely precarious conditions, in their countries of nationality or habitual residence.^{xvi} Most refugees forced to flee across borders are to be found in neighbouring countries.^{xvii} The disparity between the scale of forced displacement of people and the provision of asylum in relatively rich and stable countries such as the UK is large and long-standing – even if focus is solely upon refugees (who by definition must be outside their country of nationality or, if stateless, former habitual residence).^{xviii} However, sole focus on refugees tends to ignore the impact of internal displacement, including in States which are host to both large numbers of people internally displaced and refugees from conflict and persecution elsewhere.^{xix}

- f. Accordingly, refusal or failure by relatively rich and stable States, generally receiving few people seeking asylum and providing protection to few refugees, undermines the will and capacity of much poorer and less stable States who are host to the very great majority of displaced people. It pushes back more people to those States, thereby increasing the responsibility they are being asked to carry. It gives encouragement and licence to those States to renege on their own responsibilities. Whether because of the lack of capacity or will to meet such responsibilities, it also creates the conditions in which more people are in need of migrating further. The only possible beneficiaries of this cycle are smugglers, traffickers and other abusers, on the one hand; and those who otherwise profit, whether financially or politically, from increased border security and related policies. This is because the ‘demand’ for these ‘services’ is not only being perpetuated but being recycled.

Home Office policy and Ministers’ statements of intention

- 8. The Nationality and Borders Bill, currently before Parliament, includes provisions to further empower officials to “*stop, board, divert and detain*” vessels used in navigation.^{xx} Since the introduction of the Bill, the Home Secretary has indicated her intention – whether under the powers in this Bill or existing powers – to seek to turnaround and push back boats at sea.^{xxi} The boats to which the Home Secretary refers are often overcrowded, unstable or otherwise unsuitable for the journeys being made. The people on board often include children, babies, pregnant women, elderly people, ill, physically or psychologically impaired people and people who are frightened, desperate, cannot swim, have limited language capacities or have suffered serious past abuses and traumas (including at sea).

- 9. Ministers’ intentions are further indicated by the following:
 - a. Provision in the Bill to exempt officials from any criminal or civil liability for their exercise of these powers at sea.^{xxii}

 - b. The removal of provision in the Bill that would have prohibited use of these powers where it was considered contrary to UNCLOS to do so.^{xxiii}

- c. The removal of provision in the Bill that would have prohibited seeking to force a boat to the territory of a State that is not willing to receive it.^{xxiv}
 - d. Provision in the Bill to prosecute, under maximum sanction of life imprisonment, any person providing, for no gain, humanitarian assistance to a person (including at sea) that enables that person to reach and claim asylum in the UK.^{xxv}
10. Ministers have stated that the decision to remove the prohibition of action contrary to UNCLOS is because its express inclusion is unnecessary.^{xxvi} Having regard to other provisions in this Bill that reassurance seems dubious. Whether coupled with those other provisions or in itself, we are concerned that the removal of this prohibition signals either an intention to be careless or negligent about compliance with UNCLOS or to seek to avoid judicial scrutiny for any failure to comply. We are aware of no similar assurance about the prohibition of forcing boats to territories of States unwilling to receive them. Action of that sort is not compatible with duties to promote cooperation between States nor with obligations to people in immediate need of being disembarked safely. All of these matters, coupled with the characteristics and conditions of the people immediately affected, raise the very real prospect of a tragedy at sea by either delaying getting people to safety or causing someone to a resistant, panicked or confused response. Of course, one person reacting in such a way may put at risk other people with whom that person is travelling.

Conclusion

11. UNCLOS covers a vast amount of human and State relations and activity. Here, we focus solely on Article 98 (duty to render assistance). We see no good purpose to seeking in any way to reduce or withdraw this duty. That would, at least in law, be a potentially complex proposition for there are other international law duties, to which we have made some reference, which either directly or indirectly require the same or similar action in respect of people at risk at sea. What is needed is greater collective commitment to meeting this and related international law duties to safeguard human life and wellbeing, including at sea. Ministers' current or intended immigration policy, however, is liable to offend international law, encourage wider disrespect for that law and the value of human life that underpins it and increase the twin vices – the high human cost and thriving exploitation – to which we have referred above.
12. We would, therefore, encourage the Committee to call on the UK Government to:
- a. Affirm in policy and practice its commitment to UNCLOS, in particular Article 98, and to related international agreements and standards for the preservation of human life and wellbeing at sea.
 - b. Revise the Nationality and Borders Bill and immigration policy to remove exemption from criminal or civil liability for officials exercising powers at sea to stop, board, divert or detain boats;

- c. To desist from pushbacks, desist from attempting to take boats to territories of States that are not willing to receive them and revise immigration policy and the Nationality and Borders Bill accordingly.
- d. Revise the Nationality and Borders Bill to remove the provision to prosecute a person for providing humanitarian assistance for no gain to a person seeking asylum in the UK.
- e. Establish safe routes by which people may seek asylum in the UK without the need to undertake a dangerous journey to do so.
- f. Co-operate with other States, including France, for the purpose of sharing responsibility for providing asylum and preserving human life and wellbeing at sea.

ⁱ Guidelines on the Treatment of Persons Rescued at Sea, Resolution MSC.167(78):

<https://www.refworld.org/docid/432acb464.html>

ⁱⁱ Section 3 (Human Rights at Sea) of *Lives Adrift: refugees and migrants in peril in the Central Mediterranean*, Amnesty International, September 2014: <https://www.amnesty.org/en/documents/eur05/006/2014/en/>

ⁱⁱⁱ Article 33(1) provides the prohibition of *refoulement*.

^{iv} Articles 2, 3 & 4

^v Articles 5(4), 10, 12, 13 & 14

^{vi} International Organization for Migration's Missing Migrants Project has identified for than 45,000 people who have died on migratory journeys since 2014. More than 27,000 of these deaths have been by drowning.

^{vii} More than 18,500 of the deaths identified by the IOM *op cit* have been in the Central Mediterranean.

^{viii} The attention on journeys across the Channel tends to overlook that over the last couple of years, during which journeys by boat by people seeking asylum in the UK have significantly increased, the overall number of people seeking asylum in the UK has remained stable indicating there to have been a change in the type of journey rather than any increase in the number of people crossing to the UK. That holds true up to the time of the most recent official data presented (end June 2021).

^{ix} These matters are well-ventilated in, e.g., the House of Lords EU Committee's Fourth Report for Session 2015-16, November 2015, HL Paper 45 on the *EU Action Plan against migrant smuggling*.

^x The immigration rules make no provision for obtaining a visa for the purpose of seeking asylum and provide for the refusal or cancellation of a visa sought or used for a purpose other than the purpose for which it is provided for in the rules. The Nationality and Borders Bill, clause 13 affirms the longstanding position that the UK will not accept asylum claims unless made by people physically present in the UK.

^{xi} As events in Afghanistan in August 2021 made clear, even where a person is eligible for a visa or other permission to travel, there may be various reasons including ones of safety why that visa or permission or the opportunity to travel upon it is not accessible.

^{xii} Prosecution of people engaged in humanitarian action at sea and obstruction of that activity has become widespread among European Mediterranean States. See, e.g.

Punishing Compassion: Solidarity on Trial in Fortress Europe, 2020, Amnesty International:

<https://www.amnesty.org/en/documents/eur01/1828/2020/en/>

A slippery slope for human rights: The Luventa case, August 2021, Amnesty International:

<https://www.amnesty.org/en/documents/eur30/4475/2021/en/>

^{xiii} Among many examples are Denmark's revocation of hundreds of Syrian's refugee protection in the country, that country's efforts to secure an agreement to expel refugees to Rwanda and:

'No one will look for you': forcibly returned from sea to abusive detention in Libya, July 2021, Amnesty International: <https://www.amnesty.org/en/documents/mde19/4439/2021/en/>

Violence, lies and pushbacks – refugees and migrants still denied safety and asylum at Europe’s borders, June 2021, Amnesty International: <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>

^{xiv} e.g. *Hansard* HC, Nationality and Borders Bill Public Bill Committee, 27 September 2021 : Col 87ff; and, among others, UNHCR’s legal opinion on the Nationality and Borders Bill, October 2021, UNHCR observations on that Bill, September 2021 and UNHCR observations on the Government’s policy paper (New Plan for Immigration) which preceded the Bill, May 2021, all of which are available here:

<https://www.unhcr.org/uk/uk-immigration-and-asylum-plans-some-questions-answered-by-unhcr.html>

^{xv} The decision to end the Italian search and rescue mission (Operation Mare Nostrum) led to a more than fourfold increase in deaths at sea in the first five months of 2015: *The global refugee crisis: a conspiracy of neglect* (the EU’s response in the Central Mediterranean), 2015, Amnesty International:

<https://www.amnesty.org/en/documents/pol40/1796/2015/en/>

The EU search and rescue mission then introduced did not last and its effective withdrawal once again led to a large increase in the death toll: *A Perfect Storm: the failure of European policies in the Central Mediterranean*, 2017, Amnesty International: <https://www.amnesty.org/en/documents/eur03/6655/2017/en/>

^{xvi} At end 2020, 48 million people were internally displaced: see e.g. UNHCR’s Mid-Year Trends 2021 report:

<https://www.unhcr.org/statistics/unhcrstats/618ae4694/mid-year-trends-2021.html>

^{xvii} UNHCR’s Mid-Year Trends 2021 report *op cit* confirms that 75% of the world’s refugees are hosted by neighbouring countries; 85% of these countries are developing countries; and 27% are the least developed countries. These figures, however, underestimate the scale of the disparity for they do not include around 5.7 million Palestinian refugees, a majority of whom hosted in Jordan, Lebanon and Syria and remainder in the Occupied Territories.

^{xviii} The disparity was succinctly set out by the UNHCR representative to the United Kingdom in her oral evidence to the Nationality and Borders Bill Public Bill Committee: *Hansard* HC, 27 September 2021 : Col 88 (Q138).

^{xix} An especially stark and current example is provided by Ethiopia. UNHCR’s Mid-Year Trends 2021 report *op cit* identifies that more than 1.2 million Ethiopians were newly internally displaced in the first half of 2021. The report also identifies Ethiopia as the country hosting the tenth largest population of refugees globally, almost 800,000 people.

^{xx} Schedule 6 of the Nationality and Borders Bill, Bill 187 (as amended in Committee)

^{xxi} e.g. Uncorrected oral evidence of the Home Secretary to the House of Lords Justice and Home Affairs Committee, Q10 & Q11 (Baroness Chakrabarti)

^{xxii} Paragraph 10 of Schedule 6, Nationality and Borders Bill, Bill 187 (as amended in Committee), which is to insert new Part A1 into Schedule 4A of the Immigration Act 1971 including, in particular, paragraph J1

^{xxiii} Government amendment 82, which was debated and approved in Committee: *Hansard* HC, Nationality and Borders Bill Public Bill Committee, 28 October 2021 : Cols 443ff

^{xxiv} Government amendment 83, which was debated and approved in Committee: *Hansard* HC, Nationality and Borders Bill Public Bill Committee, 28 October 2021 : Cols 443ff

^{xxv} Clause 40(2), Nationality and Borders Bill, Bill 187 (as amended in Committee)

^{xxvi} *Hansard* HC, Nationality and Borders Bill Public Bill Committee, 28 October 2021 : Cols 444-445 *per* Tom Pursglove