PART 3

The Law of the Sea and Ocean Governance

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Maritime Search and Rescue in the *Nationality and Borders Act 2022*: An Act of Deterrence?

Ainhoa Campàs Velasco
Lecturer in Law, University of Southampton, United Kingdom

Introduction*

The number of irregular crossings in the English Channel on board small unseaworthy boats has seen a gradual increase in the past years, notably in 2021 and 2022, along with a rise in 2019 and 2020 in the number of unaccompanied children and families attempting these dangerous crossings to the United Kingdom (UK).[1] The vast majority of those reaching UK shores on board these boats apply for asylum.[2] Since 2014 to January 2024, 75 deaths by drowning have been recorded in the English Channel.[3]

Hardened restrictive migratory policies, coupled with an increasingly inflammatory institutional rhetoric against migrants, refugees and asylum seekers arriving irregularly to the United Kingdom, have shaped the legislative efforts deployed lately, underpinned by a punitive approach and deterrent policies, encapsulated in the dehumanizing pledge to "stop the boats." This is

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1 International Organization for Migration (IOM) Missing Migrants Project, "Migration within Europe," available online: <https://missingmigrants.iom.int>. IOM Missing Migrants Project tracks migrants' deaths and migrants reportedly missing along migratory routes across the world. It resorts to data provided by local authorities, interviews with survivors conducted by IOM field officers, United Nations High Commissioner for Refugees (UNHCR), non-governmental organizations (NGOs) and media reports. See also Home Office Official Statistics, "Irregular migration in the UK, year ending March 2023," published 25 May 2023, available online: <https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-march-2023>.

2 According to UK Government figures, in the year ending March 2023, 90 percent of people crossing the Channel applied for asylum, for which see Home Office Official Statistics, n. 1 above.

3 IOM Missing Migrants Project, "Migration within Europe," available online: <https://missingmigrants.iom.int/region/europe?region_incident=4061&route=3896&incident_date%5Bmin%5D=&incident_date%5Bmax%5D=>. As of February 2024, the last reported drowning incident is dated 14 January 2024.

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notably the case of the *Nationality and Borders Act 2022* (NBA)[4] and the *Illegal Migration Act*.[5] These strategies have further laid the ground for sealing the UK-Rwanda scheme to externalize asylum processing duties,[6] held unanimously by the Supreme Court to be unlawful, upholding the Court of Appeal decision.[7]

In this hostile legal environment, this article will evaluate the criminalization of humanitarian search and rescue at sea under the NBA. It will examine the facilitation offence applicable to maritime rescuers under Section 41 of the NBA, amending the *Immigration Act 1971* (*Immigration Act*).[8] An initial attempt of indiscriminate criminalization of helping asylum seekers to enter the UK by the removal of the words *for gain* in the Bill, as introduced in the House of Commons on 6 July 2021, was met with a stern rejection and amendment proposals by the House of Lords, followed by a prolonged debate in the successive readings of the Bill that culminated in the drafting

4 *Nationality and Borders Act 2022*, c. 36 (NBA 2022). See UNHCR, "UNHCR Observations on the Nationality and Borders Bill 141, 2021–22," October 2021, available online: <https://www.unhcr.org/uk/media/unhcr-legal-observations-nationality-and-borders-bill-oct-2021>; UNHCR, "UNHCR Updated Observations on the Nationality and Borders Bill, as amended," January 2022, available online: <https://www.unhcr.org/uk/media/unhcr-updated-observations-nationality-and-borders-bill-amended>.

5 *Illegal Migration Act 2023*, c. 37. See UNHCR, "UNHCR Legal Observations on the Illegal Migration Bill," 2 May 2023 (updated), available online: <https://www.unhcr.org/uk/media/unhcr-legal-observations-illegal-migration-bill-02-may-203>.

6 Memorandum of Understanding between the government of the United Kingdom and Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement, published by the Home Office, 14 April 2022. See UNHCR, "UNHCR appeals to the UK to uphold its international legal obligations," 13 December 2022, available online: <https://www.unhcr.org/uk/news/press-releases/unhcr-appeals-uk-uphold-its-international-legal-obligations>. See UNHCR, n. 4 above, in particular, paras 22–27, 39–41, 63–68; UNHCR, "UNHCR Updated Observations on the Nationality and Borders Bill, as amended."

7 [2023] UKSC 42, on appeal from [2023] EWCA Civ 745. The Supreme Court in a unanimous judgment handed down on 15 November 2023 upheld the Court of Appeal decision of 29 June 2023, which reversed the High Court's finding. Based on the evidence produced showing current deficiencies in Rwanda's asylum processes, the Supreme Court held that "the Court of Appeal was entitled, on the evidence before it, to consider that there were substantial grounds for believing that asylum seekers would face a real risk of ill-treatment by reason of refoulement in the event that they were removed to Rwanda" (para. 73). The unlawfulness of the policy was considered by the Supreme Court not only in the light of Article 3 of the European Convention on Human Rights, 1950, and section 6 of the *Human Rights Act*, 1998, but also taking into account other relevant international conventions ratified by the UK and acts of Parliament protecting refugees and asylum seekers against refoulement (paras 19–33).

8 *Immigration Act 1971*, c. 77.

of a more nuanced and convoluted approach to the facilitation offence under Section 41(4) of the NBA.[9]

This article will assess the current legal position of those involved in maritime rescue of migrants, refugees or asylum seekers, collectively referred to here as sea migrants, attempting to cross the English Channel in what can be named as mixed migration flows.[10] In doing so, it will examine the compatibility of the NBA with the international maritime search and rescue legal framework, paying attention to the protection of rescuers and the integrity of the maritime search and rescue system. To this end, Section 41 of the NBA will be dissected and scrutinized through the lens of the maritime search and rescue legal framework. Some concerns will also be raised regarding the protection at sea of those enduring the crossings and certain attention will be given to refugee protection considerations.

The NBA evidences an urge among lawmakers to take a punitive approach towards maritime search and rescue efforts not undertaken on behalf of or coordinated by His Majesty's (HM) Coastguard or an overseas maritime search and rescue authority exercising equivalent functions. Despite the statutory exclusions and defences available to limit the effects of erasing the component *for gain* in the final draft of Section 41(4), suggesting some protection to rescuers, the NBA amounts to an act of deterrence for rescuers to act outside the supervision of the designated authorities. Further, the statutory threat to prosecute rescuers at sea ultimately serves the unspoken purpose of tightening the detection and control of unauthorized arrivals. The analysis below signals the UK's shortfalls in the compliance with its international commitments in its pursuit to prioritize deterrence policies, focusing primarily on the maritime search and rescue realm.

To this end, the facilitation offence under Section 41 of the NBA is considered first, with particular emphasis on the widening of its scope, for an understanding of its application in the legal sphere of rescue operations at sea. Secondly, a detailed examination of the scope of the facilitation offence in the realm of maritime search and rescue is undertaken. This will be achieved by initially

9 The debates are available online: <https://hansard.parliament.uk//search/Contributions?searchTerm=Nationality%20and%20Borders%20Bill&startDate=07%2F03%2F2018%2000%3A00%3A00&endDate=07%2F03%2F2023%2000%3A00%3A00>.

10 See UNHCR Background Paper on "Refugees and Asylum Seekers in Distress at Sea: How best to respond?," Expert Meeting in Djibouti, 8–10 November 2011, in particular para. 1, available online: <https://www.unhcr.org/4ec1436c9.html>; International Maritime Organization (IMO), "IMO Secretary-General welcomes UN Security Council resolution on migrant smuggling," Briefing 45, 14 October 2015, available online: <http://www.imo.org/en/MediaCentre/PressBriefings/Pages/45-UNSC-resolution-.aspx>.

considering the statutory exclusions available. Subsequently, the statutory defence rescuers may rely on when the exclusions do not apply is scrutinized and the discharge of the burden of proof required is briefly discussed. The statutory limitations to the defence are then dissected. At each stage the examination will be undertaken against the backdrop of the UK's land-based and sea-based rescue obligations under international law. The discussion will further be presented against the background of a widespread trend of criminalization of humanitarian-led maritime search and rescue with the bleak example of EU Member States' malpractices in the Mediterranean under the auspices of the "Facilitation Pack." Finally, some concerns regarding the enlargement of the maritime enforcement powers will be raised, notably the safety of life at sea as regards possible interdiction practices at sea.

Widening the Facilitation Offence

Facilitating a breach of immigration law requires that the person involved in the conduct "must know or have reasonable cause for believing that the act facilitates the commission of a breach or attempted breach of immigration law … and must know or have reasonable cause for believing that the individual is not a UK national."[11]

Facilitation offences were significantly broadened in the *Nationality and Borders Bill* (NBB) as introduced on 6 July 2021 and remain so in the NBA.[12] This was achieved by creating at one end a new immigration offence, namely, "arriving" in the UK without a valid entry clearance where required. It was further attained by omitting the constitutive element of *for gain* in the facilitation of the arrival, attempted arrival, entry or attempted entry into the UK of an asylum seeker at the other end. These are scrutinized below to contextualize the legal implications for search and rescue efforts at sea when it comes to assisting sea migrants.

The examination is carried out in two stages. Initially, the widening of the immigration offence and its impact on the facilitation offence is considered. Subsequently, the erasing of the words *for gain* from the formulation of the facilitation offence in the context of assisting asylum seekers into the UK

11 Home Office, "Nationality and Borders Bill Explanatory Notes," relating to the Nationality and Borders Bill as introduced in the House of Commons on 6 July 2021 (Bill 141) (NBB Explanatory Notes), para. 400, available online: <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/en/210141en.pdf>.

12 *Nationality and Borders Bill*, Bill 141 2021–22 (as introduced) 6 July 2021 (NBB), available online: <https://bills.parliament.uk/bills/3023/publications>.

is discussed. Two consequences will be considered: the diversion from the scope of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crimes, 2000 (Smuggling Protocol)[13] and notably, the criminalization of maritime rescuers rendering assistance at sea.

Expanding the Immigration Offence to the Earlier Stage of "Arrival" to the UK

In addition to the existing immigration offence of entering the UK without leave under Section 24 of the *Immigration Act*, Section 40 of the NBA introduces the new immigration offence of *arriving* in the UK without a valid entry clearance where required,[14] and includes arrivals in the UK without an Electronic Travel Authorisation (ETA) where required.[15]

Where arrival in the UK is by ship or aircraft, *entry* to the UK for the purpose of the *Immigration Act* is deemed to take place at the moment of disembarkation, and where disembarkation is done at a port, *entry* is deemed to take place once disembarkation has occurred and the person has subsequently left the immigration control area.[16] However, where the person is detained and taken from the immigration control area, or granted immigration bail, it is deemed that *entry* into the UK has not taken place.[17]

By including *arrival* in addition to *entry*, the immigration offence occurs at an earlier stage. The term *arrival* for the purpose of the *Immigration Act* has not been defined in the NBA. Therefore, one could resort to the UK Government understanding of *arrival* for immigration compliance and enforcement purposes, in accordance with which "[a]n individual arrives in the UK when they reach UK land or inland waters. This does not extend to UK territorial waters."[18]

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13 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crimes, New York, 15 November 2000, 2241 *United Nations Treaty Series* 507 (Smuggling Protocol).

14 NBB, n. 12 above, Clause 37.

15 NBA 2022, n. 4 above, s. 40(2).

16 Section 11(1) of the *Immigration Act 1971*, n. 8 above, reads: "[a] person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained."

17 NBB Explanatory Notes, n. 11 above, para. 385.

18 UK Government, "Guidance: Dealing with Potential Criminality (ICE Teams) (Accessible)," published for Home Office Staff, 28 November 2022, updated 4 April 2023, available online:

The legal consequences sought in the widening of the offence by incorporating *arrival* as well as *entry* into the UK are made clear in the Home Office Explanatory Notes to the *Nationality and Borders Bill* introduced on 6 July 2021 in the House of Commons (Explanatory Notes), where it is stated that this new offence encompassing *arrival* "will allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don't technically 'enter' the UK."[19] This would seem to contradict the UK Government understanding of *arrival*. It effectively brings the legal consequence of irregular *arrival* even earlier than the definition suggests, that is, at the moment individuals are intercepted in UK territorial seas, provided disembarkation eventually occurs on UK soil. For the purpose of *arrival* of sea migrants by ship, the notion of ship extends to any floating structure according to Section 11(3) of the *Immigration Act*.

Broadening the immigration offence has consequently stretched the notion of immigration law in Section 25(2) of the *Immigration Act*, to the extent that the notion of immigration offence and unlawful immigration has been widened in Section 24 to include not only illegal entry or entry without leave, but also arrival without entry clearance to the UK territory or arrival without an ETA where required.[20] The criminalization of irregular arrival in the terms established in the NBA has irremediably impacted on the scope of the facilitation offence contained in Section 25 of the *Immigration Act*, which now also encompasses the arrival or attempted arrival of persons in breach of immigration law.[21] This goes hand in glove with the stark increase of the penalization of the facilitation offence under Section 25 of the *Immigration Act*, introduced initially under Clause 38(1) of the NBB whereby the "imprisonment for a term not exceeding 14 years" was to be substituted by "imprisonment for life,"[22] as enacted under Section 41(2) of the NBA.

<https://www.gov.uk/government/publications/powers-and-operational-procedure/dealing-with-potential-criminality-ice-teams-accessible>. ICE stands for Immigration, Compliance and Enforcement Teams.

19 NBB Explanatory Notes, n. 11 above, paras 387, 388. See more broadly paras 382–389.

20 NBA 2022, n. 4 above, s. 40; *Immigration Act 1971*, n. 8 above, s. 24.

21 NBA 2022, n. 4 above, s. 40(4). See further NBB Explanatory Notes, n. 11 above, paras 382–389, particularly para. 389.

22 NBB, n. 12 above, clause 38(1); *Immigration Act 1971*, n. 8 above, s. 25(6)(a). See NBB Explanatory Notes, n. 11 above, para. 399.

Erasing For Gain *from the Characterization of the Facilitation Offence*

The scope of the facilitation offence was widened under Clause 38(2) of the NBB, originally introduced under heading "Assisting unlawful immigration or asylum seeker."[23] This clause was drafted to amend Section 25A(1)(a) of the *Immigration Act*, under the heading "Helping asylum-seeker to enter United Kingdom." Crucially, Clause 38(2) erased the key constitutive element of the offence, namely, *for gain*, from its original formulation. This effectively sought to alter the scope of the offence, widening its defining contours, to read: "[a] person commits an offence if (a) he knowingly facilitates the arrival or attempted arrival in, or entry or attempted entry into, the United Kingdom of an individual and (b) he knows or has reasonable cause to believe that the individual is an asylum-seeker."

The distinct treatment originally given to assisting unlawful immigration, which did not require the constitutive element *for gain* to be considered a criminal offence under Section 25 of the *Immigration Act*, and assisting asylum seekers into the UK under Section 25A, which did require this lucrative component, was therefore abandoned in the NBB. This remains the position under the NBA under Section 41 entitled "Assisting unlawful immigration or asylum seeker" in what could be seen as an expression of an acquired "tendency to conflate refugees and migrants" which can have devastating consequences for those in need of international protection.[24]

Two legal consequences deriving from the eradication of the element of gain are considered next: firstly, the departure from the scope of application of the Smuggling Protocol; secondly, the criminalization of search and rescue services rendered to sea migrants attempting to reach UK shores. Protection concerns will be raised regarding both sea migrants and sea rescuers.

Steering Away from the Smuggling Protocol: Protection Concerns at Sea for those Attempting the Crossings

The widening of the scope of the facilitation offence in the context of asylum seekers by eliminating the requirement of *for gain* conforms with the UK legislative autonomy to adopt "measures against a person whose conduct constitutes an offence under [their] domestic law," according to Article 6.4 of the

23 NBB, n. 12 above.

24 UNHCR, "Asylum and Migration," available online: <https://www.unhcr.org/what-we-do/protect-human-rights/asylum-and-migration>.

Smuggling Protocol.[25] This, in turn, not only redefines and widens the scope of the facilitation offence, but it also appears to remove the facilitation offence under the NBA from the remit of the Smuggling Protocol.

Section 41(3) of the NBA amending Section 25A(1)(a) of the *Immigration Act* by deleting *for gain*, distances the facilitation offence from the identifying feature of "smuggling of migrants for the purpose of the Smuggling Protocol,"[26] which requires the aim to obtain "directly or indirectly, a financial or other material benefit" in the procurement of "the illegal entry of a person into a State Party of which the person is not a national or permanent resident."[27] The Smuggling Protocol further delineates the scope of the offence and its application by including only transnational activities involving an organized criminal group.[28]

The Smuggling Protocol establishes in peremptory terms States parties' duty to take legislative and other necessary measures to establish as criminal offences, "when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit" the conducts typified in Article 6, while ensuring migrants remain devoid of any criminal liability for having been subjected to the conduct set forth therein, according to Article 5.[29] This dual approach echoes the aim of the Smuggling Protocol articulated in its Preamble to "prevent and combat the smuggling of migrants by land, sea

25 Article 6.4 reads: "Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law."

26 Smuggling Protocol, n. 13 above, art. 3(a).

27 Id.

28 Id., art. 4: Scope of Application. The term "organized criminal group" is defined under the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000, 2225 *United Nations Treaty Series* 209) Article 2, as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit." See also N. Klein, "A maritime security framework for the legal dimensions of irregular migration by sea," in: *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*, eds., V. Moreno-Lax and E. Papastavridis (Leiden: Brill Nijhoff, 2016), Ch 2, p. 38.

29 Smuggling Protocol, n. 13 above, Article 5 reads: "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol." The conducts set forth in Article 6 include "(a) [t]he smuggling of migrants; (b) when committed for the purpose of enabling the smuggling of migrants: (i) [p]roducing a fraudulent travel or identity document; (ii) [p]rocuring, providing or possessing such a document; (c) [e]nabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means."

and air,"[30] coupled with the acknowledged concern that smuggling activities "can endanger the lives or security of the migrants involved,"[31] and "the need to provide migrants with humane treatment and full protection of their rights."[32] In this vein, the Smuggling Protocol demands States parties preserve and protect the rights of persons subjected to smuggling in the terms contained in Article 16.1. These include a generic reference to States' obligations under applicable international law, and a specific reference to "the right to life and not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment." It further requires States parties to afford migrants necessary protection against violence related to smuggling activities, in accordance with Article 16.2. Particularly relevant for the purpose of maritime search and rescue, Article 16.3 demands from each State party to "afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol."

Accordingly, where the facilitation offence under the NBA falls outside the remit of the Smuggling Protocol, a question arises as to whether protection considerations and appropriate assistance under Article 16 of the Smuggling Protocol with regard to sea migrants would still be relevant and applicable. The answer is that these will remain so, on three grounds. Firstly, in the vast majority of cases sea migrants would have been the object of smuggling conducts as per Article 6 of the Smuggling Protocol. Secondly, it is unquestionable that protection considerations applicable under international law, with the particular reference in Article 16 to "the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment" and the duty to provide "appropriate assistance to migrants whose lives or safety are endangered" will remain relevant and applicable. The protection duties afforded under the International Covenant on Civil and Political Rights (ICCPR),[33] and under the European Convention on Human Rights, as amended (ECHR),[34] apply within a State party jurisdiction conceived primarily in territorial terms, including in the case of a coastal State such as the UK

30 Id., Preamble, recital 1.

31 Id., Preamble, recital 6.

32 Id., Preamble, recital 3.

33 International Covenant on Civil and Political Rights, 16 December 1966, 999 *United Nations Treaty Series* 171 (ICCPR). It entered into force 23 March 1976.

34 European Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights, as amended, 4 November 1950, ETS 5 (ECHR). It entered into force on 3 September 1953. It was incorporated in UK domestic law by means of *The Human Rights Act 1998*, c. 42.

its territorial sea.[35] Outside its territory, the same duty to ensure human rights protection arises where it can be determined as a matter of fact that a State party exercises control and authority through its agents over an individual, and therefore exercises jurisdiction over that person, as acknowledged by the European Court of Human Rights, Grand Chamber (ECtHR) (GC) in *Hirsi Jamaa and Others v. Italy* (GC).[36] The ECtHR (GC) determined as decisive in *Al-Skeini and Others v. United Kingdom* "the exercise of physical power and control over the person in question."[37] In the realm of the ICCPR, according to the United Nations Human Rights Committee (HRC) interpretation of Article 2.1 of the ICCPR,[38] States parties' duties to respect and secure the Covenant rights extend to the exercise of "power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained."[39] Effective control, over individuals or over a ship on the high sea would be exercised where State vessels incur "push-back" activities to impede migrants' boats to make progress and force them to turn back, at any rate when threatening or resorting to physical force.[40] Thirdly, with regard to the duty to render assistance to migrants whose lives or safety are endangered at sea, this duty undoubtedly remains unaltered. It is firmly anchored in customary international law and further articulated in a number of international conventions to which the UK is a

35 ICCPR, n. 33 above, art. 2 in conjunction with arts 6 and 7; ECHR, n. 34 above, art. 1 in conjunction with arts. 2 and 3; United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 *United Nations Treaty Series* 3, art. 2.1 (UNCLOS).

36 *Hirsi Jamaa and Others v. Italy* (GC) App No. 27765/09 (ECtHR, 23 February 2012), paras 73–82, particularly para. 74. See also *Al-Skeini and Others v. United Kingdom* (GC) App No. 55721/07 (ECtHR, 7 July 2011), para. 137. See further *Medvedyev and Others v. France* (GC) App No. 3394/03 (ECtHR, 29 March 2010), paras 63–67. See also N. Klein, "A case for harmonizing laws on maritime interceptions of irregular migrants," *International and Comparative Law Quarterly* 63, no. 4 (2014): 787–814, pp. 800–803. See further W. Kälin and J. Künzli, *The Law of International Human Rights Protection*, 2nd ed. (Oxford: Oxford University Press, 2019), pp. 124–127.

37 *Al-Skeini and Others v. United Kingdom* (GC) App No. 55721/07 (ECtHR, 7 July 2011), para. 136.

38 The HRC, tasked with the monitoring of the implementation of the ICCPR by its States parties and the interpretation of the provisions of the ICCPR, issues reports and publishes its interpretation of the content of human rights provisions by means of General Comments. See <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>.

39 See HRC, CCPR General Comment No 31: The Nature of the General Legal Obligation Imposed on States parties to the Covenant, adopted 29 March 2004, UN Doc CCPR/C/21/Rev.1/Add.13, para. 10, available online: <http://ccprcentre.org/ccpr-general-comments>.

40 See A. Fischer-Lescano, T. Löhr and T. Tohipidur, "Border controls at sea: Requirements under international human rights and refugee law," *International Journal of Refugee Law* 21, no. 2 (2009): 256–296, pp. 275–276; Klein, n. 36 above, pp. 800–803.

party.[41] Paragraph 2.1.10 of the Annex to the International Convention on Maritime Search and Rescue 1979, as amended (SAR Convention) embodies the legal position in the following terms: "[p]arties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found."[42]

Against this backdrop, the legal treatment given in the NBA to search and rescue efforts is considered next.

Criminalizing Search and Rescue of Migrants and Refugees at Sea

By omitting the requirement *for gain*, the prosecution on grounds of assisting irregular arrival or entry (or attempted arrival or entry) in the UK territory of asylum seekers no longer faces a key stumbling block, namely, the difficulty in proving a gain linked to the facilitation activity. This was in fact the reason adduced by the Home Office in its Explanatory Notes.[43] This rationale was subsequently raised in the debates within the Commons Chamber, where the motivation for the omission of the words *and for gain* was made clear. The amendment apparently sought to overcome the difficulties recurrently encountered to prove that facilitators acted *for gain*, which jeopardized, in the words of the Parliamentary Under-Secretary of State for the Home Department, Tom Pursglove, the "ability to prosecute people smugglers."[44]

The institutional exchanges between the House of Lords and the House of Commons regarding Lords Amendment 20 to re-introduce the words *and for gain* however also revealed how that motivation to overcome procedural difficulties was effectively overshadowed by a purposive re-characterization of the facilitation offence in the context of asylum seekers. This was openly articulated in their disagreement to this proposed Amendment 20 as follows: "[b]ecause the Commons consider that the offence of facilitating the entry of

41 These are identified below in the next section.

42 Hamburg, 27 April 1979, 1405 *United Nations Treaty Series* 19. The SAR Convention entered into force on 22 June 1985. The Annex to the SAR Convention was amended by IMO Resolution MSC.70(69), 18 May 1998, on the adoption of amendments to the International Convention on Maritime Search and Rescue, 1979. Further amendments were introduced in 2004 by IMO Resolution MSC.155(78), 20 May 2004, on the adoption of amendments to the International Convention on Maritime Search and Rescue, 1979.

43 NBB Explanatory Notes, n. 11 above, paras 401, 402.

44 UK Parliament, *Hansard*, Nationality and Borders Bill, Volume 711, debated on 22 March 2022, Column 192, available online: <https://hansard.parliament.uk/commons/2022-03-22/debates/FA4FBF36-5168-4B9B-8C7E-09D2AA33C39/NationalityAndBordersBill>. Contrast with Stephen Kinnock's intervention, Nationality and Borders Bill, Volume 711, 22 March 2022.

an asylum seeker into the United Kingdom should be capable of prosecution *whether or not the defendant was acting for gain*."[45] This rationale and the aim sought arguably go further than presenting the burden of evidence hurdle as a sole motivation; it effectively eliminates the requirement of gain altogether from the characterization of this facilitation offence, expanding its contours indiscriminately. The eradication of the component *for gain*, amending Section 25A(1)(a) of the *Immigration Act*, results in the *de facto* criminalization of humanitarian search and rescue at sea.

The debates that followed in the House of Commons and House of Lords in the successive readings of the NBB resulted in the drafting of Section 25BA of the *Immigration Act* "Facilitation offences: application to rescuers."[46] This section, specifically addressed to rescuers, seems an attempt to limit the impact of the criminalization of search and rescue efforts. In this endeavor, it formulates the legal position with regards to rescuers' exposure to criminal liability in a convoluted combination of safeguards, including exclusions from the facilitation offence, in addition to the pre-existing general exception under Section 25A(3), and possible defences with specific limitations that arguably unveil underlying tensions between deterrent immigration policies and the duty to proceed to the rescue of those in distress at sea. These will be considered next with the aim to underscore that the NBA not only has been designed to deter irregular arrivals as it has been widely acknowledged, but it also becomes an instrument to deter search and rescue operations that may be undertaken outside the coordination and effective control of the relevant authorities.

The criminalization of search and rescue (SAR) efforts outside the coordination of the relevant authorities is irreconcilable with the UK's international SAR duties, duties contained in the relevant treaties which are to be read in compliance with the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties, 1969 (VCLT).[47] Particular attention is drawn here to key elements in Article 31.1 of the VCLT which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" as evidence of the States parties' intention

45 Emphasis added. See for instance, House of Lords Bill 138 Commons Disagreement, Amendments in Lieu and Reasons, 23 March 2022, available online: <https://bills.parliament.uk/bills/3023/publications>.

46 NBA 2022, n. 4 above, s. 41(4).

47 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 *United Nations Treaty Series* 331 (VCLT).

underpinning the international agreement concluded.[48] A textual interpretation of the terms of the treaty marks the starting point and the ordinary meaning given to these terms will be linked to and influenced by their context, which includes the text of the treaty, its preamble and its annexes if any.[49] It will be equally clarified and guided by the object and purpose of the treaty.[50] Good faith, although without a specific and independent function, informs the whole interpretative process. It ensures a teleological approach whereby the treaty is read and applied in accordance with a textual and contextual approach so in its performance the object and purpose of the treaty are not undermined, and the intentions of the States parties are advanced.[51]

The purpose of the SAR Convention can be identified in the third recital of its Preamble as the rescue of persons in distress at sea,[52] ultimately for the prevention of loss of life at sea. The SAR Convention is informed by the customary duty to render assistance at sea, contained in a number of international conventions. The first recital of its Preamble notes "the great importance attached in several conventions to the rendering of assistance to persons in distress at sea and to the establishment by every coastal State of adequate and effective arrangements for coast watching and for search and rescue services." These include the United Nations Convention on the Law of the Sea, 1982 (UNCLOS)[53] and the International Convention for the Safety of Life at Sea, 1974 as amended (SOLAS Convention) both of which the UK is party.[54]

A contextual and purposive approach to the reading of the SAR Convention further determines the relevance of the motivation set in the fourth recital of its Preamble, expressing the wish to promote not only "co-operation among search and rescue organizations around the world" but also "among those participating in search and rescue operations at sea." This can be linked to paragraph 2.1.1 of the Annex to the SAR Convention which demands States

48 R. Gardiner, *Treaty Interpretation*, 2nd ed. (Oxford, UK: The Oxford International Law Library, 2015), Chapter 5.

49 VCLT, n. 47 above, art. 31.2. See further, Gardiner, n. 48 above, pp. 197–210.

50 Gardiner, n. 48 above, pp. 211–222.

51 This can be linked to Article 26 of the VCLT which reads: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." For a detailed consideration of the principle of good faith in the interpretation process, see Gardiner, n. 48 above, pp. 167–181, particularly p. 172.

52 Preamble to the SAR Convention, recital 3 *in fine*: "Desiring to develop and promote these activities by establishing an international maritime search and rescue plan responsible to the needs of maritime traffic *for the rescue of persons in distress at sea*" (emphasis added).

53 UNCLOS, n. 35 above, arts 98(1)(a) and (b), 98(2).

54 International Convention for the Safety of Life at Sea, 1974, 1 November 1974, 1184 *United Nations Treaty Series* 278, ch. V, regs 7, 33 (SOLAS).

parties' participation in the "development of search and rescue services to ensure that assistance is rendered to any person in distress at sea" and as paragraph 2.1.10 further provides, this shall be done "regardless of the nationality or status of such a person or the circumstances in which that person is found." Both land- and sea-based duties on search and rescue, referred to in the fourth recital of the Preamble of the SAR Convention, are embodied in UNCLOS, in Articles 98.1 and 98.2, and in the SOLAS Convention, Chapter V, Regulations 7 and 33.

Land-based duties dictate that coastal States parties will "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea" according to Article 98.2 of UNCLOS, which is echoed in Chapter V, Regulation 7 of the SOLAS Convention.

Sea-based duties compel States parties to require masters of ships flying their flags "to render assistance to any person found at sea in danger of being lost"[55] and "to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him."[56] The SOLAS Convention addresses the duty directly to the ship master at sea "which is in a position to provide assistance on receiving a signal from any source that persons are in distress at sea" to "proceed with all speed to their assistance."[57] It is relevant to emphasize the crucial importance given in both instruments to the speed with which assistance is to be rendered, also mirrored in paragraph 1.3.13 of the Annex to the SAR Convention when referring to the immediate assistance required in situations of distress at sea.

The duty to render assistance at sea applies where it does not entail "serious danger to the ship, the crew or the passengers,"[58] and the assessment of the need, nature and viability of the assistance with due consideration of the safety of the ship, crew and passengers would be left to the discretion of the master.[59] Importantly for the purpose of the present discussion, the SOLAS Convention further provides in Regulation 33.1 that in proceeding with all speed to the

55 UNCLOS, n. 35 above, art. 98(1)(a).

56 Id., art. 98(1)(b).

57 SOLAS, n. 54 above, ch. V, reg. 33.1.

58 UNCLOS, n. 35 above, art. 98.1.

59 See S. Nandan and S. Rosenne, eds., *The Virginia Commentary*, Volume III (Martinus Nihjoff Publishers, 1995), para. 98.11(c): "This obligation is a matter for the discretion of the master, considering all the circumstances of the situation in which assistance is required."

assistance of persons in distress the master will, "*if possible*, [inform] them *or* the search and rescue service that the ship is doing so."[60]

Therefore, the omission of *for gain* and the criminalization of SAR operations outside the coordination of the designated authorities, far from echoing the wording, the spirit, object and purpose of the SAR Convention, as well as relevant provisions of UNCLOS and the SOLAS Convention, introduce constraints and obstruct both SAR land- and sea-based duties. Consequently, the criminalization of humanitarian search and rescue in the terms of the NBA is incompatible with the SAR legal framework where the only limitation to the duty to render assistance to those in distress at sea appears to be the safety of the prospective assisting ship and of those on board according to the assessment of the circumstances by the master.

The Government's urge to ensure control over unauthorized arrivals is undoubtedly consistent with the UK's sovereign prerogative to regulate migration within its jurisdiction.[61] However, the criminalization of SAR services rendered outside the supervision of the designated authorities has, undeniably, a negative impact on the adequacy and effectiveness of SAR services. It effectively undermines the integrity of the SAR system, particularly given the limited State SAR capacity at sea. It serves in turn as a legal mechanism to tighten the control over unauthorized arrivals. It underscores the urge to identify refugees arriving irregularly by sea for the purpose of applying the differential treatment designed in Article 12 of the NBA, which is briefly discussed below.

Facilitation Offences: Rendering Assistance and Rescuing Persons at Sea

Exclusions from the Facilitation Offence

Would the Exclusion under Section 25A(3) of the Immigration Act Apply to Those Rendering Assistance at Sea?

The application of Section 25A(1) whereby an offence is committed by an individual who "(a) … knowingly facilitates the arrival [or attempted arrival] in [or the entry [or attempted entry] into], and (b) knows or has reasonable

60 SOLAS, n. 54 above, ch. v, reg. 33.1 (emphasis added).

61 *Hirsi Jamaa and Others v. Italy* (GC) App No. 27765/09 (ECtHR, 23 February 2012), para. 113: "[a]ccording to the Court's established case-law, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens."

cause to believe that the individual is an asylum seeker" is excluded under Section 25A(3), pre-dating the NBA. Therefore, despite the removal of the requirement *for gain*, the offence of assisting unlawful immigration or asylum seekers under Section 25A(1) would not apply to "anything done by a person acting on behalf of an organization which (a) aims to assist asylum seekers, and (b) does not charge for its services."[62] The broad scope of the opening words in this subsection "*anything* done by a person" (emphasis added) would arguably apply to those rendering assistance at sea and delivering survivors to a place of safety even if this exclusion is contained outside Section 25BA, which is devoted to rescuers.

Therefore, in the realm of maritime assistance and search and rescue, this exclusion from the facilitation offence within the scope of Section 25A seems to concern only rescuers working under the umbrella of an organization that aims to altruistically assist asylum seekers. This would seem to leave out of the exception individuals selflessly engaged in humanitarian search and rescue operations who do not belong to any organization, or those who, in the course of navigation, encounter migrants in danger or in distress at sea, for instance fishermen, or the master and crew aboard a ship who proceed to assist or to rescue migrants in distress and disembark them at a place of safety on British soil.

The term "organization" as depicted in Section 25A(3)(a) and (b) of the *Immigration Act* for the purpose of excluding them from the facilitation offence has raised questions as to whether they have to have as sole and predetermined aim the assistance of asylum seekers, or whether assistance to asylum seekers could be included within a wider objective to assist any person in distress at sea, regardless of their legal status.[63] The interpretation of the scope of this exclusion requires further clarification for the sake of legal certainty, particularly given that an exclusion or an exception to a rule, in this case contained in Section 25A(1)(a), may attract a restrictive interpretation. One concern that has been raised regards the crucial search and rescue work done by Royal National Lifeboat Institution (RNLI) which would not fit within a narrow reading of Section 25A(3) whereby the aim of the organization would be

62 *Immigration Act 1971*, n. 8 above, s. 25A(3); NBB Explanatory Notes, n. 11 above, para. 402: "[i]t remains the case that this offence does not apply to persons acting on behalf of an organisation which aims to assist asylum seekers and does not charge for its services."

63 For a wider discussion of the concerns at stake, see UK Parliament, Joint Committee on Human Rights, "Legislative Scrutiny: Nationality and Borders Bill (Part 3)—Immigration offences and enforcement, 5. Criminalisation of asylum seekers and those who help them," paras 145–152, available online: <https://publications.parliament.uk/pa/jt5802/jtselect/jtrights/885/88508.htm>.

exclusively that of assisting asylum seekers.[64] This could theoretically expose the RNLI to the risk of being outside the exclusion of Section 25A(3), and their efforts to save lives at sea questioned, even subjected to criminal liability in instances where rescue operations involve asylum seekers, unless they bring themselves within the exclusion in Section 25BA(1) discussed below.

Against a narrow reading of Section 25A(3), the UK Search and Rescue "Strategic Overview of Search and Rescue in the United Kingdom of Great Britain and Northern Ireland" (SAR Strategic Overview) could shed some light to the approach that would be taken to RNLI interventions at sea.[65] The SAR Strategic Overview reveals that the "UK SAR effort *relies heavily* on volunteers and voluntary organisations to save lives at sea and on land."[66] It further acknowledges the risks they undertake "to assist others in need, without remuneration."[67] It refers generally to voluntary UK SAR organizations registered as charities and independent lifeboats provided by voluntary organizations for SAR purposes in some coastal areas.[68] Crucially, it refers in particular to the charity, the RNLI, whose units and rescue teams are located strategically and are declared to the relevant national authorities for SAR operation purposes.[69]

From a policy perspective, seeking to criminalize rescues at sea as acts of facilitation where the UK SAR system relies heavily on rescue volunteer work due to an insufficient search and rescue capacity would seem certainly hard to justify and sustain. From a legal standpoint, it undermines its land-based duties to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea."[70] From a procedural viewpoint, in the case of prosecution on grounds of Section 25A(1)(a), the effect of invoking the exception under Section 25A(3) would be the shifting of the burden of proof. The exception to the rule is to be proved by the party seeking to rely on such an exception and hence for the individual acting within the organization involved, to prove the organization aims to assist asylum-seekers and does not charge for the services rendered.

64 Id.

65 UKSAR, "Strategic Overview of Search and Rescue in the United Kingdom of Great Britain and Northern Ireland," January 2017, available online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/593127/mca_uksar.pdf>.

66 Id. (emphasis added).

67 Id.

68 Id.

69 Id. See further on RNLI SAR services at <http://rnli.org>.

70 UNCLOS, n. 35 above, art. 98(2); SOLAS, n. 54 above, ch. V, reg. 7; Annex to the SAR Convention, n. 42 above, paras 2.1.1, 2.1.10.

This would seem to address in this particular circumstance the procedural difficulty for the prosecutor in presenting evidence of gain, and was raised in the House of Commons as the motivation for the controversial omission of *for gain* in Section 25A(1)(a).

Rescuer's 'Act of Facilitation' Excluded from the Categorization of Facilitation Offence under Section 25BA(1)

In the realm of maritime rescue, an additional exclusion is crafted under Section 25BA(1) which begs close consideration. Applying solely to rescuers, Section 25BA(1) of the *Immigration Act* introduced by Section 41(4) of the NBA excludes from the characterization of a facilitation offence "an act done on behalf of, or coordinated by (a) Her Majesty's Coastguard, or (b) an overseas maritime search and rescue authority exercising similar functions to those of Her Majesty's Coastguard." This exclusion therefore applies to coordinated rescuers regardless of whether they act within an organization as per Section 25A(3). Remarkably, the NBA does not exclude from the categorization of facilitation offence SAR operations performed with humanitarian purposes in compliance with the SAR legal framework, whether under the coordination of relevant SAR coordination centers or independently.

Section 25BA(1) appears difficult to reconcile with the duties involved in the rescue of those in distress at sea in accordance with the maritime SAR framework. Equating rescue at sea to an act of facilitation, even if subject to this statutory exclusion, is at odds with its universally recognized normative status of customary international law,[71] also depicted as a universal and uniform practice "of the maritime world."[72] As stated earlier, it is incompatible with SAR

71 de Vattel described the duty to render assistance at sea as "one of the most ancient and fundamental features of the law of the sea." E. de Vattel, *The Law of the Nations* (J. Chitty, trans) (London, 1834), 170, cited in R. Barnes, "Refugee law at sea," *International and Comparative Law Quarterly* 53, no. 1 (2004): 47–77, p. 49 (fn 10 thereto); See Nandan and Rosenne, n. 59 above, para. 98.11(b); V. Moreno-Lax, "Seeking asylum in the Mediterranean: Against a fragmentary reading of EU Member States' obligations accruing at sea," *International Journal of Refugee Law* 23 no. 2 (2011): 174–220, p. 194; M. Pallis, "Obligations of states towards asylum seekers at sea: Interactions and conflicts between legal regimes," *International Journal of Refugee Law* 14, no. 2 and 3 (2002): 329–364, p. 334; S. Trevisanut, "Search and rescue operations in the Mediterranean: Factor of cooperation or conflict?," *International Journal of Marine and Coastal Law* 25, no. 4 (2010): 523–542, pp. 523, 527.

72 *Scaramanga & Co v. Stamp and Another* (1879) IV CPD 316, 318 and 319. See also the Court of Appeal decision (1880) V CPD (CA) 295 at 304 and 305.

duties under UNCLOS,[73] the SOLAS Convention,[74] and the SAR Convention, to which the UK has adhered.

A better understanding of the rescue duties requires an examination of the relevant provisions in the SAR Convention and UNCLOS, against which Section 25BA(1) needs to be considered. The term 'rescue' is defined in the SAR Convention as "[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety."[75] Three stages can therefore be identified in the rescue operation. The initial one is the retrieving of persons in distress from the sea and embarking them on board the assisting ship. The second stage is to provide for their initial medical and other needs. The third stage is their delivery at a place of safety which consequently marks the completion of the rescue operation.

The Initial Stages: Retrieving Persons from Distress at Sea and Providing for Their Initial Medical and Other Needs

Recurrently, people attempting the English Channel crossings would try to reach the UK territorial sea and contact the designated Rescue Coordination Centre (RCC) for assistance.[76] The relevant RCC would then coordinate the rescue operation resorting to rescue units where available or to vessels navigating in the vicinity. In these instances, the rescue operation would be conducted and coordinated from the beginning by or on behalf of HM Coastguard, and would therefore fall under the exclusion in Section 25BA(1) of the *Immigration Act*.

Whether a ship encounters sea migrants in distress, or is informed of the approximate location of a boat in distress, the duty to proceed speedily to their rescue applies regardless of whether the boat is located on the high seas, the exclusive economic zone, or in the territorial sea.[77] The duty further applies regardless of the nationality, status of those in distress or the circumstances in

73 UNCLOS, n. 35 above, arts. 98(1)(a) and (b), 98(2).

74 SOLAS, n. 54 above, ch. V, regs 7, 33. See also their domestic transposition in the *Merchant Shipping (Safety of Navigation) Regulations 2020*, 2020 No. 673, in particular Section 5(2)(n).

75 Annex to the SAR Convention, n. 42 above, para. 1.3.2.

76 A Rescue Coordination Centre is defined as a unit "responsible for promoting efficient organization of search and rescue services and for co-ordinating the conduct of search and rescue operations within a search and rescue region," Annex to the SAR Convention, id., para. 1.3.5.

77 The duty to assist applies in all maritime areas. UNCLOS, n. 35 above, art. 58.2, which states: "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." See Nandan and Rosenne, n. 59 above, para. 98.11(g) *in fine*. See also Trevisanut, n. 71 above, pp. 523, 526.

which they are found.[78] The limit to this obligation is set by considerations of reasonableness and involves safety considerations with regards to the assisting ship and the persons on board.[79]

The act of retrieving persons from distress at sea, embarking them on board the assisting ship and providing where possible for their initial medical and other needs should not be characterized as a facilitation offence and should not attract a punitive measure. Its criminalization not only lacks a legal basis, but undermines the integrity of international provisions relevant to maritime search and rescue the UK is to abide by. To make the very initial stage of the rescue operation contingent on receiving coordination instructions from the relevant authorities could entail a delay in assisting those in danger at sea. It is well-known that the taking on water, capsizing or sinking of a flimsy boat can occur very rapidly and turn into a tragic outcome in a matter of minutes. Therefore, any added requirement interfering with the timely assistance of those in distress is fundamentally incompatible with the wording, the general spirit, the object and purpose of the maritime search and rescue legal framework. The most likely scenario where master and crew on board a vessel encounter persons in distress within UK Search and Rescue Regions (SRR) is that while immediate action will be taken to pull persons from the water or the craft and retrieve them from distress, swift communication will be established with the corresponding RCC to seek support and further coordination of the operation. This was the case for instance in the incident in the English Channel in December 2022 where a skipper and fishing crew spotted stranded migrants and initiated the rescue, which was followed by a major and coordinated rescue operation.[80]

The Final Stage of the Rescue: Delivery of Survivors at a Place of Safety

The facilitation offence under the NBA and hence the *Immigration Act* would only seem relevant to the final stage of the rescue operation marked by the delivery of survivors at a place of safety, where this is not performed by or on behalf of, or coordinated by "(a) Her Majesty's Coastguard, or (b) an overseas

78 Annex to the SAR Convention, n. 42 above, para. 2.1.10; SOLAS, n. 54 above, ch. V, reg. 33; UNCLOS, n. 35 above, arts 18, 98(1).

79 UNCLOS, n. 35 above, art. 98(1)(a) and (b); SOLAS, n. 54 above, ch. V, reg. 33.1. See Nandan and Rosenne, n. 59 above, para. 98.11(c).

80 H. Bancroft, "English Channel rescue: Four migrants dead and 43 saved in dinghy crossing tragedy," 14 December 2022, *The Independent*, available online: <https://www.independent.co.uk/news/uk/home-news/channel-migrant-deaths-small-boat-b2244949.html>.

maritime search and rescue authority exercising similar functions to those of Her Majesty's Coastguard."[81]

As an initial observation, the overwhelmingly generalized and accepted practice shows that it would be highly implausible for masters and crewmembers of merchant ships encountering migrants at sea, or non-governmental organization (NGO) rescuers on the look-out for migrants in distress at sea, to reach the last stage of a rescue operation without contacting the relevant authorities. These would be the designated RCCs with primary obligations to coordinate search and rescue services within the respective maritime geographical areas of responsibility, that is, SRRs, where the assistance is rendered.[82] Rescuers would in the majority of cases request the prompt involvement and support of the relevant authorities at sea, at any rate for the later disembarkation of survivors on land. It is undoubtedly in the interest of merchant ships, for instance, to avoid incurring costly delays or deviations to disembark survivors, or for NGO ships to be swiftly assisted by the Coastguard so they can remain operational where they are most needed.

As a second observation, the exclusion of the facilitation offence under Section 25BA(1) is to meet UK's compliance with its primary obligations under the SAR Convention. These include ensuring, where assistance is rendered within its SRR, that there is cooperation and coordination so that assisting ships "are released from their obligations with minimum further deviation from the ships' intended voyage" when safe to do so.[83] These obligations further comprise the duty to ensure coordination and cooperation so that survivors are delivered to a place of safety "taking into account the particular circumstances of the case and guidelines developed by the [International Maritime] Organization."[84] To this end, the UK's relevant RCC would initiate the process for the identification of the most suitable place(s) for disembarking the survivors.[85]

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81 *Immigration Act*, n. 8 above, s. 25BA(1).

82 SRR is defined in the Annex to the SAR Convention, n. 42 above, para. 1.3.4 as "[a]n area of defined dimensions associated with a rescue co-ordination center within which search and rescue services are provided."

83 Id., para. 3.1.9.

84 Id. For the reference to "guidelines," see the Guidelines on the Treatment of Persons Rescued at Sea, IMO Resolution MSC.167(78) (20 May 2004), available online: <https://wwwcdn.imo.org/localresources/en/OurWork/Facilitation/Documents/MSC.167%20(78).pdf>.

85 Annex to the SAR Convention, n. 42 above, paras 3.1.1, 3.1.6.4, 4.8.5.

These duties are underpinned by an international SAR system that is heavily reliant on cooperation and coordination among States.[86] In this vein, Article 98(2) of UNCLOS grounds the coastal States' duties to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea" in mutual regional cooperation arrangements among neighboring States. In the geographical context of the English Channel, the cooperation between the UK and France in matters of maritime search and rescue is crucial. Anchored in UNCLOS and the SAR Convention, it is further outlined in the bilateral agreement "Joint Action Plan by the UK and France on combatting illegal migration involving small boats in the English Channel" of January 2019 (Joint Action Plan 2019) and its Addendum of September 2019.[87] This in turn is further heightened by the "UK-France joint statement enhancing co-operation against illegal migration" published in November 2022, pledging an intensification of the bilateral cooperation to make "the small boats route unviable, save lives, dismantle organized crime groups and prevent and deter illegal migration."[88] According to the Joint Action Plan 2019, coordinating efforts at sea involve "[t]he respective maritime authorities [liaising] with each other about rescue operations to provide mutual assistance as necessary at sea, and to determine the appropriate port of safety for a rescued migrant."[89] Flaws in the cooperation and coordination among these two neighboring countries were, however, made tragically manifest in the incident in November 2021 where despite numerous distress calls made to French and British coast guards, no rescue operation was

86 Id., Ch. 3: Co-operation between States; A. Campàs Velasco, "The International Convention on Maritime Search and Rescue: Legal mechanisms of responsibility sharing and cooperation in the context of sea migration?," in: *The Irish Yearbook of International Law* Volume 10, eds., F. de Londras and S. Mullally (Oxford: Bloomsbury Hart Publishing, 2017), p. 57.

87 Joint action plan by the UK and France on combating illegal migration involving small boats in the English Channel, London, 24 January 2019 [Joint Action Plan 2019]; Addendum September 2019, both available online: <https://www.gov.uk/government/publications/uk-france-joint-action-plan-on-illegal-migration-across-the-channel>.

88 UK Border Force and Home Office, Policy Paper "UK-France joint statement: Enhancing co-operation against illegal migration," 14 November 2022, available online: <https://www.gov.uk/government/publications/next-phase-in-partnership-to-tackle-illegal-migration-and-small-boat-arrivals/uk-france-joint-statement-enhancing-co-operation-against-illegal-migration>. For a broader view of the policy underlying the UK-French cooperation, see Gower Research Briefing No. 9681, "Irregular migration: A timeline of UK-French cooperation," 22 March 2023, House of Commons Library, available online: <https://researchbriefings.files.parliament.uk/documents/CBP-9681/CBP-9681.pdf>.

89 Joint Action Plan 2019, n. 87 above, p. 3.

launched, resulting in 32 people, including three children and one pregnant woman, losing their lives.[90]

Outside the scope of the exclusion from the facilitation offence in Section 25BA(1), a defence is made available to rescuers on grounds of the existence of a situation of danger or distress of the assisted individual, under Section 25BA(2), reliance on which is dependent on discharging the burden of proof according to Section 25BA(4). A limitation to this defence is further outlined in Section 25BA(3). These will be examined in turn.

Defence Available to the Facilitation Offence and Discharging the Burden of Proof

Rescuers prosecuted on grounds of a facilitation offence may rely on the defence available under Section 25BA(2) of the *Immigration Act*.[91] This defence consists in producing evidence that "(a) the assisted individual had been in danger or distress at sea, and (b) the act of facilitation was an act of providing assistance to the individual at any time between (i) the time when the assisted individual was first at danger or distress at sea, and (ii) the time when the assisted individual was delivered to a place of safety on land."[92]

Three initial observations ought to be made on the formulation of this defence. Firstly, the evidence is now centered on the actual rescue operations and relevant times of commencement and finalization of such operations with

90 L. Dearden, "French authorities told drowning migrants they were in British waters and to call 999, logs show: Bodies were found floating in the water in the strait of Calais 12 hours after the first mayday call on 24 November 2021," 15 November 2022, *The Independent*, available online: <https://www.independent.co.uk/news/uk/home-news/migrant-boat-disaster-france-uk-coastguard-b2224875.html>. This worryingly echoes tragic incidents in the Mediterranean, such as the one on 13 October 2013 involving a fishing boat with an estimated number of over four hundred passengers, including over a hundred children, mostly Syrian refugees. The fishing boat was located approximately 70 nautical miles (M) away from Lampedusa, and 124 M off the Maltese coast, yet it was within the Maltese SRR. Despite distress calls being made to MRCC Rome, they replied asking those on board to call the Maltese forces and gave them the contact number. Further prolonged delays in the rescue operation resulted in the death of at least two hundred people. See on this incident, see the Watch the Med account of verified facts "Over 200 die after shooting by Libyan vessel and delay in rescue," 11 October 2013, available online: <https://watchthemed.net/reports/view/32>. See also F. Gatti, "Lampedusa shipwreck: those 268 deads (*Sic*) could have been avoided," *L'Espresso*, 7 November 2013 (no longer available online). See further L. Bagnoli, "The children's shipwreck: A 'disaster of bureaucracy'?," 10 January 2018, *Open Migration*, available online: <https://openmigration.org/en/analyses/the-childrens-shipwreck-a-disaster-of-bureaucracy/>.

91 NBA 2022, n. 4 above, s. 41(4).

92 Id.

no references whatsoever to the element of gain or lack of gain deriving from the assistance undertaken. Secondly, the first limb of the defence in Section 25BA(2)(a) relies on producing evidence that the act of facilitation originated from an act of assistance to a person who was in a situation of danger or distress at sea. This requirement needs to be examined in accordance with the notions of danger and distress at sea within the maritime search and rescue legal framework and the level of operative response required under the SAR Convention for this emergency phase.

The term "distress phase" is defined at two junctures in the Annex to the SAR Convention. It is described as "[w]hen positive information is received that a person, a vessel or other craft is in danger and in need of immediate assistance."[93] It is also depicted as a "situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance."[94] The situation of distress, or distress phase, is what triggers the duty to initiate speedily the rescue operation according to the definition of rescue referred to above and the relevant provisions in UNCLOS and the SOLAS Convention.[95] Furthermore, the appearance of a situation of distress also triggers a mandate on States parties to the SAR Convention to arrange, coordinate and ensure the necessary assistance at sea, namely, to "use search and rescue units and other available facilities for providing assistance to a person who is, or *appears to be*, in distress at sea."[96] This is to be read in conjunction with the duty of the responsible authorities of States parties, "[o]n receiving information that any person is, or appears to be, in distress at sea, … [to] take urgent steps to ensure that the necessary assistance is provided."[97] Therefore, it is in accordance with the wording, the spirit, the object and purpose of the SAR Convention reflected in these provisions that the defence contemplated in Section 25BA(2) of the Immigration Act needs to be read.[98]

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93 Annex to the SAR Convention, n. 42 above, para. 4.4.3.1.

94 Id., para. 1.3.13.

95 Id., para. 1.3.2; UNCLOS, n. 35 above, art. 98(1); SOLAS, n. 54 above, ch. V, reg. 33. See also *The Merchant Shipping* (*Safety of Navigation*) *Regulations 2020*, n 70 above, s. 5(2)(n).

96 Id., para. 2.1.9, under the heading "Arrangements for provision and co-ordination of search and rescue services" (emphasis added).

97 Id., para. 2.1.1.

98 In the realm of The Crown Prosecution Service, see The Code for Crown Prosecutors, 26 October 2018, para. 2.10, which under General Principles, reads: "Prosecutors must also comply with the Criminal Procedure Rules and Criminal Practice Directions, and have regard to the sentencing Council Guidelines *and the obligations arising from international conventions*" (emphasis added).

Thirdly, it has been overwhelmingly, if not unanimously, acknowledged and it remains uncontested that boats crossing the English Channel are in danger or distress from the moment their journeys begin.[99] The perilous nature of these crossings is rooted in the ill-fitted boats, dinghies, or raft used. It is undisputable that these are unseaworthy and entail a high risk of overturning, or rapidly sinking, given the flimsy structures and overcrowded travelling conditions on board. The danger further lies on the fact that the English Channel is, including at its narrowest part in the Dover Strait, one of the busiest shipping lanes in the world.

Against this backdrop, Section 25BA(4) requires the presentation of sufficient evidence on the situation of danger or distress at sea, and that "the contrary is not proved beyond reasonable doubt."[100] Given the uncontested recognition of the situation of danger or distress among sea migrants on board small boats attempting to cross the English Channel, this should arguably not constitute a procedural hurdle for the defence. It seems also difficult to envision what kind of evidence could prove the contrary beyond reasonable doubt.[101] Having said that, this would be a matter of fact to be determined on a case-by-case basis. The question remains, however, why would humanitarian-led rescuers not acting on behalf of, or coordinated by, relevant authorities be prosecuted in their efforts to preserve lives at sea in the first place?

The second limb of the defence in Section 25BA(2)(b) is to be read cumulatively with the previous one. It requires producing evidence that the act of facilitation was an act of providing assistance to the person at any time

99 See for instance the Minister of Armed Forces testifying at the Defence Select Committee hearing, Subject: Operation Isotrope: the use of the military to counter migrant crossings, 12 July 2022, asserted that migrant vessels crossing the channel are in distress. Recording available online: <https://parliamentlive.tv/event/index/21a44b09-239c-40e6-9fb9-aac9aa487b1f?in=15:16:25>, at 15:16:41 and at 15:20:10. See also NBB Explanatory Notes, n. 11 above, recognizing the perilous journeys when referring to "increasing numbers of migrants in small boats which are *dangerously unsuitable* for this purpose" at para. 450 (emphasis added); See further France-UK Joint Statement 2019, n. 88 above, where it is stated: "[f]irst and foremost, this is an exceptionally risky undertaking which endangers the lives of migrants," p. 1.

100 *Immigration Act 1971*, n. 8 above, ss 25BA(4) (a) and (b).

101 See The Code for Crown Prosecutors, 26 October 2018, where it is established that "[p]rosecutors should not start or continue a prosecution where their view is that it is highly likely that a court will rule that a prosecution is an abuse of its process, and stay proceedings" (para. 3.5 under 'The Decision whether to Prosecute') and in this vein prosecutors "must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge" based on the prosecutor's objective assessment of the evidence (paras 4.6 and 4.7 under 'The Evidential Stage').

between the moment when the assisted person was first in danger or distress at sea and the time when the assisted person was delivered to a place of safety on land. This provision could arguably be seen as rendering Section 25BA(2)(a) superfluous. The emphasis on the first limb is, however, on the actual factor of danger or distress activating the assistance whereas on the second limb the emphasis is on the time frame within which the assistance can be rendered in order to rely on this particular defence. The factor of danger and the time frame within which assistance is to be rendered effectively correspond with the notion of a rescue operation as defined in the SAR Convention as "[a]n operation to retrieve persons in distress, provide for their initial medical and other needs, and deliver them to a place of safety."[102] The considerations raised above regarding the situation of danger or distress apply here. Consistent approaches would be expected when assessing the situation of danger or distress in a prosecution against a rescuer on facilitation offence grounds. This section would suggest that rescuers charged with a facilitation offence would rely on the very act that prompted the offence, namely, the rescue of those in danger or in distress, according to Section 25BA(2). The question still remains, why is a rescue operation framed as an act of facilitation in the first place?

The second limb of the defence would further indicate that this provision constitutes a deterrent strategy for rescuers to engage in rescue operations without the coordination by HM Coastguard or an overseas SAR authority exercising similar functions, as they may find themselves prosecuted and having to defend a rescue operation on purely humanitarian rescue grounds. It would further suggest that it is a tactic to keep NGO rescue vessels not compliant with the demand to act under the supervision of the relevant authorities immobilized and rescuers on land, having to defend their case in court while humanitarian rescue facilities at sea are forcibly reduced.

Criminalization of civil society rescue activism at sea has been a notorious and widespread strategy to undermine humanitarian-led maritime rescue. The Mediterranean region is a clear theatre of operations for such tactics under the auspices of the 2002 EU Facilitation Directive and the 2002 Framework Decision, collectively referred to as the "Facilitators Package"; a legal framework that defines the offence of facilitation of unauthorized entry, transit or residence in the EU.[103] Notably, the notion of "facilitation of entry and

102 Annex to the SAR Convention, n. 42 above, para. 1.3.2.

103 Council of the EU Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, [2002] OJ L328/17 (Facilitation Directive); Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, [2002] OJ L328/1. The Facilitation Directive sought to harmonize existing legal provisions among

transit" under the Facilitation Package does not require proof of financial gain or other material benefit with regards to assistance to enter or transit the territory of a member State to constitute an offence. Instead, Member States are given the option to choose not to impose sanctions and apply their respective national laws and practices "for cases where the aim of the behavior is to provide humanitarian assistance to the person concerned."[104] The 2002 EU Facilitation Directive allows States to exempt facilitation of unauthorized entry and transit from criminalization when performed with humanitarian assistance purposes.[105]

Caught in "pull factor" narratives and institutional mistrust fueled by the visibility NGOs have given to States' delays or even inaction in deterrent external border surveillance practices, NGO rescue vessels have been repeatedly targeted by States on a number of grounds, including facilitating illegal immigration and colluding with smuggler networks.[106] The European Commission acknowledged "an increasingly difficult environment for NGOs and individuals when assisting migrants, including when they carry out search and rescue operations at sea."[107] The Berlin-based non-profit-association Mare Liberum, for instance, has reported on the criminalization and repression of NGOs and civil actors by the Greek authorities, including intimidation by way of raiding their vessel, confiscating electronic devices and taking the majority of the crew

EU Member States, including the definition of facilitation of unauthorized entry, transit and residence. Consequently, Member States were to adopt appropriate sanctions against any person who intentionally assisted an individual "who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens" (Facilitation Directive, Art. 1.1(a)).

104 Facilitation Directive, n. 103 above, arts 1.1(a), 1.2. See also the study requested by the European Parliament's Committee on Petitions, S. Carrera et al., *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 update*, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, December 2018. In particular, see the Overview and section 3, available online: <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf>.

105 European Commission "Communication by the Commission, Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence," 2020 OJ C 323/01 (European Commission Communication 2020).

106 E. Cusumano and M. Villa, "From 'angels' to 'vice smugglers': The criminalisation of sea rescue NGOs in Italy," *European Journal on Criminal Policy and Research* 27 (2021): 23–40; P. Cuttitta, "Repoliticization through search and rescue? Humanitarian NGOs and migration management in the central Mediterranean," *Geopolitics Journal* 23, no. 3 (2018): 632–660, pp. 632, 640, 641.

107 European Commission Communication 2020, n. 105 above, s. 1.

to the police station.[108] In its June 2022 update, the European Union Agency for Fundamental Rights (FRA) reported ongoing and closed investigations, with crews subject to legal and administrative proceedings. These resulted in turn in vessels being seized or immobilized, unable to carry out search and rescue operations, monitor or undertake reconnaissance activities, and crew subject to past or ongoing legal proceedings.[109] The criminalization of civil society rescue efforts in the Mediterranean, coupled with the legal uncertainty derived from the Facilitators Package and the differing transpositions of the Facilitation Directive among Member States regarding the exception based on humanitarian assistance, have proved to hinder civil-society-led rescue efforts at sea.[110] They have proved to constitute a strategy of deterrence that is well-known to have resulted in a dramatic decrease of their presence at sea and effectively the reduction in search and rescue capacity, with devastating consequences for migrants at sea.[111]

The weaknesses related to the potential criminalization of NGO rescue efforts have been addressed under the New Pact on Migration and Asylum of

108 Mare Liberum Submission to the Special Rapporteur on the human rights of migrants: Pushback practices and their impact on the human rights of migrants, available online: <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/MareLiberumSubmission.pdf>. See further Special Rapporteur on the Human Rights of Migrants, González Morales, to the Human Rights Council, "Report on means to address the human rights impact of pushbacks of migrants on land and at sea," UN Doc A/HRC/47/30, 12 May 2021, in particular para. 87: "NGO ships and crew involved in search and rescue have faced over 50 criminal or administrative proceedings initiated by Germany, Greece, Italy, Malta, the Netherlands, Spain since 2016." The Special Rapporteur notes with concern that those actions have resulted, in practical terms, in a marked decrease of adequate search and rescue capacities in the Mediterranean. In Greece, NGOs are investigated and prosecuted by authorities on grounds of "espionage", "violation of State secrets", "membership of a criminal organization" and "violations of the migration law" (footnotes are not included) <https://digitallibrary.un.org/record/3928693>.

109 See European Union Agency for Fundamental Rights (FRA), "June 2022 Update: Search and Rescue (SAR) operations in the Mediterranean and Fundamental Rights," 20 June 2022, in particular table of NGO ships involved in SAR operations since 2016, available online: <https://fra.europa.eu/en/publication/2022/june-2022-update-ngo-ships-sar-activities>.

110 For a detailed examination on the criminalization of humanitarian assistance in the EU, see further V. Moreno-Lax et al., "The EU Approach on Migration in the Mediterranean," Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, PE 694.413, June 2021, Chapter 5 <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf>.

111 Id. See also K. Roepstorff, "Migration and the shrinking humanitarian space in Europe: From maritime search and rescue operations to contested humanitarian action in EU countries," Centre for Humanitarian Action, September 2019, available online: <https://www.chaberlin.org/en/publications/migration-and-the-shrinking-humanitarian-space-in-europe-2/>; Carrera n. 104 above.

the EU put forward in September 2020. Notably, the European Commission has called for the need to avoid criminalizing those who render humanitarian assistance to people in distress at sea, whether "performed under the coordination of national Maritime Coordination Centres or on their own initiative."[112]

To this end, the mechanism of redress chosen seems limited. Instead of a legal reform, a soft legal instrument in the form of Commission guidance on the construction of facilitation of entry or transit establishes that, in the light of "the general spirit and objective of the Facilitation Directive … humanitarian assistance that is mandated by law cannot and must not be criminalised."[113] The words "mandated by law" refer here to the maritime search and rescue legal framework according to express references in the guidance to UNCLOS, SOLAS and SAR Conventions and international customary law with regards to shipmasters obligation to assist any person in distress at sea according to these provisions. The Commission guidance goes even further when expressing the view that the criminalization of NGOs or any other non-State actors undertaking maritime SAR operations in compliance with the SAR legal framework, "amounts to a breach of international law."[114] Despite the Commission guidance, a number of legal proceedings have been brought against NGOs involved in SAR operations in the Mediterranean Sea since 2020.[115]

The NBA has paved the way for humanitarian work at sea to be exposed to prosecution, and rescuers' activism having to be defended before the Courts. This could in turn enable the immobilization of NGO rescue vessels, hindering rescue capacity at sea. In particular, Section 25BA,[116] provides a mechanism to dissuade civil society assistance and rescue activities at sea from undertaking SAR services without the coordination and control by HM Coastguard or an overseas equivalent authority. Crucially, this deterrent instrument can be seen as an instrument to tighten the control over unauthorized arrivals. It serves as an instrument of swift identification to enable the authorities to conduct the two-tier system of refugee status fabricated in the NBA for differential

112 European Commission, "Commission Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities," OJ L 317/23, recitals 5, 6, 8.

113 European Commission Communication 2020, n. 105 above, s. 3 "Scope of Application of Article 1 of the Facilitation Directive" and s. 4 "Guidance."

114 Id., s. 4.

115 FRA, "Table 2: Legal proceedings by EU Member States against private entities involved in SAR operations in the Mediterranean Sea (June 2022)," available online: <https://fra.europa.eu/sites/default/files/fra_uploads/table-2-legal-proceedings-ngos-sar-operations-june-2022.pdf>.

116 NBA 2022, n. 4 above, s. 41(4).

treatment purposes in the asylum claims processing system, raising serious refugee and human rights protection concerns.

The examination of the two-tier system derived from the UK unilateral re-interpretation of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) and unique categorization of refugees into 'Group 1' and 'Group 2' falls outside the scope of the present discussion.[117] However, it seems necessary to present succinctly the immediate context within which Section 25BA of the *Immigration Act* was introduced for the purpose of the present discussion. According to Section 12 of the NBA, refugees who do not comply with the requirements contained in Subsection (2), namely, (a) coming to the UK "directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention)" and (b) presenting themselves without delay to the authorities, and the additional requirement under Subsection (3) where applicable, that is, in cases of unlawful entry or presence in the UK, refugees "show good cause for their unlawful entry or presence," would automatically fall into this newly generated, so-called, 'Group 2'. In this differential treatment of refugees, 'Group 2' refugees may be penalized by effectively being denied the protection they are entitled to under the Refugee Convention, as pointed out by the United Nations High Commissioner for Human Rights (UNHCR) in its supervisory role regarding the application of the Refugee Convention.[118] This differential treatment in Article 12 of the NBA is to be considered jointly with a restrictive interpretation of Article 31(1) of the Refugee Convention introduced in Section 37 of the NBA which would increase the probabilities for refugees to be categorized as 'Group 2' refugees, further exacerbated by the literal interpretation of the words "coming directly" for the purpose of removal of a person from the UK in the *Illegal Migration Act 2023*.[119] This is irreconcilable with a contextual and purposive construction of the immunity afforded in Article 31(1) of the Refugee Convention. This provision seeks to protect refugees from penalties on grounds of their unauthorized entry or presence in breach of domestic law in their quest to seek asylum in their flight from persecution or threatened

117 1951 Convention Relating to the Status of Refugees, Geneva, 28 July 1951, 189 *United Nations Treaty Series* 137; 1967 Protocol Relating to the Status of Refugees, New York, 31 January 1967, 606 *United Nations Treaty Series* 267.

118 Refugee Convention, art. 35. See UNHCR, n. 4 above, in particular, paras 22–27, 39–41, 63–68; UNHCR, "UNHCR Updated Observations on the Nationality and Borders Bill, as amended," n. 6 above.

119 *Illegal Migration Act 2023*, c. 37, s. 2. See UNHCR, "UNHCR Legal Observations on the Illegal Migration Bill," 2 May 2023 (updated), available online: <https://www.unhcr.org/uk/media/unhcr-legal-observations-illegal-migration-bill-02-may-2023>.

persecution on refugee law grounds.[120] More broadly, Article 12 of the NBA indicates a departure from the protection regime afforded under the Refugee Convention underpinned, according to the second Recital of its Preamble, by the UN concern for refugees and past endeavors "to assure refugees the widest possible exercise of those fundamental rights and freedoms." Alarmingly, this provision will effectively deny access to the UK asylum system, as the UNHCR has pointed out, to "the majority of refugees who will seek asylum in the United Kingdom."[121]

Limiting the Defence to the Act of Facilitation

The defence on grounds of providing assistance to those in danger or distress at sea in accordance with Section 25BA(2) will not apply in two instances according to Section 25BA(3). Remarkably, the opening words of this section seek to limit the defence by distorting or even negating the very notion of rendering assistance at sea: "[f]or the purposes of subsection (2), the following are not to be treated as an act of providing assistance." The duty to render assistance at sea and to proceed to the rescue of those in distress at sea, grounded in international law,[122] enshrined in tradition and holding the status of customary international law, are devoid of their significance in a piece of domestic legislation in order to criminalize two specific conducts under Section 25BA(3). For

120 *R v. Asfaw* [2008] UKHL 31; [2088] 1 AC. Lord Bingham stated: "The Refugee Convention had three broad humanitarian aims … The third aim, broadly expressed, was to protect refugees from the imposition of criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution or threatened persecution" (para. 9) and added: "It is of course true that in construing any document the literal meaning of the words used must be the starting point. But the words must be construed in context, and an instrument such as the Refugee Convention must be given a purposive construction consistent with its humanitarian aims" (para. 11). See also *R v. Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667, in particular pp. 677–680 and 686–688. See further UNHCR, n. 4 above; C. Costello, Y. Ioffe and T. Büchsel, "Article 31 of the 1951 Convention Relating to the Status of Refugees," UN High Commissioner for Refugees (UNHCR), July 2017, PPLA/2017/01, No. 34 of the Legal and Protection Policy Research Series, particularly s. 4, available online: <https://www.unhcr.org/media/no-34-article-31-1951-convention-relating-status-refugees-dr-cathryn-costello-july-2017>.

121 UNHCR, n. 4 above, para. 6. For a close examination of Article 31 of the Refugee Convention, see G.S. Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, detention, and protection," in: *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, eds., E. Feller, V. Türk and F. Nicholson (Cambridge: Cambridge University Press 2003), Part 3, "Illegal Entry," 3.1, 185–252, available online: <https://www.unhcr.org/419c778d4.html>.

122 UNCLOS, n. 35 above, art. 98(1); SOLAS, n. 54 above, ch. V, reg. 33; SAR Convention, n. 42 above; *Merchant Shipping* (*Safety of Navigation*) *Regulations* 2020, n. 70 above.

the purpose of the present discussion centered on the position of rescuers at sea, however, only the first one in Section 25BA(3)(a) is examined.

According to this section, when the delivery of survivors on UK soil is not the nearest place of safety on land and "the person charged with the offence did not have a good reason for delivering the assisted individual to the United Kingdom instead of to a nearer place of safety on land," the operation is "not to be treated as act of providing assistance."[123] This limitation to the defence under Section 25BA(2) refers to the last stage of the rescue operation, namely, the delivery of those retrieved from danger to a place of safety. According to this section, where a rescue operation undertaken without the coordination of HM Coastguard or equivalent authority culminates in the delivery of survivors to UK shores despite not being the closest place of safety on land to the location where the initial assistance took place, and the rescuer is not considered to have "a good reason" for it, this will not amount to an act of providing assistance for the purpose of triggering the defence under Section 25BA(2).

The first component presents an objective element of mere distance calculation. However, this consideration alone appears to be at odds with the SAR Convention, whereby for the purpose of delivery of survivors to a place of safety, States parties shall take into account the "particular circumstances of the case and the guidelines developed by the [International Maritime] Organization."[124] To this end RCCs concerned "shall initiate the process of identifying the most appropriate place(s) for disembarking such persons found in distress."[125] The requirement introduced in Section 25BA(3) is therefore not consistent with the States parties own duties under the SAR Convention where the nearest safe port is no longer the central criterion for the choice of place of safety for disembarkation purposes on land, but instead the "most appropriate place" taking into account the circumstances of each specific case. Undoubtedly, proximity would be one factor for consideration, but not the only one.

Where disembarkation occurs without any prior knowledge or intervention of the relevant authorities, and it is determined that the UK was not the nearest place of safety on land for disembarkation purposes, the second component requires the rescuer to present a "good reason for delivering the assisted individual to the United Kingdom instead of to a nearer place of safety on land" to rely on the defence under Section 25BA(2). This requirement presents a

123 NBA 2022, n. 4 above, s. 41(4); *Immigration Act 1971*, n. 8 above, s. 25BA(3)(a).

124 Annex to the SAR Convention, n. 42 above, para. 3.1.9; Guidelines on the Treatment of Persons Rescued at Sea, n. 84 above.

125 Annex to the SAR Convention, n. 42 above, paras 3.1.6.4, 4.8.5.

considerable degree of vagueness that can only give rise to legal uncertainty and concern over potential ample margins of appreciation or even arbitrary approaches to what can be considered "a good reason." As indicated above, the SAR Convention refers to the need to identify the most appropriate place(s) for disembarking persons found in distress at sea, taking into account the particular circumstances of the case and the Guidelines on the Treatment of Persons Rescued at Sea. This will therefore be fact sensitive and determined on a case-by-case basis, with the rescuer having to discharge the burden of proof.

Rescuers will under the NBA be exposed to criminal liability for rendering assistance at sea to those in danger while attempting irregular crossings and delivering them to a place of safety in the UK if the operation is not carried out under the auspices of the relevant authorities. Outside their scrutiny, the default position therefore becomes the potential criminal prosecution of rescuers who would need to defend humanitarian-led rescue operations when faced with facilitation offence charges as the lack of financial or other gain is no longer a component that characterizes this offence. The NBA presents with deficient clarity and devoid of certainty one possible defence within narrow confines that seem to disregard key considerations in the SAR Convention and the Guidelines informing the process of disembarkation and delivery to a place of safety. Alternative defences may, however, be available for the rescuer given that Section 25BA(2) merely refers to "a defence" in a non-exhaustive formulation.

The NBA, as it has already been argued, facilitates the detection of irregular arrivals through SAR operations in the context of unsafe irregular sea crossings. This is achieved by criminalizing civil society search and rescue efforts that are not carried out on behalf of, or coordinated by, HM Coastguard or overseas equivalent authorities, and by crafting a limited statutory defence that disregards fundamental obligations under international law. The priority must, however, remain the safety of life at sea and the UK must uphold its duties under the SAR Convention and the broader international legal framework at all stages of search and rescue operations at sea, to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea."[126]

The safety of life at sea for those attempting irregular sea crossings to reach UK shores raises further concerns in the NBA in the context of the enlargement of maritime enforcement, as discussed in the next section.

126 UNCLOS, n. 35 above, art. 98(2).

Safety of Life at Sea and Schedule 7 to the NBA

Maritime enforcement powers have been expanded both geographically and functionally, under Schedule 7 to the Act.[127] The enforcement powers include diverting "migrant vessels in international waters away from UK shores," effectively push-back or turn around practices, within and beyond the territorial sea, including "international waters," to impede migrants reaching UK shores.[128] These powers amount to border surveillance activities beyond the UK borders consistent with widespread and increasingly robust border control policies favoring forced returns at sea to prevent people reaching the shores of a particular State.[129] These practices are long known to endanger lives in their pursuit to prevent people from reaching the chosen destination to exercise their right to seek international protection, and they contravene obligations pertaining to the international law of the sea, maritime law, human rights law and refugee law.[130]

The primary aim of these expanded enforcement powers under Schedule 7 to the NBA, also identifiable as interdiction or non-entrée practices, is presented as a deterrent that seeks to reduce the number of migrants attempting the crossing and to secure UK borders, ultimately, it is argued, to avoid protection duties under international refugee law.[131] Equally, the goal insistently

127 NBA 2022, n. 4 above, s. 45; Schedule 7, Part A1, B1 "Power to stop, board, divert and detain," in particular B1(2)(d) and (5). See also NBB Explanatory Notes, n. 11 above, paras 449–487.

128 NBB Explanatory Notes, n. 11 above, paras 453–454: "[453] [a]t present, the enforcement powers which can be exercised by relevant officers do not extend to ships that are in foreign or international waters. [454] This clause supplements and expands the current maritime enforcement powers so that relevant persons may divert migrant vessels in international waters away from UK shores." See R. Syal, "Priti Pattel to send boats carrying migrants across Channel: Border force is being trained on 'turn around' practices but France warns plans could endanger lives," 9 September 2021, *The Guardian*, available online: <https://www.theguardian.com/uk-news/2021/sep/09/priti-patel-to-send-boats-carrying-migrants-to-uk-back-across-channel>.

129 See D. Ghezelbash et al., "Securitization of search and rescue at sea: The response to boat migration in the Mediterranean and offshore Australia," *International and Comparative Law Quarterly* 67, no. 2 (2018): 315–351; B. Miltner, "Irregular maritime migration: Refugee protection issues in rescue and interception," *Fordham International Law Journal* 30, no. 1 (2006): 75–125; Barnes, n. 71 above, p. 61.

130 A. Callamard, "Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions: Unlawful Death of Refugees and Migrants," UN Doc A/72/335, 15 August 2017, paras 10–11, available online: <https://digitallibrary.un.org/record/1303261>. See further Special Rapporteur on the Human Rights of Migrants, González Morales, n. 108 above.

131 NBB Explanatory Notes, n. 11 above, para. 455. For a broader discussion on non-entrée practices, see T. Gammeltoft-Hansen and J.C. Hathaway, "Non-refoulement in a world of

presented is the dismantling of the organized smuggling or trafficking networks by deterring migrants.[132] The reduction in numbers of crossings has also been directly related to the preservation of life.[133] However, it is difficult to comprehend how diverting practices at sea can concur with preserving lives at sea, particularly given the dangerous nature of these journeys. Push-back practices are expressions of State border violence at sea, which in differing degrees of intensity are well known to put lives at further risk with fatal consequences.[134] In this context, the statutory maritime enforcement powers in Schedule 7 to the NBA have been verbally nuanced on different occasions prioritizing safety in accordance with international law.[135] For example, at the Defence Select Committee hearing on 12 July 2022, in the context of Operation Isotrope (the use of the military to counter migrant crossings), the Minister of State (Minister for Armed Forces) repeatedly and categorically stated that

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cooperative deterrence," Law & Economics Working Papers (2014) Paper 106. The term "non-entrée," introduced by Hathaway, describes legalized policies adopted by States to block refugees from accessing their territories. See J. Hathaway, "The emerging politics of non-entrée," *Refugees* 91 (1992) 40, 41.

132 NBB Explanatory Notes, n. 11 above, para. 455.

133 Id.

134 See for instance *Safi and Others v. Greece* (App No. 5418/15) regarding the tragic incident on 20 January 2014 where a fishing boat with refugees on board, predominantly from Afghanistan, were pushed back by the Hellenic Coast Guard on board a high pursuit boat. The aggressive push-back tactics caused the fishing boat to take on water and to capsize causing the death of 11 people, including infants. The ECtHR unanimously concluded in its judgment of 7 July 2022 that Greek authorities "had not done all they could reasonably have been expected to do to afford all the applicants and their family members the level of protection required by Article 2." Greece had violated Article 2 of the ECHR Right to Life (ECLI:CE:ECHR:2022:0707 JUD 000541815). See further the extensive work of the Forensic Architecture research agency documenting over two years Greek authorities' violent push-backs at sea, leaving boats adrift in the Aegean Sea with damaged or no engines, "Drift-backs in the Aegean Sea," available online: <https://aegean.forensic-architecture.org>. In this context see also Legal Centre Lesvos, "Over 2 years of systematic and widespread violent attacks against migrants in Greek seas carried out by the Hellenic Coast Guard and Frontex," 5 August 2022, available online: <https://legalcentrelesvos.org/2022/08/05/over-2-years-of-systematic-and-widespread-violent-attacks-against-migrants-in-greek-seas-carried-out-by-the-hellenic-coast-guard-and-frontex/>; Report of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, A. Callamard, n. 130 above.

135 NBB Explanatory Notes, n. 11 above, para. 471: "Any tactics employed to divert a ship will only be used where it was safe to do so, in line with international law, including UNCLOS, and a vessel should only be required to leave UK waters if there are no concerns about the vessel's ability to reach land or the welfare of those on board."

"every single migrant vessel that enters UK waters is considered to be in distress."[136] Not only did the Minister for Armed Forces refer to the inappropriate loading capacity of these overcrowded vessels, but he also mentioned the inappropriateness of the waters for that type of vessel. The Minister concluded that "the starting point for any interdiction is that it is a saving life at sea situation which is non-discretionary."[137] Notwithstanding the Prime Minister and Home Secretary interest in what they perceived to be successful push-back practices undertaken by other governments, notably in Greece and Australia despite the human cost and human rights violations they entail, they were advised, based on compelling evidence provided by professional mariners within the Royal Navy, not to engage in such push-back tactics.[138] The wording in Schedule 7 to the NBA can, therefore, be seen in stark contradiction with these recommendations not to undertake these practices in the light of the persuasive evidence against them. It is also irreconcilable with the SAR legal framework, with refugee law protection considerations and the safeguard of fundamental human rights, primarily the right to life.[139]

Channel crossings are attempted in flimsy, ill-fitted, overcrowded boats. It is acknowledged that they are in distress and the only course of action is, therefore, a rescue operation with delivery of survivors at a place of safety. Where the rescue operation is undertaken in UK SRR, as mentioned above, the relevant UK RCC is to identify the most suitable place of safety for disembarkation of survivors.[140] The finalization of the rescue would then be followed by asylum claims being duly processed. This, however, is sought to be trumped, as mentioned above, under Section 12 of the NBA, whereby the purported 'Group 2 refugees' may be penalized by being denied their right to obtain international protection. These punitive measures necessarily rely on a tight control of unauthorized arrivals by sea, now also pursued through the potential criminalization of unsupervised maritime SAR efforts. These policies, far from achieving the slogan obstinately drilled of stopping the boats, only favor the denial of international protection of sea migrants and the perpetuation of a status of

136 ParliamentLive.tv, "Defence Select Committee hearing, Subject: Operation Isotrope: The use of the military to counter migrant crossings," 12 July 2022, available online: <https://parliamentlive.tv/event/index/21a44b09-239c-40e6-9fb9-aac9aa487b1f?in=15:16:25>, at 15:16:41 and at 15:20:10.

137 Id., at 15:20:10.

138 Id., at 15:20:44.

139 L.-M. Komp, "The duty to assist persons in distress: An alternative source of protection against the return of migrants and asylum seekers to the high seas?," in: Moreno-Lax and Papastavridis eds., n. 28 above, Chapter 9, p. 222.

140 Annex to the SAR Convention, n. 42 above, paras 3.1.1, 3.1.6.4, 3.1.9, 4.8.5.

destitution. The criminalization of "non-controlled" humanitarian-led SAR initiatives for these purposes further undermines the integrity of the SAR system.

Conclusion

This article has examined the expansion of the scope of the facilitation offence with particular attention to the omission of the constitutive component *for gain* from its original formulation. Despite its consequent detachment from the realm of application of the Smuggling Protocol, human rights law protections remain intact for those attempting these journeys and the duties to render them assistance at sea stay unaltered. Centrally, the eradication of the words *for gain*, which sets as the default position the criminalization of humanitarian search and rescue efforts at sea performed outside the coordination and effective control of HM Coastguard or overseas equivalent authorities, is incompatible with the duty of coastal States to promote, preserve and maintain adequate and effective SAR services to ensure that assistance is rendered to any person in distress at sea. It contravenes the maritime SAR international framework and undermines the integrity of the SAR system.

The statutory exclusion applicable to rescuers renders the NBA a statutory instrument to deter humanitarian-led SAR operations from being performed outside the coordination and supervision of the relevant authorities. This requirement, as considered here, lacks legal basis in the SAR legal framework. It departs from the object and purpose of the SAR Convention and relevant provisions of UNCLOS and the SOLAS Convention. Crucially, it renders the NBA an instrument that effectively enables tightening control over unauthorized arrivals to UK by undermining the SAR system. This requirement in turn would enable the authorities to apply the distinct and punitive treatment to the so-called 'Group 2 refugees' in contravention of the Refugee Convention.

In examining the scope of the statutory defence, it is clear that, given the uncontested acknowledgement that small boats in the English Channel are in distress, it would cover all rescue initiatives for humanitarian purposes, although this would still need to be determined on a case-by-case basis. This would mean prosecuted rescuers would rely on the very rescue operation undertaken to be acquitted but at the high cost of having to defend their humanitarian-led activism at sea. These proceedings coupled with the immobilization of their rescue vessels would hinder SAR capacity at sea, weakening the integrity of the SAR system.

The scope of the statutory defence in turn reinforces the central argument in this article that in the realm of maritime SAR, the NBA is effectively

an instrument of control of irregular arrivals through the criminalization of SAR undertakings outside the supervision of the relevant authorities. Safety of life at sea must, however, remain the highest priority and overarching aim of the duty of the UK to maintain adequate and effective SAR services, irrespective of the nationality, status or circumstances of those in need of assistance. Furthermore, the primacy of safety of life at sea should not be disturbed by expanded maritime enforcement powers. States' malpractices both in their quest to criminalize humanitarian-led search and rescue, and in border surveillance and securitization at sea, put lives at further risk.

Against the backdrop of this hostile legal environment, restoring humanization of sea migrants in institutional narratives and legislative undertakings becomes a priority. Humanity at sea further begs the de-criminalization of all humanitarian search and rescue efforts. This is consistent with maritime SAR duties and is an ethical imperative.