

## The Duty to Rescue Boat People<sup>1</sup>

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In October 2014, the EU decided to end the search-and-rescue operation that the Italian navy had been conducting in the Mediterranean under the title ‘Mare Nostrum’, which had been picking up unseaworthy boats packed with migrants travelling from destinations in North Africa and taking them ashore on the Italian mainland or on islands including Lampedusa and Sicily. This was a big undertaking: an estimated 100,000 migrants had been saved in the course of 2014, while as many as 3,000 had perished in the sea.<sup>2</sup> It was to be replaced by a much more limited operation – ‘Triton’ – whose mandate was to patrol only within thirty miles of the European coast, and whose aim was specifically that of immigration control. The UK government chose not to support Triton financially, and the rationale for its decision was explained by the Minister of State, Baroness Anelay:

We do not support planned search and rescue operations in the Mediterranean. We believe that they create an unintended “pull factor”, encouraging more migrants to attempt the dangerous sea crossing and thereby leading to more tragic and unnecessary deaths. The Government believes the most effective way to prevent refugees and migrants attempting this dangerous crossing is to focus our attention on countries of origin and transit, as well as taking steps to fight the people smugglers who wilfully put lives at risk by packing migrants into unseaworthy boats.<sup>3</sup>

Not surprisingly, this decision drew horrified reactions from human rights advocates. In a press release, Kate Allen, the UK Director of Amnesty International, had this to say:

This is a very dark day for the moral standing of the UK. The Italian navy’s desperately needed search and rescue operation in the Mediterranean has saved thousands of lives and other European countries should now be stepping up to share that responsibility with them, not

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<sup>2</sup> <http://www.dw.de/deadliest-year-for-migrants-crossing-the-mediterranean-iom/a-17963858>. Latest estimates suggest that in 2015 the number of migrants rescued may reach 200,000.

<sup>3</sup> <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/141015w0001.htm>. The UK government has since relented a little, sending one navy ship with rescue capacity, but its main goal is still to stem the flow of refugees by targeting the smugglers who provide the boats.

shirk it. The vague prospect of rescue has never been the incentive. War, poverty and persecution are what make desperate people take terrible risks. History will judge this decision as unforgiveable. When the hour came, the UK turned its back on despairing people and left them to drown.<sup>4</sup>

Somewhat similar views were expressed by Sarah Teather, the Liberal Democrat Chair of the All-Party Parliamentary Committee on Refugees:

This decision is deeply depressing. We would rather let people drown for nothing other than baseless political motives. It shows that when it comes to immigration, the Government has plumbed new depths of inhumanity.

We cannot pretend this problem has nothing to do with us and wash our hands as people die. It is the policies we are pursuing, attempting to turn Europe into a fortress with no safe routes in, that is forcing migrants into risking their lives. We are forcing people to choose between dying in their own war torn country and drowning in the sea.<sup>5</sup>

These remarks give us an inkling of the moral and political issues raised by the plight of the Mediterranean boat people, which I aim to investigate in some detail in this paper. In its more general form, the question is: what duty, if any, do competent governments and their navies and commercial vessels have to rescue migrants attempting dangerous sea crossings whether in the search for a better life or simply to escape persecution? In attempting to answer it, we may need to draw upon a range of resources: general moral principles concerning human rights and our responsibilities to protect them; jurisprudential debates about the duty to rescue, understood as a duty falling upon individuals to go to the aid of people in distress; and the more specific injunctions of international law concerning the duty to rescue at sea. But first I need to flesh out the particular case that prompts these questions in a little more detail.

It is not, of course, unique. It is one of a class of 'boat people' cases that stretches back at least as far as the original Vietnamese boat people who fled the country in large numbers after the end of the Vietnam War for destinations across South East Asia. That class includes refugees from Cuba and Haiti trying to reach the U.S., migrants from Asian countries travelling via Indonesia across the sea to

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<sup>4</sup> <http://www.amnesty.org.uk/press-releases/amnesty-condemns-uk-opt-out-search-and-rescue-refugees-and-migrants>

<sup>5</sup> <http://sarahteather.org.uk/en/article/2014/0927757/sarah-teather-on-government-decision-not-to-support-mediterranean-search-and-rescue-operations-we-should-all-be-ashamed>.

Australia, and migrants from Cape Verde, Senegal and Mauritania heading for the Canary Islands. The Mediterranean case stands out not only because of the numbers involved, which have risen from about 20,000 per annum in the year 2000 to more than 100,000 per annum in recent years (check), but also because of the media visibility of the tragedies that occur when boats sink, such as the Lampedusa disaster of October 2013; the total number who have drowned over the last two decades may be as high as 20,000.<sup>6</sup> The boats leave mainly from Tunisia and Libya, but the people on them have often come from much further afield, especially from Somalia and Eritrea; more recently refugees from Syria have been setting out from ports in Turkey. Places on the boats are obtained at significant cost from smugglers, who frequently abandon crowded vessels and head for shore when they fear being apprehended. Some of those on the boats count as refugees but others do not: for example 'in 2008 about 75% of those who arrived in Italy by sea applied for asylum and around 50% of those who applied were granted refugee status or protection on other humanitarian grounds'.<sup>7</sup> This mixed composition creates complications when boat people in distress have been rescued and the question is what should happen next: is it permissible to return them to their place of departure, or would this be a breach of the principle of *non-refoulement*, which 'prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment, or torture.'<sup>8</sup>?

The duty to rescue people in distress on the high seas is a long-established principle of international law. It is a duty that falls not only upon naval ships but on commercial vessels as well. According to article 98 of the UN Convention on the Law of the Sea:

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of

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<sup>6</sup> <http://www.bbc.co.uk/news/world-europe-24521614>.

<sup>7</sup> A. di Pascale, 'Migration Control at Sea: The Italian Case' in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (Leiden and Boston: Martinus Nijhoff, 2010).

<sup>8</sup> G. Goodwin-Gill, and J. McAdam, *The Refugee in International Law*, 3<sup>rd</sup> ed (Oxford: Oxford University Press, 2007), p. 201. The interpretation of this principle in international law is a complex matter. See J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005, pp. 307-70. It is also disputed whether *non-refoulement* applies extraterritorially, i.e. to people not on the territory of the state in question. On this see R. Barnes, 'The International Law of the Sea and Migration Control' in Ryan and Mitsilegas (eds.), *Extraterritorial Immigration Control*, pp. 115-16.

persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.<sup>9</sup>

This duty is quite demanding insofar as it does not merely require ships' captains to rescue people in distress when they happen to be passing by, but to take active steps to change the ship's course to carry out a rescue on receiving relevant information; furthermore they have then to carry the rescuees to a place of safety despite there being no legal obligation on the part of any particular state to take them in. On the other hand, the article does contain escape clauses that limit the onerousness of the duty – the clause that refers to 'serious danger to the ship, the crew or the passengers', and the clause that qualifies the duty to proceed to the point of rescue by reference to what may 'reasonably be expected' of the ship's master. In consequence, although the duty to rescue at sea has been incorporated into the positive law of a number of states, the chances of a prosecution being brought for a failure to carry out the duty are deemed to be small.<sup>10</sup>

It is nevertheless worth asking why the duty to rescue at sea appears on the face of it to be more demanding than the corresponding duty that applies to people on dry land, the escape clauses notwithstanding. In some, but not all, states, the latter duty has been turned into a legal obligation by means of so-called Bad Samaritan laws that require individual people to go to the aid of those threatened by death or serious injury when they can do so without incurring significant risk.<sup>11</sup> The situation envisaged in the application of these laws is one in which there is just a single potential rescuer able to help the victim, and he/she is given the choice, depending on the circumstances, between actually carrying out the rescue and alerting the relevant authorities. It does not impose a duty on individuals not already present at the place at which the rescue must be carried out to go to that place; nor, on the other hand, does it require the rescuer to do more than perform the act of rescue itself – for example pull the victim out of the river. There is no equivalent to having to find a port of entry at which the rescued persons can be landed – an obligation that makes many sea rescues prospectively quite demanding for those who undertake them. On land, good Samaritans

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<sup>9</sup> [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm)

<sup>10</sup> See J. Pugash, 'The Dilemma of the Sea Refugee: Rescue without Refuge', *Harvard International Law Journal*, 18 (1977), pp. 580-82; R. Barnes, 'Refugee Law at Sea', *International and Comparative Law Quarterly*, 53 (2004), pp. 50-51.

<sup>11</sup> For discussion of Bad Samaritan laws and the issues they pose, see J. Ratcliffe (ed.), *The Good Samaritan and the Law* (Garden City, NY: Anchor Books, 1966), and M. Menlowe and A. Smith (eds.), *The Duty to Rescue: the Jurisprudence of Aid* (Aldershot: Dartmouth, 1993). For the underlying principles, see my essay "'Are they my poor?": the problem of altruism in a world of strangers', in D. Miller, *Justice for Earthlings: essays in political philosophy* (Cambridge: Cambridge University Press, 2013) and the further references cited there.

might feel that they are morally required to follow the example of their prototype, who not only bandaged the wounds of the man who had fallen among thieves but took him to a nearby inn and paid the innkeeper's bill. But this is certainly not included under the legal duty to rescue.

What explains the more stringent character of the duty to rescue at sea? The following conjecture seems to me plausible: the nature of sea travel is such that any vessel may at some point get into difficulties and its master and crew find themselves in need of rescue. Even a *Titanic* may strike an iceberg. It is therefore in everyone's interest to enter an agreement that imposes a duty of rescue, since although carrying out the duty may prove to be moderately demanding, the cost of not being rescued is almost infinitely high. Thus states have an interest to sign the Convention that obliges them to place ships carrying their flags under a duty to rescue, and ships' masters have an incentive to accept and comply with that duty. In other words, the duty to rescue at sea is supported by a sense of reciprocity: anyone who sails is potentially a net beneficiary, despite the cost.

On land, by contrast, occasions for rescue are far more sporadic, and usually arise in the case of those who have chosen to undertake a risky activity such as mountaineering (these people might therefore be asked to insure themselves in advance for the cost of rescue by specialist teams). It is actually very rare indeed for a member of the public to be confronted by an individual who just happens to have got himself into a predicament that requires a rescue. Most of us are likely to go through our lives without either needing rescue or having to provide it. So although it is *possible* to regard the duty of rescue as resting on an implicit contract, it is more persuasive to see it simply as duty owed by one human to another, without regard to the likelihood that the rescuer may herself one day stand in need of rescue.<sup>12</sup> This also explains its relative narrowness, both in terms of when it takes effect – the rescuer must already be physically close to the victim – and in terms of the cost limitations that apply: the rescuer is excused if she would find carrying out the rescue significantly burdensome.

But suppose we now apply this analysis to the case of the Mediterranean boat people. Although international lawyers usually address this question by referring to the general law of the sea, it is immediately apparent that the circumstances are not those for which that law was originally developed. There are at least four relevant differences. First, the boat people and the rescuing ships are not in a relationship of reciprocity: that is, there are no conceivable circumstances in which the boats that carry the migrants could go to the rescue of the naval or commercial vessels that are

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<sup>12</sup> For a much more systematic attempt to explain why the duty to rescue cannot be grounded in reciprocity, see A. Ripstein, 'Three Duties to Rescue: Moral, Civil, and Criminal', *Law and Philosophy*, 19 (2000), 751-79.

being asked to help them.<sup>13</sup> Typically these boats are overcrowded and unseaworthy from the moment they leave shore. It is not a matter of an otherwise sound ship having got into unexpected difficulties. Indeed in some cases it seems that the boats are left deliberately in an unseaworthy condition, since it is part of the smugglers' intention that they should be intercepted and the occupants taken off soon after they set sail (add evidence). Second, the law of the sea allows compensation to be paid for the costs involved in carrying out a rescue. In particular, it permits the rescuing ship to salvage the cargo that was being carried by the stricken vessel at the same time as it picks up the surviving crew, thus enabling it to claim 'equitable remuneration' from the vessel's owners when the cargo is returned.<sup>14</sup> When boat people are rescued, in contrast, there is nothing valuable on their craft to salvage, and the boat itself is typically of little or no value. Thus from the rescuing ship's point of view, carrying out the rescue is a pure cost that, as we shall see later, may turn out to be quite substantial. Third, the people who board these boats have typically chosen to do so with some foreknowledge that they will need to be rescued at sea – in particular because this is what the smugglers will have told them is likely to happen. Of course the extent of their foreknowledge will vary from case to case. And later we will need to ask whether it is reasonable to hold them responsible for their predicament, given the circumstances they are trying to escape. At this point I am simply indicating disanalogies between the boat people and the crew of a normal ship that, say, gets caught in a severe storm. Fourth, whereas in the standard case, creating a duty of rescue is very unlikely to generate moral hazard – no ship's crew is going to take a greater risk of foundering just because that event would trigger a duty of rescue – many believe (see the remarks by Baroness Anelay above) that rescue practice under a regime such as Mare Nostrum did serve to encourage more migrants to make the seaward crossing. Thus it is conceivable at least that more lives overall will be lost as a result of ships undertaking rescue duties on behalf of boat people than would be lost if they abstained.

These salient contrasts imply that we cannot explain the nature and limits of the duty to rescue boat people simply by appeal to the international law of the sea. We have to dig deeper to see whether anything could justify imposing a stringent duty on governments and the ships under their command

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<sup>13</sup> Moreover there is also likely to be a huge numerical imbalance between rescuers and rescuees, particularly in the case of small merchant ships asked to carry out the duty of rescue towards boats carrying many hundreds of migrants. As Peter Hinchcliffe, Secretary-General of the International Chamber of Shipping, said recently, 'There's a world of difference between a ship with a crew of 20 rescuing another merchant ship or yacht with a similar crew – and the situation at the moment where merchant ships with limited crews are rescuing boats of 300 or more.' (<http://www.theguardian.com/world/2015/jul/22/merchant-ships-called-on-to-rescue-migrants-in-mediterranean>).

<sup>14</sup> Pugash, 'The Dilemma of the Sea Refugee', pp. 582-3.

to perform these rescues. Let's begin by examining the moral hazard issue in greater detail. It has long been recognized that there is a relevant difference between emergency situations – which by their nature are unique and unpredictable – and more routine and foreseeable circumstances in which people are likely to find themselves in need of help. Sidgwick, for example, addressed the distinction from a utilitarian perspective:

If I am made aware that, owing to a sudden calamity that could not have been foreseen, another's resources are manifestly inadequate to protect him from pain or serious discomfort...I am bound to make as much effort to relieve him as will not entail a greater loss of happiness to myself or others. If, however, the calamity is one which might have been foreseen and averted by proper care, my duty becomes more doubtful; for then by relieving him I seem to be in danger of encouraging improvidence in others.<sup>15</sup>

Moreover when someone is confronted with a genuine emergency, we do not think that they should consider the wider consequences of carrying out the rescue, whether this involves thinking about what the rescued person might later go on to do, or thinking what about what the effects might be on third parties who witnessed, or learnt about, the rescue taking place. The duty of rescue arises out of a direct physical confrontation between rescuer and rescuee. Exactly why spatial proximity matters so much is a subject for discussion.<sup>16</sup> Whatever the explanation finally turns out to be, we need to make a distinction between the person (or team of persons) confronting a rescue situation directly, and a collective agent such as a government deciding to set up a rescue *system* designed to cover a range of future eventualities. In the latter case, it clearly makes sense to consider the wider consequences of what is being proposed.<sup>17</sup> Since the aim of the practice will be to save lives or help the injured, it would be self-defeating if its overall consequences were that the number of deaths or injuries increased, as people came to rely on the existence of the rescue operation and took unnecessary risks as a result.

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<sup>15</sup> H. Sidgwick, *The Methods of Ethics*, 7<sup>th</sup> ed. (London: Macmillan, 1907), p. 436.

<sup>16</sup> For a forensic analysis, see F. Kamm, 'Does Distance Matter Morally to the Duty to Rescue?', *Law and Philosophy*, 19 (2000), 655-81.

<sup>17</sup> What I say here has runs somewhat parallel to Bernard Williams's discussion of why it is wrong to think about humanitarian intervention in terms of the moral duty of rescue in B. Williams, *In the Beginning was the Deed: realism and moralism in political argument* (Princeton NJ: Princeton University Press, 2005), ch. 12. The parallel is not exact because sea rescue unlike military intervention does not (normally) involve the use of force, but what Williams has to say about the much broader set of political questions that intervention raises, while individual rescue does not, applies here too.

But what if the state whose government is presently contemplating whether to contribute to an ongoing search-and-rescue mission is itself partly responsible for the situation that is now causing the boat people to undertake their perilous journeys? This, as we saw at the beginning, is how the position is often portrayed by those who want to argue that the states in question (like the UK) have no option, ethically speaking, other than to continue to contribute to missions such as *Mare Nostrum*. Is it then still permissible to offer consequentialist reasons (such as those provided by Baroness Anelay) for withdrawing? The argument against this is that by acting in the way that it has, the state incurs remedial obligations to the people who are forced to flee. For example, if we assume that Western states like Britain, France and Italy bear some share of the responsibility for the chaos that now engulfs Libya by virtue of the actions they took to help bring down the Gaddafi regime, they incur obligations to those refugees who are now trying to escape Libya on account of the danger they face by remaining there.<sup>18</sup> These obligations are person-specific obligations of remedial justice, so they cannot be voided by appeal to the general consequences of setting up a search-and-rescue mission, any more than I can escape a debt by showing that the money that would be used to repay it can be better spent elsewhere.

There is something to this argument (although we might worry about the consequences of conceding that well-intentioned interventions may bring remedial duties in their wake, while sitting back and doing nothing while injustice is perpetrated by other agents only generates undirected duties to pick up the pieces afterwards – duties that are shared among all capable parties). However it is important to distinguish two ways in which Western powers might be held responsible for generating perilous refugee flows. One is that they have played an active part in generating these flows by their policies towards, or their interventions in, societies in Africa and the Middle East. The other is that they have failed to create viable access routes for refugees who are escaping a variety of predicaments, including endogenous factors (such as belonging to a persecuted sexual or religious minority in their home countries). This second form of responsibility will extend to cover many more people than the first, and it is noteworthy that the critics of current European policy in the Mediterranean (such as Sarah Teather, cited above) refer specifically to the creation of ‘fortress Europe’ – the scarcity of channels through which asylum can be claimed. The central charge, in other words, is not that European states have caused the refugee flows, but that they have failed to respond adequately to them by, for example, allowing asylum applications to be heard in their embassies and consulates abroad. If this is the charge, then it is much harder to argue that

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<sup>18</sup> For an argument that the granting of asylum to refugees can be justified in such circumstances as a form of redress, see J. Souter, ‘Towards a Theory of Asylum as Reparation for Past Injustice’, *Political Studies*, 62 (2014), 326-42.



responsibility creates specific obligations of redress. The point here is not to defend ‘fortress Europe’: European countries ought indeed to provide mechanisms whereby asylum-seekers with legitimate claims to refugee status can present them. The issue is whether a failure to provide such channels creates person-specific obligations of the kind that, as suggested above, would defeat a consequentialist approach to seaborne migration and the human casualties it produces. It is important always to remember that the claim that a person whose human rights are under threat in her country of origin can make is a claim against all the states that could provide her with refuge, not against any one state in particular. This changes only at the point at which she presses that claim against state S by arriving at its border and asking for asylum. Thus no single state can be under a remedial duty as a direct result of its failure to offer adequate opportunities to those seeking asylum.

So if we look inside one of the crowded boats drifting across the southern Mediterranean in the hope of being rescued, we are likely to find three classes of people aboard. There will be economic migrants – people looking for a better life in Europe, many admittedly from societies that are quite poor. There will be refugees fleeing domestic persecution on grounds of political activity, religious conviction or sexual identity. And there will be other refugees who can claim justifiably that they are escaping conflicts that resulted in part from western intervention. All are endangered by remaining on the boat, and no one suggests that they can (or should) be separated at the point of rescue. A policy of rescue, where rescue from the sea is followed by processing in one or other European country, will give all of these people the foothold in Europe they are seeking. Some of them – the third group – may be entitled to this access as a way of remedying an historic injustice; the others are not.<sup>19</sup> So should the overall consequences of the policy count in deciding whether to adopt it? Does it matter that in fulfilling our obligations to group 3 we may be incentivising future members of groups 1 and 2 to embark on crossings with tragic consequences? These are difficult questions, and I will return to them later when discussing the *content* of the duty to rescue, i.e. what exactly the rescuers are obliged to do for the rescued.

I want next, however, to take up the second point of disanalogy between standard rescue at sea cases and the special case of the boat people: the fact that the migrants have put themselves in a

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<sup>19</sup> The people in group 2 are entitled to asylum somewhere, but not necessarily in Europe. In general, it is defensible for European states to discharge some of their obligations towards refugees world-wide by paying to support properly-resourced refugee camps in areas close to the places that are producing the refugees. I have defended this position in ‘Justice in Immigration’, *European Journal of Political Theory*, forthcoming, and at greater length in *Strangers in our Midst: the political philosophy of immigration* (Cambridge, MA: Harvard University Press, forthcoming), ch. 5.

position where a rescue is very likely to be needed. How does this fact condition the duty? Does it indeed cease to be a duty altogether?

It would be a mistake to say that the migrants have freely chosen to be exposed to peril at the hands of the elements in the sense in which this would be true of, say, an experienced Alpinist setting out to climb the Eiger. There are two differences: unlike the mountaineer, many of the migrants are driven by desperation, and they may not be properly informed of the likely consequences of their actions. We don't really know what the smugglers who supply the boats tell their customers – whether they assure them that the boats are seaworthy, or convince them that rescue will soon be at hand. But we can assume that they are not in a position to make a fully rational decision about whether to embark. Nevertheless a decision has to be made: they are not being forced to climb aboard the boats, even though as I have just noted they may be driven by necessity – the absence of reasonable alternatives. And they will have made lesser decisions given the array of alternatives that they face – for example which boat to pay to join.<sup>20</sup> This means that there is *one* sense in which the migrants are responsible for their own predicament: they have actively put themselves in a position where rescue is necessary. They are not just victims of a natural disaster. What difference does this make to the duty of rescue?

It seems clear that it does not straightforwardly eliminate the duty. Confronted with a boat that is in imminent danger of sinking, a rescue vessel must try to take its occupants aboard. But if we step back from the immediate peril, we can ask how a responsible government should deploy its resources in this context. If it has ships present in the general area, what should it instruct them to do? Should they engage actively in searching for boats in need of rescue, or should their aim be to prevent people from getting on board in the first place, if they are able to do that? As we saw when looking at the international law of the sea, its requirement is that the master of a vessel who receives information about 'persons in distress' must go to their rescue, but there is a proviso that reads 'in so far as such action may reasonably be expected of him'. This clause was no doubt intended to place limits on the cost that complying with the duty of rescue might impose on the rescuing ship, but might one also read it so as to encompass cases in which the vessel in question is actively engaged in preventing future maritime tragedies? If vessel V is currently employed in

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<sup>20</sup> Though there is evidence that the smugglers sometimes deceive the migrants about the deal they are being offered – for example understating the number of fellow-passengers there will be on the boat (something that affects the asking price of a berth), or concealing the fact that the boat will have no competent helmsman. For evidence see <http://www.theguardian.com/world/2015/apr/24/libyas-people-smugglers-how-will-they-catch-us-theyll-soon-move-on>.

preventing smugglers taking their boats out of port, thereby placing their occupants in future peril, would it be justified to divert it to the rescue of those in present peril?

This is again a difficult question to answer. We are naturally pulled in favour of the urgent situation of those whose boat is about to sink. The people who are currently trying to leave port may be the lucky ones whose boat actually reaches Lampedusa or Sicily, or gets picked up by some other vessel. Yet the migrants' responsibility for being aboard an unseaworthy vessel, especially in cases where they join the vessel in anticipation of being rescued, does seem to diminish the force of the duty. A test of intuition here is to ask whether a ship that has to choose between going to the aid of a vessel crippled by an unexpected storm and a listing boat overloaded with migrants should decide simply on the basis of the number of endangered lives involved, or whether it can also give some weight to the source of the peril as well. My view is that the source matters: to the extent to which people bear responsibility for placing themselves in dangerous situations, our responsibility to aid them is reduced (but not eliminated). At the very least, when the numbers on both sides are roughly the same, we should choose to aid those who are in no way responsible for their predicament. And this concern about responsibility as well as need may reasonably influence a government's decision about how it should instruct its ships sent to or passing through the relevant area.

I turn next to the *content* of the duty of rescue, as it applies to the case we are considering. What more precisely must a rescuing ship do to aid those it hauls from the water? It is clearly under no obligation to conduct them to their preferred destination. The obvious answer is that it must offload them safely somewhere on dry land. But now we encounter a problem. Under international law, no state is obliged to allow ships carrying refugees or other passengers to disembark on its territory, and there have been well-known historical cases in which such ships have been forced to sail for thousands of miles in order to find a port willing to allow them to anchor and offload their occupants.<sup>21</sup> This places the captain of a rescuing ship in a quandary in the case of refugees, as Pugash explains:

If he refuses to take the refugee on board, he will be violating a law that is rarely, if ever enforced; but he will also be neglecting a duty owed by all mankind to those in need. On the

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<sup>21</sup> Perhaps the best known is the SS *St Louis*, a German ship which in 1939 carried over 900 refugees from Nazi Germany across the Atlantic, only to be refused entry by Cuba, the United States and Canada in succession. Returning to Europe, it was finally able to dock at Antwerp, and the passengers were distributed between the UK and (less safely) France, Belgium and the Netherlands. Similar cases arose in the case of refugees fleeing by sea from Vietnam and other South East Asian countries in the 1970s.

other hand, if he rescues the refugee, he may not be able to find a country willing to grant asylum and the country of origin may be unwilling to take the refugee back.<sup>22</sup>

There is no parallel to this in the case of the individual duty of rescue, which is always understood to have cost limitations built into it: we must pull the drowning person out of the river and if necessary summon an ambulance, but that is where our responsibility normally ends. The master of a ship that rescues boat people faces unknown costs – not only the immediate costs of feeding and caring for the victims, but the indefinite cost of a voyage to a port where they can be disembarked.<sup>23</sup> There is no convention in international law whereby the ‘flag state’ of a merchant ship will agree to take responsibility for accepting and processing the people that the ship takes on board. Moreover ‘the flag state itself may be too distant from the scene of rescue to undertake practical responsibility for those in distress’. Thus

a ship’s master must exercise discretion because the nearest port of call may be unsuitable, the next *scheduled* port of call too far away to relieve distress, and there has to be allowance for particular circumstances, including the safety of the rescue ship, the severity and nature of the survivors’ distress, and the rescue ship’s ability to provide food, water and medical requirements.<sup>24</sup>

Would it be sufficient to return boat people to the place they had set out from, assuming this could be done safely? What if the place in question – Libya, for example – had no competent authority able to protect their human rights securely? Technically this would probably not count as *refoulement* since the refugees among the boat people would be returned from international waters, not from the territory of a receiving state. Nevertheless it would be ethically indefensible to rescue people from the frying pan only to dump them in the fire. The place where boat people are put ashore must be such that it leaves them in no imminent danger of injury or death. This is setting the bar quite low, but at this point I am trying to establish what the duty of rescue itself

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<sup>22</sup> Pugash, ‘The Dilemma of the Sea Refugee’, p. 601.

<sup>23</sup> In international law, ports are regarded as being under the sovereign authority of the relevant state, and so there is no right of entry for a vessel unless the vessel itself is in distress. Only in exceptional circumstances would this apply to a ship carrying refugees or other migrants. For discussion, see Barnes, ‘Refugee Law at Sea’, pp. 57-61.

<sup>24</sup> M. Pugh, ‘Drowning not Waving: boat people and humanitarianism at sea’, *Journal of Refugee Studies*, 17 (2004), p. 61. Could the problem be addressed by ‘the creation of a duty incumbent on the rescuing vessel to disembark at the next port of call in conjunction with a duty on coastal States to allow disembarkation’ in international law? Although initially appealing, this proposed solution has its own difficulties. For discussion, see Barnes, ‘Refugee Law at Sea’, pp. 71-2.

entails, not what wider responsibilities capable states might have towards the people who set out in boats. The parallel here is with the responsibilities of the individual rescuer on land, in contrast to the wider responsibilities of the state to provide medical assistance, shelter, and so forth to all those on its territory.

States such as Greece and Italy have addressed this problem by agreeing to serve as the dropping off and processing point for all those rescued in nearby waters, putting their own immigration systems under severe stress as a result, and it seems clear to me that in doing this they have done more than they are required to do, either legally or ethically. The problem they are facing is one that all capable states have a shared responsibility to address as part of their general responsibility to protect human rights. There is a plausible argument that the Mediterranean should be seen primarily as a European problem by virtue of a regional division of labour that makes states in South East Asia responsible for Vietnamese or Burmese boat people, the US responsible for Cuban boat people, and so on, but there is no reason to narrow this down further so that responsibility falls entirely on the shoulders of the state that is closest to the place where a sea rescue takes place. The general principles for distributing responsibility apply: backward-looking considerations such as the role that a particular state may have played in creating a flow of migrants need to be balanced against forward-looking considerations such as the state's capacity to provide aid and to accept refugees.<sup>25</sup> There is a strong argument in favour of a Europe-wide initiative to create a secure holding station, probably in North Africa, to which boat people could be brought for assessment, together with a commitment on the part of each state to take in a proportion of those found to have valid claims to asylum. This must be preferable to the random way in which the burden is now distributed, with two states bearing responsibility for almost all initial admissions, and then those who are admitted making their way, as far as they are able, to their preferred destination within Europe. Moreover by bringing people back to North Africa – or perhaps in other cases to Turkey – for assessment, the incentive problem discussed earlier would be partly addressed. There would no longer be an assumption that being rescued from the Mediterranean automatically gives you a foothold in Europe.

Let me now try to summarise the conclusions of my discussion for the duty to rescue boat people. The first key point is that we need to distinguish the immediate duty carried by the captain of a naval vessel or a merchant ship who encounters an unseaworthy boat crammed with migrants from the wider responsibility of relevant states to respond to a pattern of (unauthorised) seaborne migration.

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<sup>25</sup> See D. Miller, 'Distributing Responsibilities', *Journal of Political Philosophy*, 9 (2001), 453-71, and D. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 4.

I suggested that in setting up procedures to deal with this phenomenon, whether in the form of a search and rescue operation or by a more direct attack on the smugglers who were filling and launching the boats, these states should consider the long-term consequences of adopting any such procedure. Specifically, they should be guided largely, though perhaps not exclusively, by the aim of minimising loss of life and injury over time, bearing in mind the incentive effects of their policies.<sup>26</sup> So although Baroness Anelay might have her facts wrong when justifying the UK's decision in 2014 to cut back its support for search-and-rescue, the kind of argument she was offering seems to me to be one that a government can legitimately make. A policy of rescue that by encouraging more people to take risks results in more lives being lost overall is not a defensible policy.

In discussing the duty of rescue itself, I pointed out several ways in which saving boat people differed *both* from individual land rescues *and* from 'normal' sea rescues of the kind envisaged under the international law of the sea. These differences concerned the likely cost of the rescue, the possibility of being compensated for this cost, and the extent to which the person being rescued was responsible for getting into the predicament that made rescue necessary. I also suggested that sea rescues in general could be seen as part of a reciprocal practice from which any seafarer might benefit at some time, though I doubted whether this was also true of land rescues – in this respect, though not in the other three, migrants hauled from unsound boats resembled the proverbial drowning swimmer dragged from the fast-flowing river. All of this implies that the duty to rescue boat people is a relatively weak duty, if we assume, as seems reasonable, that the strength of such a duty is affected not just by the benefit it confers on its target but also by factors such as the cost of carrying it out, the responsibility of the beneficiary for her predicament, and so forth. This is not to deny the existence of the duty, but to suggest that we should not be too quick to condemn ships' captains who try to avoid places where rescues are likely to be needed, or governments who make a sincere attempt to put their resources into tackling the problems that induce out-migration at source in preference to sending naval ships on rescue missions.

The most draconian version of the latter approach aims to prevent migrants from setting out to sea in the first place by intervening to take away their material means of doing so. We might label this the 'burn the boats/blockade the ports' strategy. Is it defensible? The problem here is that at least some of those attempting to leave will be trying to escape immediate danger – their lives may be put at risk by remaining in Libya or Syria. It is not justifiable to block someone who is acting so as escape

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<sup>26</sup> The qualifying clause is needed here because I have conceded that among the migrants there may be some who are owed duties of redress, and to whom, therefore, general consequentialist reasoning should not be applied.

a threat to her human rights so long as the action in question is not itself a threat to someone else's rights. So 'burn the boats', even if it could be made effective (which seems open to doubt), is off the table ethically. What about 'lock up the smugglers'? There is little doubt that the smugglers are behaving unethically. They are exploiting the victims and profiting immensely, given the prices being charged for a seat on one of the boats compared to the cost of acquiring the boats themselves.<sup>27</sup> They are also grossly deceiving the migrants by exaggerating their chances of reaching Europe and understating the risks of the passage. There can be no duty to allow the smugglers to operate, even if they offer effectively the only route out of countries such as Libya. The danger of catching a North African Schindler in an operation to sweep up the smugglers is vanishingly small. So were it possible to reach agreement with the local authorities in the sending countries to put the smugglers out of business, that would not violate the human rights of the migrants, whereas physically destroying their only means of escape from situations of violence would. Of course merely tackling the smugglers without doing anything to succour their erstwhile clients is not an acceptable policy. This reinforces the point that a comprehensive response to the migration crisis must include creating proper channels for asylum-seekers claims to be assessed by European states.

The predicament of boat people, in the Mediterranean and elsewhere, arouses strong passions on both sides, as my opening quotations were meant to illustrate. It is tempting to think that the critics of government policies have the moral high ground all to themselves, but this is not so, as I have tried to argue. Nevertheless no-one could dispute that this series of events is indeed a tragedy. Our responses to it will be influenced by background beliefs about the respective rights of immigrants and nation states. If we think that border controls are morally questionable, if not indefensible, then we are likely to view the plight of the boat people as one more illustration of the malign effects of states' exclusionary policies. If, on the other hand, we believe that states do have the right to control their borders, and within certain limits decide who to admit, then we are likely to see boat people as attempting to take advantage of our good nature by positioning themselves so as to be in need of rescue (and thereby standing a good chance of sidestepping the border controls). Yet another view sees this as a clash between two forms of necessity devoid of intrinsic ethical significance – the migrants' desperate wish for a better life versus the state's need to maintain its territorial integrity, and thus its legitimacy. These underlying perspectives are rarely made explicit in popular debate, but they are likely to determine the balance that is struck between the human rights

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<sup>27</sup> For some estimates of the smugglers' profits, see <http://www.theguardian.com/world/2015/apr/24/libyas-people-smugglers-how-will-they-catch-us-theyll-soon-move-on>.

of migrants by sea and the corresponding duties of the ships that might rescue them, or of the governments that directly or indirectly command the ships.