The International Law of the Sea and Migration Control

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1. Introduction

The protection of human rights and the regulation of migration activities in ocean spaces remains an issue of considerable political and legal importance.¹ A number of specific issues remain problematic.² First, many obligations that require rendering of assistance are poorly drawn and implemented in practice; second, there is a gap between obligations of rescue and any requirement of coastal States to allow disembarkation; third, there are institutional problems of co-ordinating responses to migration and supporting the States and persons affected by migration. More generally, there is a problem of political intractability and concerns about how more specific and binding rules on migration may reduce the scope of State's sovereignty.

In this paper I ask what problems remain that impede the development of a more satisfactory regulatory regime for dealing with the irregular migration of people by sea. To this end, I pose two questions. Firstly, is there something about the way international law (and law of the sea in particular) has developed and is structured that inhibits the effective regulation of irregular maritime migration? The basic premise here is that the study and practice of law often occurs within compartmentalised fields of study and that this serves to immunise specialist fields of study from normative influences in other specialised fields. Although international law of the sea is very much open to influences

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from general international law, it is less susceptible to developments in international law’s specialised fields such as international human rights law. This has tended to isolate the substantive content of the law of the sea from potentially important humanitarian considerations. Secondly, are there any particular obstacles in the law of the sea to the development of more effective rules on the regulation of migration at sea? As there appears to have been a paucity of significant legal developments in this area, it is essential to understand how general prescriptive process may limit the development of new norms, or point towards their development in a particular way. Against this background, I then consider how irregular migration is regulated under the law of the sea, first looking at how competence to regulate migration at sea is allocated in various maritime zones. I then consider the effectiveness of various rescue obligations, and examine whether or not they provide a suitable point of reference for dealing with incidents of irregular migration by sea. In doing so I also try to identify whether there are any normative trends in the regulation of migration at sea and comment upon these.

2. **Field independence and the cross-fertilisation of international legal norms**

It seems that the age of the generalist is passing in international law. For example, the teaching and practice of international law is often broken down into specialist sub-fields such as international criminal law, international trade law and international environmental law, and, of present concern, the law of the sea and international human rights law. There may be good reason for having this specialisation. It maintains the integrity of a particular sub-field of study. It allows the law to adapt to the nuances of the area so regulated. It may facilitate the development of coherent rules, at least internal to the sub-field of study. In general there can be no assumption that rules, processes and techniques that are used in one area should be used in other areas. Thus commercial law is often regarded as immune to considerations of equity (and justice) in order to ensure clear and precise rules that facilitate trade and permit commercial men to plan their activities. This position reflects the separation of technical maritime rules and wider human rights considerations.

Square pegs do not fit into round holes and there is often no good reason for taking into account norms from distant and unrelated areas of law. However, this does not always justify the complete immunity of rules and values in one area of study to normative influences from other areas. International law remains a discreet legal system in its own right, and there are meaningful connections between its norms. The fragmentation of international law and the potential insulation of