

The Outlaw of the Sea: Balancing Navigational Freedom and Maritime Interdiction Practices in the Context of Transnational Irregular Movement of People by Sea

Leo Arman P. Galang

61 ATENEO L.J. 274 (2016)

*SUBJECT(S): INTERNATIONAL LAW, LAW OF THE SEA, HUMAN
TRAFFICKING, MIGRANT SMUGGLING, REFUGEES,
MARITIME LAW*

*KEYWORD(S): INTERNATIONAL LAW, LAW OF THE SEA, HUMAN
TRAFFICKING, MIGRANT SMUGGLING, REFUGEES,
RIGHT TO NAVIGATION, HUMAN RIGHTS, MARITIME
LAW*

Policing the oceans strikes at the very grain of the complex and often convoluted language of international peace and security. With incidences of human trafficking and migrant smuggling at sea reaching unprecedented proportions globally, States resort to measures within the legal contours of transnational crime prevention and suppression of illicit activities at sea. And when the vector of threats came with a human face, the States' response took a familiar form — the interception of human beings in the exceptional arena of the high seas.

Yet, security imperatives must necessarily wrestle with the overarching principle of freedom of the high seas.

The question now remains: in the dialectics between crime prevention and freedom of the seas, where do State interdiction practices legally stand?

Under the framework of maritime law, interdiction practices primarily challenge the general rule on exclusive flag State jurisdiction and freedom of the high seas. With only few exceptions limited to extreme circumstances in International Law, interdiction policies must overcome the test of permissibility.

Under the framework of transnational crime prevention, States are duty bound to cooperate in preventing, punishing, and addressing the root causes of trafficking in persons and migrant smuggling under the Human Trafficking and Migrant Smuggling Protocols to the United Nations

Convention against Transnational Organized Crime. However, because of the primary indifference of interdiction policies to victim identification and victim protection within the trafficking-smuggling continuum, intercepting States ultimately frustrate their humanitarian and crime prevention obligations under International Law.

Debates concerning extraterritorial application of human rights obligations must necessarily be reconciled with the nature of control that a State exercises. Push backs, non-entry and forced relocation strategies cannot undermine the protection of refugees and asylum-seekers, and the proper treatment of rescued persons in distress at sea.

Hence, the proliferation of the interdiction practices of States against transnational irregular movement of persons in the high seas, under the guise of compliance with the duty to prevent and punish transnational crimes, constitutes a systematic relegation of the freedom of the seas and the right to navigation, and, ultimately, defeats humanitarian and crime prevention obligations under International Law.