A note of appreciation...

I am particularly pleased to be here today at the ‘initiation’ of the Jean Monnet Centre of Excellence on Migrants’ Rights in the Mediterranean, and I would like to express my thanks to Professor Giuseppe Cataldi and to Dr Anna Liguori for the invitation and for what is a most timely initiative in a most appropriate location.

Above all, however, I would like to express my thanks to Italy, to the people of Italy, for all that they have done over the past eighteen months and more to bring safety and protection to those putting their lives, their future, at risk on the sea. It is a noble record. Italy has acted as the conscience of Europe, putting into daily practice the values which so many of us, speaking as a European, count dear. But it has done so without the degree of support – material, moral and practical – which it is entitled to expect from its partners in the community.

Europe, or at least, the European Union, claims the right to manage the movement of people across the Mediterranean, but it is too ready to decline the responsibilities and to dispute the obligations that go with that claim. Many of us hope that this will change, and this afternoon, I want to follow up my thanks with what I hope will be some insights into the nature of those duties, and some suggestions about what needs to be done next.

Let me begin, however, with some views from outside, from across the Atlantic. Writing in *The New Yorker* on 4 May, Philip Gourevitch put it clearly and succinctly:

‘... every year, people drown in the waters between Africa and Europe. And this year almost two thousand have died, including, last week, nearly eight hundred on one ship, which
capsized and sank en route to Italy. Before that horrifying incident, this year’s death rate for Mediterranean boat people was ten times higher than it was for the same period a year ago. Now it’s thirty times higher, and that increase is attributable to Europe’s dereliction of duty...’

After reviewing aspects of that continuing failure and the predilection for tightening border controls and acting militarily against traffickers, he went on to note that Europe’s leaders seem,

‘... to be avoiding the fact that, as long as people are prepared to risk everything for a better life, there will be boat people, and that when dealing with them the law of the sea is the place to start: rescue first, then sort out the rest on land. When it comes to the drowned and the saved, we know dereliction of duty when we see it.’

Turning closer to home, as one Syrian refugee said to the Guardian (4 May 2015), he had been,

‘... determined to go, whether or not there is a rescue operation. I’m risking my life for something bigger, for ambitions bigger than this... If I fail, I fail alone. But by risking this, I might create life for my three children.’

Europe’s role and Europe’s responsibilities

In a paper which I presented in Athens in March, I considered what the European Union might do, indeed, ought to do, with regard to so-called irregular migration, and I looked in particular at the ‘inwards-looking’ dimensions of the EU’s common policy on refugees and asylum.

The strategy of implementing a common policy through twenty-eight national systems, I suggested, was always bound to fail, no matter how comprehensive the top-down, legislative agreement on qualification, standards and criteria. The Dublin scheme, too, for all that it guarantees a decision for the asylum seeker somewhere, contributes nothing to what is and

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1 ‘Regulating “Irregular” Migration: International Obligations and International Responsibilities’, Keynote Address to the International Workshop, National and Kapodistrian University of Athens Faculty of Law, Friday, 20 March 2015.
always was clearly needed in Europe, namely, effective, equitable sharing of protection responsibilities among a community committed to common, fundamental principles.

The situation for refugees and asylum seekers is now further compounded by the fact that the EU remains uncertain how to respond to the essentially demographic and economic drivers of movement between States, (a substantial working age population with no work to turn to), which accompany flight from conflict and persecution, and which could already be anticipated two or three decades ago.

I suggested that, given the nature of the Union, its basis in common values and shared international obligations, what was needed was a truly European response, in which ‘Europe’s refugees’ would enjoy European asylum, European protection and the rights and benefits accorded by European law. This would require, in turn, an EU institution, a European Migration and Protection Agency competent to fulfil collectively and to implement the individual obligations of Member States and the policy and protection goals of the EU. Moreover, it is essential to add ‘migration’, along with refugees and asylum seekers, precisely because the arrival of those in an irregular situation, whether directly or following interception or rescue at sea, presents Member States with legal and practical challenges that demand a community-based response.

But the internal dimension can only ever be but one aspect of a coherent response. Europe must also look outwards and engage beyond the region, beyond the Mediterranean, for the movement of people today affects the interests of multiple States and stakeholders.

There is no European Migration and Protection Agency just yet, and while existing institutions, such as the European Asylum Support Office and the Fundamental Rights Agency, can play a role in monitoring for effective protection the sorts of ‘solutions’ to which I will now turn, a much more international approach is still needed.

Duties of care and protection

When thinking about the movements of people and about international legal obligations – ‘Whose obligations?’ is a question to which I will return – it helps to recall certain basic principles.
States party to the 1951 Convention relating to the Status of Refugees accept that those leaving their country for fear of persecution, are entitled to special protection, on account of their position. The European Court of Human Rights has spoken to like effect, noting that asylum seekers are a ‘particularly underprivileged and vulnerable population group in need of special protection...’

The vulnerability of the migrant, not in the sense of weakness, so much as in exposure to smuggling and trafficking and the absence of any effective protecting authority, was recognized by the Commission on Human Rights back in 1997, and their need for protection has been underlined since in the work of successive Special Rapporteurs on the Human Rights of Migrants and in a series of UN General Assembly resolutions.

Children seeking refuge are also entitled to ‘receive appropriate protection and humanitarian assistance’, whether accompanied or not; and in 2014, of the roughly 170,000 who arrived one way or another in Italy, more than 13,000 were children travelling alone; this year already, the number is approaching 2,000.

This same emphasis on protection appears expressly in the Palermo Protocol on Trafficking – to protect and assist the victims – and again in the Palermo Protocol on Smuggling. In each case, the Protocol includes specific ‘savings clauses’ preserving the ‘rights, obligations and responsibilities of States and individuals...’, under the refugee treaties and the principle of non-refoulement.

How, if at all, are these principles to be made meaningful in the Mediterranean today, and how should they govern Europe’s operations?

In my view, that comes about through a combination of context, circumstance, knowledge and, in particular, engagement. Europe already asserts the right to manage the movement of people across those waters, and with that comes obligations.

Some might argue that protection is compromised by fragmentation, by the apparently contradictory pull of obligations relating to interception and rescue at sea or combatting smugglers and traffickers, on the one hand, and of human rights, on the other. States’ responsibilities are certainly not part of a seamless web of rights and obligations when it comes to seaborne migration, but some things are clear. A State minded to take action, as it should, against smuggling and trafficking, already has duties towards the victims. A State which elects to intercept boats believed to be carrying irregular migrants likewise has protection
obligations to those over whom it exercises authority and control, irrespective of the legality of any particular interception.

The State which commendably engages in a dedicated search and rescue operation situates itself straightaway within the legal framework set by the UN Law of the Sea Convention, the Safety of Life at Sea Convention, the Search and Rescue Convention, the standards set by the International Maritime Organization, and the basic principle of disembarkation in a place of safety.

All of this is known to the EU and to its Member States. After all, the 2014 EU Regulation governing Frontex search, rescue and interception operations at sea could not be clearer on the basics, underscoring the obligation of Member States to render assistance to any vessel or person in distress at sea, and prohibiting the disembarkation of intercepted or rescued persons in a country where they would risk serious harm.

It is common knowledge, of course, that notwithstanding the primary role of the State responsible for a Search and Rescue Region to ensure cooperation and coordination, an obligation deficit remains with regard to disembarkation – in large measure, I suspect, because no State can come close to anticipating with confidence the potential scope of its responsibilities; and none, it seems, can yet rely on the support of others. There’s a contingency issue here which calls for closer examination, and it is precisely the reason why we need to step beyond the field of individual State responsibilities to consider the regional dimension and the distinct opportunities for co-operation and mutual support presented by this unique environment.

Due diligence

The Mediterranean is an interesting place to start. It covers some 2.5 million square kilometres. Some twenty-three States have littoral responsibilities, and for twelve or thirteen of them, that involves responsibility for Search and Rescue Regions.

The Mediterranean has also become something of a proving area, where a few States have sought to question the applicability of certain protective principles in the context of extra-territorial operations, but where the European Court of Human Rights, among others, has confirmed what students of the law of State responsibility already knew, that liability can follow the flag.
The Mediterranean is special, and being a shared and much exploited space, it raises questions about collective responsibility, and the ways in which that might be translated into practical results.

Certainly, the EU has a collective role and a collective responsibility. Through the operations of individual Member States, but particularly through Frontex, it has staked a claim to control or manage large areas of the Mediterranean with a view to curbing irregular migration, and regular calls on search and rescue responsibilities have helped to underline the EU’s practical engagement in the area.

What, then, are its duties? ‘Responsibility’ in international law has a number of facets, and we need always to look at the nature of the primary obligations involved.

Fault, in the sense of wilful or negligent conduct may be relevant in some instances; or responsibility may be consequential on the breach of due diligence obligations, understood as an objective, international standard; and actual liability itself may be contingent on circumstances, such as the parties involved, knowledge, capacity, the requisite goals, and so forth.

For a number of reasons, the Mediterranean provides the basis for a special regime which engages, in general, the responsibility of littoral States and those which stand behind them or otherwise involve themselves in relevant conduct; the result, I suggest, is a special regime, linking States which act both in the fulfilment of their individual obligations and in the interests of the community, to those which are part also of that community and share those interests.

Bases of obligation: Search, rescue, interception, protection and solutions

The reasoning of the International Court of Justice in the *Hostages* case suggests a useful approach for identifying the key elements of legal responsibility in comparable situations, including,

- where States are fully aware of urgent ongoing situations of risk, endangering life at sea, in part as a result of smuggling and trafficking;
- where States are fully aware of their obligations (a) to establish search and rescue regions in the area; (b) to provide and/or to co-ordinate
search and rescue services; (c) to combat smuggling and trafficking, including by taking preventive measures against non-State actors whose conduct violates human rights; (d) to protect human rights; and where States and their institutions have the capacity and the means at their disposal to respond through surveillance and rescue, both individually and collectively.

Unlike the Hostages case, where two parties only were involved, the situation in the Mediterranean engages many potential actors, few of which will necessarily have a direct juridical relationship with the individuals at risk. Nevertheless, the circumstances and the known facts clearly put in issue the individual and collective responsibility of identifiable States to save lives at risk and to ensure, respect and protect human rights.

The Mediterranean is a large, but enclosed maritime area, subject to regular, close surveillance and to a certain level of effective control. The failure by those States (and their institutions) to respond comprehensively and in such a way as to maximise protection and solutions engages their responsibility, whether individually or inter se, irrespective of the availability of a remedy in the individual case.

This is not a counsel of perfection, or a statement of obligation to achieve the required result in all circumstances, but rather, ‘... an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result’, as the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea described it in 2011.

What we see is nonetheless a positive protection obligation, not immediately absolute in the sense of the prohibition of torture, but a positive due diligence obligation to save lives; and thereafter to treat those rescued or otherwise brought within the jurisdiction in accordance with settled law.

Moreover, given the nature of the humanitarian crisis, this regime of responsibility does not stop at the shore line. The phenomenon of contemporary migration has much deeper roots and so long as the drivers of desperation continue, so too will the search for refuge. The legal interests of States of origin, transit and intended or accidental destination are all engaged, and only a rights- and protection-based strategy can have any impact. This is a bigger question, requiring more time and more thought, and this paper can do little more than signal the urgent necessity to respond both to symptoms and to causes.
Rescue at sea

On one issue in particular, there is a pressing need to act, and to reduce and ideally eliminate the disjuncture between rescue and safety of life at sea, on the one hand, and solutions, on the other; disembarkation in a place of safety is essential, but it cannot be the end of the story.

In principle, a starting point for disembarkation could be flag-State responsibility in the case of rescue or interception by public ships (that is, a State’s naval or equivalent vessels). But although a beginning, that must not be allowed to result in ultimate gross disparities between States, lest they be disinclined to commit resources to the safety of life at sea. States committed to search and rescue in the Mediterranean fulfil a community responsibility, and a formula for equitable sharing is called for which, while securing prompt disembarkation, then leads on to land-based assistance, processing, and solutions.

Nor can flag-State responsibility be applied to merchant vessels. What is needed here, as experience with the Indo-China refugee crisis demonstrated, is an internationally agreed and administered scheme or pool of disembarkation guarantees, together with provision for compensating ships’ owners for at least some of the costs incurred when ships’ masters fulfil their international legal duties.

In thinking medium- and long-term, attention must also focus on assistance to States of transit, many of which are facing new challenges in the management of migration, but without the infrastructural capacity to accommodate, assist, protect and process non-nationals on the move. The EU has taken initiatives with third States in the region, but too often they are oriented to control alone (in the EU’s interest), with no regard to the wider, international dimensions.

If those intercepted or rescued at sea are not disembarked in European space, then effective, open and internationally supervised agreements will be essential to ensure their landing and accommodation in a place of safety, their treatment and protection in accordance with applicable international and European standards, and a solution appropriate to individual circumstances, such as asylum, resettlement, facilitated third country migration, or return in safety and dignity to countries of origin. Indefinite detention of refugees, asylum seekers and migrants in sub-optimal conditions ought never to be on Europe’s agenda, and given the extraterritorial reach of Europe’s obligations (both EU and ECHR), may well engage its liability.
This means bridging, in law and practice, the migration/refugee protection gap, which is what Mediterranean transit is effectively achieving in fact. And it means a readiness on the part of the EU and its Member States to integrate their own human rights and fundamental values into truly cooperative relations with transit and other affected States.

Next steps

What we are witnessing in the Mediterranean today is not just a European phenomenon. It is international, engaging States on all sides of the sea, and many also beyond the littoral. Certainly, it has resonance in the European Union, because we have mutually agreed principles of cooperation – solidarity and fair sharing of responsibility; because we are committed to certain values – democracy, the rule of law; because we are obliged to protect those fundamental rights now set forth in the Charter; and because we have elected to engage pro-actively in this maritime space.

But the ‘international’ dimension, the impact of EU policies and practices on third States is also evident, whether in the EU’s negotiation of readmission agreements; its endorsement of individual Member States’ use of so-called safe third country removals outside the Dublin scheme; in the management of internationally agreed search and rescue areas (for better or worse); and necessarily also in the interests of a variety of non-State stakeholders, whether international organizations or representative organizations such as the International Chamber of Shipping.

Given the manifest need for a concerted, internationally agreed and implemented response, why does the EU continue to dither? Why do the practical proposals of key organizations, such as UNHCR, seem to fall on deaf ears? The EU’s response to date is woefully inadequate, in principle, in practical proposals, in comprehending the situation and the power and magnitude of the drivers at work, in looking beyond narrow self-interest, and in characterizing the challenges almost exclusively in terms of control and security.

This lack of direction and sense of purpose seems due in part to the nature of the entity, and to the fact that, for all its formal espousal of ‘community’ goals and ‘community’ values, the Union remains a congeries of dislocated, dysfunctional sovereign States, unable to contemplate working together on what is perceived perhaps as a ‘difficult’ issue touching sovereignty, security, and, of course, ‘the other’.
As the European Council on Refugees and Exiles noted last month, commenting on the then latest response to the crisis, current proposals merely seek to prevent migrants and refugees reaching Europe, essentially by moving border control farther and farther outwards, ‘fighting’ the traffickers, destroying the boats, building fences, and, we suppose, ‘preventing’ illegal migration.

But one look at who is moving and why shows how the focus on smuggling and trafficking misses the big picture. What is needed, clearly, are opportunities – substantial safe, legal access to Europe, through resettlement, family reunion, humanitarian visas, and temporary protection, coupled with greater protection capacity along the way and real solidarity between north and south.

But we have been here before, and we know that with the right political will, workable and working solutions can be found; that mechanisms can be put in place which will ensure disembarkation against appropriate guarantees (such as assistance in identification and determination of status, or with care and accommodation, or with appropriate solutions in asylum, migration or return); that transit States (which also have problems of accommodation, processing, solutions) can be brought on board as partners in a protection oriented response with international and regional oversight; that countries yet more distant can be brought into what will have to be longer-term planning for development.

The Mediterranean, though, has an international and not purely regional dimension. It is a microcosm of indecision and inaction, but it also brings forth issues and challenges common to many other parts of the world – the Caribbean and the Pacific, to name just two. What could be achieved in the Mediterranean, properly founded on principles of protection and accountability intrinsic to a democratic community oriented to the rule of law, could serve as a model for elsewhere (unlike the unilateralist Australian approach, which is premised on arbitrariness and clouded in secrecy).

In the 1970s, too, there were difficulties galvanizing political will and political action around the no less desperate situation of Indo-Chinese refugees, and it took an international conference to kick-start serious progress. Ironically, given the nonsense spouted by British ministers apparently content until recently to witness continuing loss of life at sea, it was the United Kingdom which, in May 1979, proposed to the United Nations Secretary-General that he convene an international conference to deal with the problem. The Secretary-General, together with the High Commissioner for Refugees, conducted intensive preliminary
consultations, following which he called a meeting in Geneva in July that year, with representation at the ministerial level.

Sixty-five governments participated in the conference, chaired by the Secretary-General, together with observers, international organizations and NGOs. Building on the preceding informal consultations, it led to substantial increases in the funding of relief and the provision of resettlement places; in the offer of sites for processing centres; in opening discussions with the principal source country, Viet Nam, on family reunion, orderly departures, and return; and, as already mentioned, in practical proposals regarding rescue at sea.

Looking at the results of that conference and at the concrete initiatives which followed, it is surprising how similar are the issues we are facing today, notwithstanding the very different political situation. Then, as now, it was essential to maintain the primacy of protection principles; to engage with governments across the broadest spectrum; to secure commitments both from within and outside the region; to ensure the involvement of competent international organisations and NGOs; to promote practical and humanitarian relations with source countries; and to bring in the shipping community and build on its commitment to rescue at sea by devising practical disembarkation schemes.

That was just the beginning. Ten years later, the Secretary-General was back in the picture, working again with UNHCR and convening a second international conference on Indo-Chinese refugees, this time to adopt a Comprehensive Plan of Action which would eventually bring to an end a humanitarian crisis which had nevertheless changed dramatically over the years.

A new international consensus was needed, and the Secretary-General urged States to refrain from acting unilaterally. The outcome of this international approach, to what by then comprised both refugee and migration dimensions, was ultimately effective in restraining ‘clandestine’ departures, enhancing regular family reunion programmes, confirming the principle and practice of temporary refuge, determining entitlement to protection against international standards, making continuing provision for third country resettlement, developing internationally administered return and repatriation operations, and reviewing progress over time.
Conclusions for now

Today we need a similar initiative, for what we are facing in the Mediterranean is not an isolated issue, not a purely European problem. On the contrary, it is truly international. The movement of people leaves few States untouched, and much of that movement is driven by desperation – unremitting conflict and persecution, failed and exhausted economies. Only a long-term approach, combining protection, humanitarian assistance and opportunity with political and financial investment in mitigating and removing causes can have any impact.

The Secretary-General is already involved in a number of migration and development projects. It is time now to think and act wider and deeper, to turn to and address constructively the humanitarian dimensions. It is time to learn from Indo-China and other experience that international cooperation can work.

It is time to convene an international conference, perhaps on a rolling basis, for this is not a one-off situation. It is time to draw on the knowledge and experience of the United Nations; on the UN High Commissioner for Refugees; the UN High Commissioner for Human Rights; the Emergency Relief Coordinator and the Office for the Coordination of Humanitarian Affairs; the Special Rapporteur on the Human Rights of Migrants; the UN Development Programme; the UN Children’s Fund; the World Health Organisation; the International Maritime Organisation.

It is time to bring in regional organizations – Europe, of course, in its different cooperative forms; the African Union; ASEAN; the Organization of American States.

It is time to being in other international and non-government organisations, including the International Chamber of Shipping, the Inter-Parliamentary Union, the International Organisation for Migration, the International Committee of the Red Cross and the grass roots capacities of the International Federation of Red Cross and Red Crescent Societies.

Only by engaging across the broadest spectrum of interest can we make a start to what will and must be a generations-long project of protection and opportunity, in strengthening asylum, but also in realising human potential both at home and abroad, in bringing working and workable alternatives to those whom desperation drives to risk all.

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