

**Written evidence submitted by University of Bristol (CHA0021)**

1. This evidence addresses aspects of several of the consultation questions, in particular the following:
  - a) the legal position of migrants crossing the English Channel and the obligations of UK and French authorities and other parties to ensure their safety under UK and International (Maritime) Law
  - b) Actions taken by French and UK government personnel to reduce the risk to life for migrants crossing the English Channel in small boats.
  - c) Conditions in migrant camps in France and other states such as Italy and Greece
  - d) The care provided for unaccompanied children arriving in the UK.

Although the terms of reference only specifically refer to UK and International (Maritime Law), the application of both bodies of law by UK governmental authorities and personnel is subject both to the relevant international human rights obligations which are applicable to the government's actions, as well as to the UK Human Rights Act.

Those migrants who have entered into the UK territorial sea fall within the jurisdiction of the UK and so are protected by those obligations. As regards those who have not, Article 98 of the 1982 Law of the Sea Convention (to which the UK is a party, and in which in this regard also reflects customary international law), entitled 'Duty to render assistance', provides that:

1. 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 persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
- ....

This duty is applicable within all maritime areas and so is applicable to all those crossing the English Channel. It is buttressed by Article 98(2) which provides that:

'Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose'.

This reflects longstanding tradition, as well as the 1974 Safety of Life at Sea (SOLAS) convention and the 1979 Search and Rescue (SAR) Convention which provide further obligations relating to the assistance of those in distress at sea and which are binding on both the UK and France.

2. It inexorably follows that governmental personnel involved in maritime operations have a duty to assist those in danger of being 'lost', or 'in distress' at sea. Whilst not

all those crossing the English Channel in small boats necessarily fall into this category, many may. Moreover, the duty is not dependent upon the source of the danger. Thus, if those crossing put themselves in danger of being lost or in distress, the duty is not affected since it is ultimately humanitarian in nature and therefore governmental personnel have a duty to assist. Moreover, such duties have long been integral to the mission, purpose and ethos of key UK maritime agencies, particularly the MCA but also marine police units too, as well as the UK's largest charity the RNLI. These, then, are not simply legal obligations but are values deeply embedded in the institutional fabric, traditions and professional expectations of those within the UK maritime sector more widely.

3. Once a person has been rescued by an official vessel, those on board fall within the effective jurisdiction of the UK for the purposes of human rights law, and are therefore persons in respect of whom there is an obligation to respect their rights and freedoms as provided for in international law. It also means that they are entitled to make claims for asylum if they wish, which would preclude their return to a third state until that claim has been determined, or unless there is another regime applicable which is compatible with that obligation (for example, the Dublin III Regulation.)
4. Those crossing the channel who are not 'in distress' or in danger of 'loss' are in a similar situation but for other reasons. In the normal course of things, they would proceed to enter UK waters and so fall within domestic jurisdiction. The UK is fully entitled to enforce its borders and take measures to prevent the entry of those with no right to do so. However, it must also fulfil its obligations to allow asylum claims at the border. Those on vessels which have entered UK territorial waters cannot just be 'returned' without due process, which involves a determination of their status. This cannot be done whilst at sea and requires them to be brought ashore. Those on small vessels which have not entered UK territorial waters might, in principle, be denied entry but only provided this act in itself did not put those onboard at risk. In practice, this is likely to mean that small boats crossing the English Channel could only be denied entry if it was known that they could safely return to another country. It should be stressed that this would require a specific, evidenced-based determination that *this* small boat, and *these* persons upon it, could do so.
5. As regards children asylum seekers, in addition to the general obligation to ensure that 'the best interests of the child shall be a primary consideration' ( Article 3 (1) of the UN Convention on the Rights of the Child (UNCRC) ), Article 22(1) provides that:

'States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties'.

This reinforces the need to ensure that children are properly identified and offered protection and assistance. Once again, it is difficult to see how this could be done in the context of an operation at sea involving those attempting to cross the English Channel in small boats.

6. Moreover, making a determination that those on a particular vessel could safely return to France has the practical effect, in law, of placing those on the vessels 'within the jurisdiction' of the UK for human rights purposes which, in itself, may necessitate that there be a possibility of review of the that decision. In short, the likelihood of it being possible to lawfully prevent the entry into UK waters of those seeking to cross the English Channel in small boats for the purposes of migration is remote. They either are *already* at risk or may well be *put at risk* by the action of governmental authorities which prevents them from doing so. A potential solution might be to have a system of effective guarantees (from France, or other country in question)) concerning what would happen to the *particular migrants in question* if they were, due to the actions of UK agencies, to re-enter French (or other country's) maritime zones, coupled with a system to verify and monitor this. The practicality of this is questionable.
7. As a result, the only effective method of limiting the flow of cross channel migration must lie in enhanced cooperation with the French authorities in either preventing departure or ensuring that those at sea within their own maritime zones are returned safely to shore. What is not possible is a situation in which those at sea in small boats are deprived of their ability to land. Indeed, it is likely to be only a matter of time before those in many small boats will be reduced to a situation of distress, given their frequent unseaworthiness, in which case they would have to be rescued anyway.
8. The question of whether those who have come within the jurisdiction of UK authorities can be returned in the manner outlined above is linked to the crucial question of the nature of the facilities in which the migrants and asylum seekers, including both accompanied and unaccompanied children might be held. Under Article 3 of the European Convention on Human Rights (ECHR) the UK has an obligation not to return a person to a situation in which there is a real risk of their being exposed to torture, inhuman, or degrading treatment or punishment. Space precludes full coverage of this point but it has been clear ever since the judgment of the Grand Chamber of the European Court of Human Rights in *Hirsi Jamaa v Italy* (2012) that this principle applies to 'pushback' operations at sea. In that case, it was found to be foreseeable that those returned to Libya did face a real risk of such treatment and so the Court found Italy in breach of its obligations under Article 3.
9. It would not be justified to conclude that the mere fact of removing, returning or otherwise ensuring that migrants in small boats in the English Channel remained in or were returned to French waters (or to France) would mean that they faced such a real risk. It cannot, therefore, be claimed that such operations are necessarily impermissible on this ground. However, it is clear from various judgments of the European Court of Human Rights, the work of bodies such as the European

Committee for the Prevention of Torture and of National Preventive Mechanisms operating under the framework of the Optional Protocol to the UN Convention against Torture that aspects of the conditions in which migrants can be held can fall far short of acceptable standards in countries to which the Dublin III Process is applicable. It is both impossible and inappropriate to make generalised and abstract assessments concerning these. What can be said with certainty is that returning or bringing about the return of a migrant who is within the jurisdiction of the UK to a third country where they might face status based quasi-carceral detention for prolonged periods and in inappropriate and poor conditions inevitably raises the question that this might amount to inhuman or degrading treatment. Once again, such determinations cannot effectively be assessed on an individualised basis during the context of operations involving small boats at sea.

10. A further related point concerns the obligations of the UK under the Optional Protocol to the UN Convention against Torture, which puts in place mechanisms ‘to prevent torture and other cruel, inhuman or degrading treatment or punishment’ (OPCAT, Article 1: these words reflecting the obligation in Article 7 of the 1966 International Covenant on Civil and Political Rights- ICCPR). The OPCAT requires, inter alia, each state party to establish a ‘National Preventive Mechanism’ with the authority to visit any place where a person might be detained on the basis of public authority, including on board vessels. (For the avoidance of doubt, in *Hirsi Jamaa v Italy* the European Court confirmed that a person being ‘returned’ to a third country does not cease to be a detained person merely by virtue of being ‘rescued’, and this requires that, whilst bearing in mind the operational context, the protections applicable to all detained persons are to be respected, as confirmed by the Grand Chamber of the European Court of Human Rights in *Medvedyev v France* (2010)). The UK has designated such a mechanism, although it has yet to undertake any such monitoring activities onboard vessels at sea. Experience in other jurisdictions shows that this is more usually done following arrival in port at designated reception centres, by both national and international monitoring bodies. Were those rescued at sea not brought ashore in the UK, then thought would have to be given to ensuring the UK mechanism had the operational capacity to undertake such on-site monitoring operations in order to prevent a lacuna in protection. It is arguable that ‘push-back’ operations might necessitate this in any case.
11. Unaccompanied children who enter the UK, are rescued at sea or are in UK territorial waters, will be entitled to have their asylum claim considered in the UK under Regulation 8 of the Dublin III Regulation, if they had a close relative or sibling who is already legally present here. Article 37 of the UNCRC states that children should only be detained as a measure of last resort and for the shortest appropriate period of time. The UK’s policy is not to detain children apart from a short period of time whilst awaiting for them to be collected by social services, however there is concern from monitoring groups that this policy is not being fully complied with. They are also entitled to have their asylum claim assessed in the UK by the fact that they have applied for asylum here. They should not be returned to a third country until their asylum claim has been properly processed and finally determined. When they arrive,

they should not be held in a short term holding facility, such as the Kent Intake Unit, but should be transferred into the care of a local authority under its powers deriving from section 20 of the Children Act 1989. In recognition of the disproportionate burden falling on some local authorities, such as Kent County Council, Central Government is obliged to ensure that the National Transfer Scheme is provided with the necessary funds to operate efficiently and in the best interests of these children. When assessing the age of these children, all local authorities must comply with the guidance that has been provided by a number of court decisions including that of the Supreme Court in *R (A) v London Borough of Croydon* [2009] UKSC 9.

12. UK and French authorities also have international obligations towards those who die or go missing and to their families. These obligations are reflected in the [Mytilini Declaration](#) adopted in 2018. The Declaration is also pertinent to this Inquiry given the current disastrous situation in which the Moria camp in Mytilini was destroyed by fire on 9<sup>th</sup>-10<sup>th</sup> September 2020. The conditions in camps in Italy, Greece and France, together with the lack of legal routes to claim asylum, are contributory factors in the increased numbers of people taking dangerous journeys, such as those across the Channel. This is because the UK has to honour its obligations to those who have justifiable claims to travel to the UK in order to claim asylum, including those displaced from Moria or living in other camps. Poor conditions in camps abroad potentially increases the numbers of those seeking to cross the English Channel.
13. In conclusion, it may be helpful to step back a little from what may seem rather complex and legalistic considerations. At the heart of the applicable provisions of international maritime and human rights law, two basic propositions are to be found. The first, as reflected in Article 98 of the Law of the Sea Convention, is the imperative of responding in a humanitarian spirit to those in peril at sea: the second, as reflected in Article 7 of the ICCPR and Article 3 of the ECHR, is that those within the jurisdictional ambit of the UK authorities are not to be treated in ways which are cruel, or inhumane. So put, an operational approach to the control of migration which has the potential to leave vulnerable people in small boats at sea and in a position of heightened vulnerability – and all the more so when this may include children, accompanied or not – seems at the most basic of levels to be difficult to justify.

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