



LL.M. THESIS

Migrants and Refugees at Sea

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## I. Introduction

Migrants and Refugees at sea are a particular vulnerable group. First of all the sea itself is dangerous, each year hundreds of persons die, trying to reach a better future. The phenomenon of migration via sea is not new itself.<sup>1</sup> After a period in the 90's, when people in Asia were trying to reach a better future by boats, the Mediterranean has now captured the attention of the international community as the deadliest stretch of water for migrants and refugees in 2011.<sup>2</sup>

The influx of persons is not the only factor causing an increased death toll, the boats of the migrants and refugees are often unseaworthy. This leads to an increasing demand for rescue-at-sea mission. Frontex, the European External Border Agency has uploaded footage of such an operation.<sup>3</sup> The increased number of rescues has raised challenging questions in the coastal States about how best to respond. Arguably, the possibility that those rescued might claim asylum constitutes a disincentive for coastal States to rescue at all.<sup>4</sup> Failures to help persons in distress occur on a regular basis.<sup>5</sup>

The reasons for persons to enter such boats are diverse. Some are refugees, fleeing from war in their home country, others just wish for a better future and want to find a better paying job somewhere else. Generally speaking one can differentiate between migrants, refugees and victims of human trafficking.<sup>6</sup> The term 'mixed migration' tries to describe this development.<sup>7</sup> This poses a challenge for the coastal States. The status of a person leads to a different level of protection. It is thus important to differentiate between those concerned.<sup>8</sup>

The status of the persons concerned is not, however, the only important factor in defining the scope of an enforcement measure. It is also crucial, to properly define the maritime zone in which a State is operating. The States powers are in no way universal on the oceans. In its own territorial waters, the States competence is naturally more extensive. The high seas, on the contrary, are governed by the primacy of the freedom of navigation. The States needs a justification to even visit a ship there.

The following paper shall examine, which limits the States must respect while operating at sea. This will be mirrored by an analysis of the rights of migrants and refugees at sea. Given the quantitative restriction of the present paper, the analysis cannot go into detail in each aspect. It focusses on the most controversial issues when it comes to States' action at sea. Excluded are legislative acts by the European Union. The paper will focus on the legal background in public international law as arising out of the relevant international agreements. Ultimately the nation States, who are member States of the relevant international treaties, are bound by those treaties. The member States of the European Union are almost entirely also parties to the relevant treaties. The compliance of the national legislations and of European Union legislation with the international public law rules will only be briefly addressed in this paper.

1 United Nations High Commissioner for Refugees (UNHCR), *Refugees and Asylum-Seekers in Distress at Sea - how best to respond?* (2011) no 2, available at: <http://www.unhcr.org/refworld/docid/4ec211762.html>.

2 UNHCR, *Mediterranean takes record as most deadly stretch of water for refugees and migrants in 2011* (2012), available at: <http://www.unhcr.org/refworld/docid/4f2818452.html>.

3 Frontex, *Lampedusa Rescue Operations, Material for the Justice and Home Affairs Council* (2011), available at: <http://tvnewsroom.consilium.europa.eu/event/justice-and-home-affairs-council-june-2011/lampedusa-rescue-operations/>.

4 V Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a fragmentary reading of EU Member States' obligation accruing at Sea' (2011) 23 *International Journal of Refugee Law* 174, 174.

5 Council of Europe, *Lives lost in the Mediterranean Sea: who is responsible?* (29 March 2012) no 13, available at: <http://www.unhcr.org/refworld/docid/4f7be86b2.html>,

6 E Papastavridis, 'Interception of human beings on the high seas: a contemporary analysis under international law' (2009) 36 *Syracuse Journal of International Law and Commerce* 145, 155.

7 UNHCR, *Refugees and Asylum-Seekers in Distress at Sea*, no 2.

8 European Commission, *Communication on migration* COM(2011) 248 final, 5.

## II. Interception at sea

The legal obligations and the rights of the coastal States differ from one maritime zone to another. The United Nations Convention on the Law of the Sea (UNCLOS, the Convention) differentiates between internal waters<sup>9</sup>, territorial sea<sup>10</sup>, contiguous zone<sup>11</sup> and the high seas<sup>12</sup>. Additionally, islands, archipelagic states and straits are governed by further specific legal regimes.<sup>13</sup>

The conflict between the freedom of the seas and the sovereignty of the coastal State has been the impetus for many developments in the law of the sea- starting with Grotius and his famous book *Mare Liberum* and finding its preliminary end in the 1982 UNCLOS convention.<sup>14</sup> The coastal States on the one side and the States that rely heavily on the freedom of navigation on the other side have been and still are the opponents in this discussion. The interest of the coastal State is to have as much sovereignty over the waters adjacent to its land territory as possible. The other side demands the freedom to pass through waters as they wish. The reasoning of the latter is mostly based on the interest of merchant ships. UNCLOS tries to reconcile these opposing interests. Still 'il reste par conséquence des zones d'incertitude et de controverse' as Vincent puts it.<sup>15</sup> In this context it is of particular relevance for the present paper whether and under which conditions a ship can be stopped that is flying a foreign flag.

### 1. Scope and definition of interception

The concept and the term interception is disputed. Even though it is not mentioned in the UNCLOS, it is a fairly prominent term in the Law of the Sea.<sup>16</sup> The term was interpreted firstly by the United Nations High Commissioner for Refugees (UNHCR) in 2000<sup>17</sup> and later amended by the Executive Committee (ExCom) of the UNHCR in 2003. This later definition is widely applied e.g. by the Council of Europe.<sup>18</sup> The definition reads as follows:

Interception is one of the measures employed by States to:

a) prevent embarkation of persons on an international journey;

9 United Nations Convention on the Law of the Sea (10 December 1982) 1822 *UNTS* 3 [cited UNCLOS], Article 8.

10 UNCLOS Article 2 et seq.

11 UNCLOS Article 33.

12 UNCLOS Article 86 et seq.

13 Not only are the above mentioned governed by special regimes, see Art. 34 et seq. for straits, Art. 46 et seq. for archipelagic states, Art. 121 for islands, the Convention offers all kind of special legal regimes for different geographical areas.

14 N Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 2; see also: D Rothwell and T Stephens, *The International Law of the Sea* (Hart Publishing Ltd. 2010) 2 et seq.

15 P Vincent, *Droit de la Mer* (Iarcier 2008) 17.

16 Through the Amendment to the FRONTEX Regulation (Regulation EU 1168/2011), the word 'interception' was for the first time included in the legal bases of FRONTEX.

17 The UNHCR defined interception as '*encompassing all measures applied by a State, outside its national territory* [emphasis added], *in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.*' See: UNHCR, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach* (2000) no 10, available at: <http://www.unhcr.org/refworld/docid/49997afa1a.html>.

18 Council of Europe, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants* (1 June 2011) 9, available at: <http://www.unhcr.org/refworld/docid/4ee0d4ac2.html>.

- b) prevent further onward international travel by persons who have commenced their journey; or
  - c) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;
- where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner.<sup>19</sup>

This definition does not only include measures on the high seas but also preventive measures that are conducted earlier. In addition to measures that are applied at sea, it also encompasses measures ashore. The focus of the definition is the State's intent to interrupt the movement of undocumented migrants and refugees altogether.<sup>20</sup> Excluded from this definition are rescue-at-sea missions. The intent of the action has to be, to prevent undocumented persons from reaching the coastal State's shore (in the case of interception at sea). The definition has erased the term 'outside its national territory' which was present in the earlier definition. It is to some degree odd, to erase an element that is becoming more and more essential in the factual conduct of an interception operation.<sup>21</sup> For it is a widely used practice to intervene even before the vessels enter the territorial sea.<sup>22</sup> This practice extends the coastal States' authority further seawards. Nessel has called this phenomenon very appropriately the 'externalization of borders'.<sup>23</sup>

Furthermore it is interesting how 'reasonable grounds' should be interpreted. This term is also used in the Convention itself,<sup>24</sup> although there is no definition of the term in the UNCLOS.<sup>25</sup> Since this ambiguous term is used to limit the fundamental principle of the freedom of navigation, more than a mere suspicion that the vessel is violating international laws is required.<sup>26</sup> Objective criteria are still needed to serve as an indication of 'reasonable grounds'.

For the purpose of this paper, only interception at sea is relevant. Included in the term is the diversion of boats from their current course. It might also include accompanying the vessels back to their point of departure.<sup>27</sup> The term also includes instances when the competent authorities take the passengers onto their own vessel and escort them back to the coastal State or the point of departure.<sup>28</sup> Different legal grounds are to be found in the UNCLOS. They range from the right of a coastal State to conduct the necessary steps to prevent the infringement of its rights<sup>29</sup>, to the actual boarding. It remains in question how broad the scope of interception is. Does the term also include

19 UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees* (1975 – 2009 Conclusion No. 1 – 109, 2009) no 97, available at: <http://www.unhcr.org/refworld/docid/4b28bf1f2.html>.

20 B Miltner, 'Irregular Maritime Migration: Refugee Protection Issues In Rescue and Interception' (2006) 30 *Fordham International Law Journal* 75, 80.

21 See further: B Miltner, 81 et seq. She is arguing that this definition even is counterproductive and obscures the view on the questionable legality.

22 G Goodwin-Gill, 'The Right to seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23 *International Journal of Refugee Law* 443, 450.

23 L Nessel, 'Externalized Borders and the invisible Refugee' (2009) 40 *Columbia Human Rights Law Review* 625, 650.

24 e.g. UNCLOS Art. 110 No. 1.

25 J Krajewski, 'Out of Sight, out of Mind? A Case for Long Range Identification and Tracking of Vessels on the High Seas' (2008) 56 *Naval Law Review* 219, ch VIII.

26 E Papastavridis, 191.

27 R Weinzierl and U Lisson, *Grenzschutz und Menschenrechte- Eine europarechtliche und seerechtliche Studie* (Deutsches Institut für Menschenrechte 2007) 23.

28 E Papastavridis, 152.

29 UNCLOS Art. 25.

the seizure of persons detected? The fact that stopping and searching the vessel is included in the term interception should not lead to the presumption that other follow-up measures are also incorporated.<sup>30</sup> Problematic is for example that seizure requires an offence being committed. Generally<sup>31</sup> this is not the case in with undocumented persons being transported.<sup>32</sup> One thus has to draw a line between seizure of persons and interception. Interception is solely the right to stop the ship and alter its course, this might include as a maximum the 'right of visit' and to search the ship, but taking persons into custody is not included in the term of interception.<sup>33</sup> This, however, does not exclude the seizure of a vessel itself though. It is also important to note that this classification does not prevent a State from taking persons on board of a vessel into custody, but this is than a measure that has to be examined separately. The seizure can be classified as a second step in the same operation, but distinct in its legal nature.<sup>34</sup> The issue will be briefly addressed further below.<sup>35</sup>

Another blurry line is between search and rescue-at-sea missions and interception. In practice it is hard to distinguish between these two. Vessels which are used by undocumented persons are often unseaworthy<sup>36</sup>, so the ship could be just as much in need of being rescued as an interception operation might be justified. The problem arises because different legal repercussions are attached to the two concepts. This is due to the fact that rescue has a predominantly humanitarian character, opposed to the enforcement character of interception.<sup>37</sup> The definition is only partly helping to differentiate between them. In the Preamble of the ExCom Conclusions it is said that, 'when vessels respond to persons in distress at sea, they are not engaged in interception'. On the other hand, the definition provides that measures which help the persons who are transported are included in the term 'interception'. This problem has been identified by the UNHCR but no solution has been found yet to differentiate properly between the two concepts.<sup>38</sup> One clear borderline, however, is when the authorities are responding to a distress call. This cannot be interpreted then as an interception operation but only as a rescue mission.<sup>39</sup> Ultimately the individual case is decisive.

Undoubtedly interception is applied more and more frequently by coastal States and has proven to be a tool to enforce the laws of said State.<sup>40</sup> The core cause for interception is however to prevent undocumented migrants from reaching the coastal State's shore.<sup>41</sup> The applied means may vary in the individual case, ranging from searching the boat to altering its course.

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30 D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 340.

31 The problem of human trafficking will be addressed below, see II 6 b).

32 V Moreno-Lax, 187.

33 E Papastavridis, 154.

34 D Guilfoyle, 9.

35 See II 4 b).

36 FRONTEx, *Annual Risk Analysis Quarterly Issue 2*, (April-June 2011) 20, available at: [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Fran\\_Q2\\_2011.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Fran_Q2_2011.pdf).

37 B Miltner, 82.

38 UNHCR, *Regional Conferences on Refugee Protection and International Migration in Central America, Western Africa, Eastern Africa and Asia - Selected Conference Materials* (2011) 176, available at: <http://www.unhcr.org/refworld/docid/4e0d6be02.html>.

39 UNHCR, *Conclusion on Protection Safeguards in Interception Measures* (2003) no 97, available at: <http://www.unhcr.org/refworld/docid/3f93b2894.html>.

40 UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea (Final version, including Annexes, 2002)* no 1, available at: <http://www.unhcr.org/refworld/docid/3cd14bc24.html>.

41 B Miltner, 85.

## 2. Exclusive jurisdiction of the flag state

The high seas are ruled by the principle enshrined in Art. 87 UNCLOS: the freedom of the high seas and in particular the freedom of navigation. Those rights though are not granted to the ship itself,<sup>42</sup> rather, the rights are derived from the flag State. The ship exercises the legal position of the State as is stated in Art. 90 and 91 UNCLOS. The States have the right to 'sail ships flying its flags'.<sup>43</sup> This link is the principle factor for maintaining discipline on the oceans.<sup>44</sup> A ship is subject to the exclusive jurisdiction of its flag State on the high seas.<sup>45</sup> The duties of the flag State consist of exercising its jurisdiction effectively over the ships flying its flag.<sup>46</sup> This exclusive jurisdiction is prescribed as a set of rights and obligations.<sup>47</sup> The flag State does not only carry the right to exclusive jurisdiction but also the responsibility to ensure that those rights are respected. This responsibility includes according to Art. 94 UNCLOS, the duties to exercise effective control in administrative, technical and social matters. Only the courts of a flag State are competent if a violation of the given rules has occurred. This general power is limited by the rights of the coastal state.<sup>48</sup>

A vessel flying without a flag does not have this protection, it can be visited by any military ship.<sup>49</sup> So far as interception goes, flag-less vessels cannot derive rights out of the UNCLOS. Maritime law allows the boarding and search of vessels without nationality.<sup>50</sup> They are subject to universal jurisdiction by all States.<sup>51</sup> This has been confirmed for a number of times by various US Courts.<sup>52</sup> In those cases stateless vessels are even referred to as 'international pariahs'. It is argued that this is derived out of the UNCLOS which is a treaty between States.<sup>53</sup> The UNCLOS grants rights and assigns duties only to States. Along with this exclusive competence comes the responsibility to regulate the seas and ensure that the statutes are enforced. Thus the vessel itself is virtually defenceless without a flag.<sup>54</sup> Such vessels are often the ones used by undocumented persons or their helpers.<sup>55</sup> This does not limit the passengers' rights derived from his personal nationality though. Thus it is wrong to assume that people on such vessels are not protected at all.<sup>56</sup> Still the flag a vessel is flying is decisive in determining its legal position.

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42 S Rah, *Asylsuchende und Migranten auf See- Staatliche Rechten und Pflichten aus völkerrechtlicher Sicht* (Springer Verlag 2009) 18.

43 UNCLOS Art. 90.

44 M Nordquist, *United Nations Convention on the Law of the Sea a Commentary vol 3* (Martinus Nijhoff Publishers 1991) Art. 91, 104.

45 UNCLOS Art. 92.

46 UNCLOS Art. 94.

47 R Weinzierl and U Lisson, 32.

48 See II 4.

49 UNCLOS Art. 110 1. (d).

50 K Wouters, 'The Marine I case- a comment' (2010) 22 *International Journal of Refugee Law* 1, 7.

51 J Paust, 'Nonstate Actor Participation in International Law and the Pretense of Exclusion' (2011) 51 *Virginia Journal of International Law* 977, 991.

52 *United States v. Shi*, 525 F.3d 709, 722 (9th Cir. 2008), No. 06-10389; *United States v. Caicedo*, 47 F.3d 370, 372-73 (9th Cir. 1995), No. 94-50147.

53 B Wilson, 'Submersibles and Transnational Criminal Organizations' (2011) 17 *Ocean and Coastal Law Journal* 1, 45 et seq.

54 T Zwinge, 'Duties of Flag States to Implement and Enforce International Standards and Regulations- and Measures to Counter their Failure to Do so' (2011) 10 *Journal of International Business and Law* 297, 320.

55 B Miltner, 105.

56 D Guilfoyle, 18.

### 3. Internal waters

In the internal waters the State has the exclusive jurisdiction.<sup>57</sup> They form part of its territory. The term “internal waters” includes also river mouths, estuaries, canals and the water within inland lakes, dams and seas.<sup>58</sup> The jurisdiction of the coastal State is undisputed in those waters and with few exceptions is unlimited. Foreign vessels can be visited and searched.<sup>59</sup> The migration rules apply and the state can conduct border controls. The state even can block the access to its ports.<sup>60</sup> A right to innocent passage only exists so far as a vessel is proceeding to a port.<sup>61</sup>

A state can thus apply all means it is able to apply according to its own laws, notwithstanding international human rights obligations.

### 4. Territorial sea

According to Art. 2 UNCLOS the sovereignty of the coastal State extends to an adjacent belt of sea. This is called the territorial sea. The end of the territorial sea, which exceeds a maximum of 12 nautical miles<sup>62</sup>, marks the end of the territorial scope of application of the jurisdiction of the coastal State.<sup>63</sup> Also in this area the coastal State has the exclusive jurisdiction- limited by the 'innocent passage' regime. The coastal state has - other than this exception - the full right to exercise its jurisdiction.<sup>64</sup> This vast extent of jurisdiction has recently been compounded with a more vigorous policing approach.<sup>65</sup> Art. 2 § 3 UNCLOS provides that 'the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law'. One of the biggest impediments to the States' sovereignty over its territorial sea is the right of 'innocent passage'.<sup>66</sup>

#### a) Innocent passage

The right of 'innocent passage' is a result of the conflict between States' sovereignty and the freedom of the seas. It forms a fundamental part in balancing those opposing concepts. The right of 'innocent passage' is a right that can only be exercised by vessels flying a flag. As stated above, the rights and the level of protection in the UNCLOS are derived from the States. A vessel which is used by migrants and refugees often does not fly a flag. One of the reasons not to fly a flag is that it makes deportation to their country of origin harder, so they voluntarily choose not to use a flag. More often, the ships that are used by migrants and refugees do not fulfil the lowest security standards, they are unseaworthy<sup>67</sup> and would also for this reason hardly be allowed to fly under any flag. Plus they are often used by smugglers who have an interest in staying under the radar of law enforcement.<sup>68</sup> Those ships thus cannot rely on the right of innocent passage. Those vessels can be

<sup>57</sup> P Vincent, 36; Vincent is using the term '*souveraineté totale*'.

<sup>58</sup> D Rothwell and T Stephens, 54.

<sup>59</sup> R Weinzierl and U Lisson, 33.

<sup>60</sup> D Rothwell and T Stephens, 55.

<sup>61</sup> UNCLOS Art. 18 1. (b).

<sup>62</sup> UNCLOS Art. 12.

<sup>63</sup> R Weinzierl and U Lisson, 33.

<sup>64</sup> According to Vincent during the Prohibition in the USA, Vessels were even intercepted by the US Marine to enforce the ban on alcohol. This was perceived of being justified, P Vincent, 47.

<sup>65</sup> D Rothwell and T Stephens, 73 et seq.

<sup>66</sup> B Miltner, 101.

<sup>67</sup> UNHCR, *Background Note* no 1.

<sup>68</sup> UNHCR, *Refugees and Asylum-Seekers in Distress at Sea* no 2.



stopped, searched and an entry into the territorial sea of the coastal State can be prevented.<sup>69</sup>

On the other hand ships flying under a flag of a State different than the coastal State are protected by this regime. According to Art. 24 UNCLOS the coastal State has to safeguard the right of 'innocent passage' through its territorial sea. This does not only include refraining from any activity that is an impediment of said right. The State also has to warn of any dangers inherent in its waters. Any interception is a violation of the flag State's right.<sup>70</sup> Still, the regime of 'innocent passage' is not without any boundaries. A passage is defined as

- (...) navigation through the territorial sea for the purpose of
- (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
  - (b) proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.<sup>71</sup>

This passage has to be conducted fast and without any unnecessary stops.<sup>72</sup> A vessel does not have the right to linger in the territorial sea of the coastal state without the intention to pass through. The ship's goal must be to traverse the territorial sea without entering the internal waters or processing from or to the internal waters (e.g. to enter a port).<sup>73</sup> Stopping is only permitted as far as it is necessary, for example to repair the engines or to rescue persons in distress. Since the regime of 'innocent passage' is an infringement on the coastal State's sovereignty it is defined very narrowly.

The second requirement of this right is the innocent character of the navigation. According to the Convention a passage is not innocent if it is prejudicial to the peace, good order or security of the coastal State.<sup>74</sup> Paragraph two of Art. 19 UNCLOS provides a list of examples. This list is exhaustive<sup>75</sup>. First of all it names activities that are a direct threat to the security of the coastal state such as espionage activities according to Art. 19 § 2. (c) UNCLOS. It also lists causing pollution<sup>76</sup> or any fishing activities<sup>77</sup> as activities which affect the character of the passage. Most importantly for this paper is Art. 19 § 2 (g).<sup>78</sup> It lists the unloading of persons contrary to the immigration laws as one of the not permitted activities.

A boat that is unloading migrants at the coast is thus not protected by the regime of innocent passage. It remains in question however, at what point the immigration laws are violated.<sup>79</sup> Rah asks whether a boat entering into the territorial sea with people who want to apply for asylum in the

69 R Weinzierl and U Lisson, 34.

70 S Rah, 22.

71 UNCLOS Art. 18.

72 See Vincent, 47 for a more profound analysis of the term 'passage'.

73 M Nordquist, *United Nations Convention on the Law of the Sea a Commentary vol 2* (Martinus Nijhoff Publishers 1991) Art. 18, 159.

74 UNCLOS Art. 19.

75 M Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 *International Journal of Refugee Law* 329, 356.

76 UNCLOS Art. 19 No. 2. (h).

77 UNCLOS Art. 19 No. 2. (i).

78 See also UNCLOS Art. 42 No. 1 (d) as an additional enforcement provision for straits.

79 S Rah, 27.

regular procedure can itself be considered contrary to the immigration laws of any State. For a coast guard ship it is hard to tell *prima facie*, whether or not a vessel is loaded with persons who want to apply for asylum or persons who want to circumvent the immigration procedures. It is not regulated in the UNCLOS which measures apply if a ship is carrying migrants without the proper papers.<sup>80</sup> The focal point is, whether subjective criteria play a role in defining a conduct as contrary to immigration rules or rather, if only the objective conduct is decisive.

According to German law for example, a foreigner enters Germany the moment he reaches a border crossing point.<sup>81</sup> When entering the territory by sea, even though already in the German territorial sea, this process is shifted to the port.<sup>82</sup> Foreigners are perceived to have entered only when they reached the border crossing point at the port. This rule objects declaring any innocent passage as not innocent before the actual process of unloading the passengers in a place other than a port. Thus it would prevent the interception of a boat carrying migrants or refugees. Interestingly the Ministry of the Interior added another provision. The afore mentioned rule does not apply to foreigners who have the intention to circumvent the regular border crossing procedures.<sup>83</sup> Here, a subjective element is added. It is also mentioned expressly that the right of innocent passage does not apply.

The wording used in Art. 19 § 2 (g) UNCLOS gives no indication as to whether a subjective element is implied. It refers only to the violation of the immigration laws of the coastal State. Carrying migrants *per se* is not a violation of the obligations arising out of the UNCLOS.<sup>84</sup> Whether an objective innocent action can be perceived as being contrary to the coastal State laws, only due to the alleged intention to act contrary to the immigration laws of said State, remains questionable. It has to be taken into account that the interception of a flag State's vessel is a violation of its sovereignty and the great role that the regime of 'innocent passage' plays in the carefully balanced interplay between freedom of the seas and coastal State sovereignty. The conclusion that the reference to the immigration law of the coastal State necessarily includes a subjective element may not address the issue adequately.

In the famous Corfu Channel case of the International Court of Justice it was discussed how an 'innocent passage' is classified, long before the UNCLOS in its current form came into force.<sup>85</sup> Even though in the Corfu Channel case the subject matter of the dispute was the passage of military ships through a strait, the court developed criteria for defining the innocent nature of a passage. In the case the Albanian authorities had the misconception that the ships of the United Kingdom were passing with the attitude to intimidate. These measures are according to the court no violation of the sovereignty of Albania.<sup>86</sup> However, the court states, that 'the attitude must have been (...) to demonstrate such force that [Albania] would abstain from firing again on passing ships'.<sup>87</sup>

Notwithstanding that a subjective approach leads to the conclusion that the passage was intended

80 R Weinzierl and U Lisson, 34.

81 § 13 (2) Aufenthaltsgesetz Deutschland.

82 Bundesrepublik Deutschland, *Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz* [General Administrative Regulation to the Law on Residence] (26 October 2009) Art. 1 zu § 13- Grenzüberschritt, No. 13.2.6.1, available at: <http://www.verwaltungsvorschriften-im-internet.de/pdf/BMI-MI3-20091026-SF-A001.pdf>.

83 Allgemeine Verwaltungsvorschrift 13.2.6.2.

84 E Papastavridis, 163.

85 International Court of Justice *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)* Judgement of 9 April 1949, ICJ Reports 1949, 4 et. seq., available at: <http://www.icj-cij.org/docket/files/1/1645.pdf>.

86 *Corfu Channel Case*, 31.

87 *Corfu Channel Case*, 31.

not to be innocent, the objective manner in which it was conducted is decisive. A solely subjective approach is thus not sufficient to declare a passage not to be innocent. Applied to the case of migrants entering the territorial sea of a coastal State, an objective indication of a violation is necessary to declare a passage prejudicial to the peace, good order or security of the coastal State.

Rah notes that prior violations of vessels of the same kind might sufficiently justify States' actions against such vessels.<sup>88</sup> Following this approach each vessel that is carrying migrants and refugees cannot rely *prima facie* on the right of innocent passage due to the practice of vessels unloading migrants contrary to immigration laws. Moreno-Lax comes to a different conclusion stating that the unloading of persons is not even covered by the term 'passage'.<sup>89</sup> This thesis ignores that the example of Art. 19 § 2 (g) UNCLOS was expressly included to regulate illegal immigration. The unloading of persons is the most common way such a violation is conducted. The idea to limit the sovereignty of the coastal State can hence not be derived from the Convention.<sup>90</sup>

To conclude, the example of Art. 19 § 2 (g) covers not only the process of unloading persons but also the intention to do so if indications for such a behaviour are given. This Article is complemented by Art. 21 UNCLOS.

#### b) Means of the coastal State

The coastal State is limited in its application of countermeasures in the case of a violation of the innocent passage regime. Firstly it has to be mentioned that the State generally has the capacity to regulate the innocent passage according to Art. 21 UNCLOS, but certain restrictions apply. The capacity even goes so far as to temporarily suspend the right of innocent passage.<sup>91</sup> The German administrative regulation which was mentioned above is a good example of this rule. The room for maneuver of the State still is narrow. Art. 24 UNCLOS provides that the coastal State 'shall not hamper the innocent passage (...) except in accordance with this Convention'. Also the Article prohibits any requirements having the practical effect of preventing the right of 'innocent passage'. This article balances the duties of a foreign ships exercising the right of 'innocent passage' with the coastal State's duty not to hamper the passage.<sup>92</sup>

But Art. 21 § 1 (h) UNCLOS expressly allows for regulations relating to 'innocent passage' in the field of preventing the infringement of immigrations laws. The coastal State has thus already within the concept of 'innocent passage' a broad capacity to regulate.<sup>93</sup>

The focal point here is, under which conditions a State can react if a passage is rendered prejudicial to the peace, good order or security of the coastal State. Art. 25 § 1 UNCLOS provides that 'the coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent'.<sup>94</sup> Such suspension is not to discriminate in form or fact among foreign ships.<sup>95</sup> The competent authorities may therefore intercept a ship and search it. Only those measures are deemed necessary where no less intrusive means exists. The competent authorities also may block the access to a port or set up certain requirements to entry.<sup>96</sup> Not applicable is § 3 of Art. 25 UNCLOS

<sup>88</sup> S Rah, 29.

<sup>89</sup> V Moreno-Lax, 192.

<sup>90</sup> M Pallis, 357 et seq.

<sup>91</sup> D Rothwell and T Stephens, 76.

<sup>92</sup> M Nordquist, *vol 2* Art. 24, 222.

<sup>93</sup> Notwithstanding Human Rights obligations which will be tackled below.

<sup>94</sup> See also: V Moreno-Lax, 190.

<sup>95</sup> M Nordquist, *vol 2* Art. 25, 229.

<sup>96</sup> S Rah, 57.

to the case of a vessel carrying migrants and refugees. According to this Article, a State can suspend the right of 'innocent passage' entirely. This capacity is limited through the requirement that it has to serve as an essential protection to the security. The Articles gives 'weapons exercises' as an example. One can only derive from this wording that military security is meant.<sup>97</sup> There are no indications present which justify an extension of this wording to asylum seekers.

This right to take the necessary steps is limited by States' obligation to Rescue-at-sea in distress.<sup>98</sup> Notwithstanding certain limitations, States can derive the right to hamper the passage of a vessel through its territorial sea from the Convention. Goodwin-Gill also includes in the acceptable measures the right to force a ship to leave the territorial sea.<sup>99</sup> The law of the coastal State can be applied so that a seizure of the persons on board is part of its competence.

It remains questionable however, whether or not the use of force is allowed. This includes the stopping of a vessel, the search of the ship and if necessary the seizures of the persons on board. The coastal State is of course capable of relying on the right to self-defence.<sup>100</sup> The Convention itself does not provide an answer to this question. Limitations to the exercise of powers can be found in Art. 225 UNCLOS. Those limits are very broad and only exclude actions that 'endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.' This provision is not meant to regulate the use of force according to Art. 25 UNCLOS. It is only regulating that the safety of the ship has to be taken into account.<sup>101</sup>

The reference to the UN Charter in Art. 301 UNCLOS also offers no insight to the question of the allowance of force. The literal sense of Art. 25 UNCLOS on the other hand does not preclude the use of force if it is necessary. Further, Art. 2 § 1 UNCLOS states that the 'States' sovereignty 'extends beyond its lands territory', and the use of force by the States' authorities on their own territory is undoubtedly recognised. Art. 2 § 4 of the UN-Charter, which prohibits the application of force in the international scene also does not exclude the use of force. The action of a military ship is not contrary to territorial integrity or the political independence of the flag state. According to Papastavridis 'the use of force in such law enforcement activities should not be *ipso jure* disallowed',<sup>102</sup> since no treaty provides a clear answer. In particular, it follows that police actions should be allowed.<sup>103</sup> Such use of force can nevertheless only be used in a proportional and appropriate manner.<sup>104</sup> This proportionality has to be considered between the means and the ends.<sup>105</sup> Additionally force can only be permitted if it is a necessary means for a justified end. Also a justifying provision is necessary, since the use of force is an exception to the general rule.<sup>106</sup> This question was decided by the International Tribunal for the Law of the Sea in Hamburg in 1999. The Tribunal explained, that 'force must be avoided as far as possible and, where it is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances'.<sup>107</sup>

This is primarily derived from public international law and therefore should also apply in the case

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97 M Pallis, 357.

98 See below III 2.

99 G Goodwin-Gill, *The Refugee in International Law* (2nd edn Oxford University Press 1996) 164.

100 Art. 51 Charter of the United Nations.

101 D. Guilfoyle, p. 293.

102 E Papastavridis, 212.

103 D. Guilfoyle, 275.

104 D Rothwell and T Stephens, 422 et seq.

105 G Goodwin-Gill, *The Refugee in International Law* 162.

106 D Guilfoyle, 276.

107 International Tribunal for the Law of the Sea, *The M/V "Saiga" (No.2) Case* (1 July 1999) case no 2, no 155.

of stateless vessels. The power to stop and search a vessel and use force if no other less intrusive measure exists lies within the coastal States capacity. One could argue whether the turning away of refugee boats by the coastal State is less intrusive than taking the passengers into custody. But given the fact that the vessels are often in a bad condition and the risk of the loss of lives is imminent, this conclusion cannot be drawn. In individual cases the conclusion might be different though.<sup>108</sup> The use of force continues to constitute an exceptional measure.<sup>109</sup>

### c) Actions in the territorial sea of a third State

To shift the control measures of the coastal State closer to the State of departure of the vessels which carry persons, States sign bilateral agreements which grant the right to exercise control measures. Whether this is done to prevent unseaworthy vessel to endanger the life of the passengers or to stop those vessels long before they can enter the territorial sea of the State of destination is an open question. This tool is frequently used in the Mediterranean.<sup>110</sup> An example is the bilateral agreement between Libya and Italy.<sup>111</sup> Libya has given far reaching controlling rights to foreign authorities.<sup>112</sup>

Spain and Morocco also have such agreements which allow Spanish ships to interfere in Moroccan waters.<sup>113</sup> Generally speaking the transfer of control rights from one State to another State does not pose a problem.<sup>114</sup> The State then has the full capacity of the coastal State when it comes to its immigration laws.<sup>115</sup> Through such treaties even the involvement of third states can be legally furnished.<sup>116</sup> This rule comes regularly into play relating to agreements in the Mediterranean Sea. The conclusion of the agreement between Spain and Senegal was for example followed by an FRONTEX action where different Member States of the EU participated.<sup>117</sup> It is expressly mentioned in the FRONTEX founding regulation that the agency may 'cooperate with the authorities of third countries competent in matters covered by this Regulation in the framework of working arrangements concluded with these authorities'.<sup>118</sup> Still one has to take into account, that such a treaty, which is giving a State other than the coastal State or the flag State a right to search and visit a vessel, is an exception to the rule. As was stated by an Arbitrary Tribunal in the *Wanderer* case, those treaties thus must be interpreted '*stricto jure*'.<sup>119</sup> The State giving the expressive permission to perform enforcement measures in its territorial sea to another State, still retains sovereignty over its territorial sea.<sup>120</sup>

108 See below the influence of the non-refoulement principle on limiting the State's powers III 3.

109 P Gautier, *The Exercise of Jurisdiction over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction* (E. Franckx & P. Gautier eds, Bruyant 2010) 87.

110 R Weinzierl and U Lisson, 34.

111 European Court of Human Rights (ECHR), *Hirsi Jamaa and Others v. Italy* App no 27765/09 (23 February 2012) no 18 et seq.

112 S Hamood, 'EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?' (2008) 21 *Journal of Refugee Studies* 19, 38.

113 A Betts, 'Towards a Mediterranean Solution? Implications for the Region of Origin' (2006) 18 *International Journal of Refugee Law* 652, 660.

114 R Weinzierl and U Lisson, 79; E Papastavridis, 179.

115 E Papastavridis, 178.

116 Vienna Convention on the Law of the Treaties (23 May 1969) 1155 *UNTS* 331, Art. 36.

117 E Papastavridis, 182.

118 Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2004) *OJL* 349/1, Art. 14.

119 International Arbitral Awards, *Owners, Officers and Men of the Wanderer (Gr.Br).v. United States* (9 December 1921), Reports of International Arbitral Awards vol VI, 71.

120 B Miltner, 118.

#### d) Conclusion

In the State's territorial sea the powers of the coastal State are broad. Limits can firstly be found in the regime of 'innocent passage'. A coastal State has to provide innocent passage to all vessels flying a flag. Ships that carry migrants and refugees at sea can only rely on this right, if they are not on a ship that does not fly any flag. Those ships can be controlled any time by the coastal State authorities. Ships that are flying a flag can only be controlled under the condition that the passage becomes prejudicial to the peace, good order or security of the coastal State. Carrying migrants is considered to be such an infringement if it is contrary to the immigration rules of the coastal State. The entry into the territorial sea without the proper papers is an indication for such a violation. Prior conduct is also a justification to suspect *prima facie* that a boat of the same kind has the intention to circumvent the immigration laws. A passage which has become non-innocent can be intercepted by the coastal State. The coastal State's capacities are limited by the requirement that each action has to be necessary, proportional and appropriate. The State can further sign agreements with other States and derive from those agreements the right to control ships according to the coastal State's capacity. Those rights can yet only provide for the rights expressly derived from the agreement.

### **5. Contiguous zone**

The contiguous zone is the strip of sea that is directly attached to the territorial sea. It may extend to a maximum of 24 nautical miles.<sup>121</sup> This zone is legally a part of the high seas in which the freedom of navigation is the general principle.<sup>122</sup> But Art. 33 UNCLOS provides exceptions to that rule. The coastal State has the capacity to prevent infringements when it comes to custom, fiscal, immigration or sanitary matters.<sup>123</sup> The State further has the power to 'punish infringement of the above laws and regulations committed within its territory or territorial sea.'<sup>124</sup> This paragraph provides that the coastal State authorities can apply their national laws even outside the State's territory. This rule though applies only to offences committed within the territory. It hence does not include infringements that have been conducted in the contiguous zone itself. The State only has the capacity to 'prevent' infringements there. Undoubtedly the State nevertheless has the power to exercise control in this zone.<sup>125</sup> As stated above, States use this power more and more to prevent access to their territorial sea altogether for vessels carrying migrants and refugees all together.<sup>126</sup>

It is necessary to examine the scope of States' power. The scope of enforcement is actually more limited than often perceived.<sup>127</sup> The actions must be consistent with the purpose of the zone.<sup>128</sup> It remains questionable at what stage an offence has been committed since the infringement of the immigration law only begins with entering the territorial sea. It also has been stated that the interception of vessels is not a right available to States at all.<sup>129</sup> As stated above, probability is a decisive factor. Goodwin-Gill comes to the same conclusion: 'If reasonable and probable ground to

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121 UNCLOS Art. 33 No. 2.

122 R Weinzierl and U Lisson, 34.

123 D Rothwell and T Stephens, 80.

124 UNCLOS Art. 33 1. (b).

125 S Rah, 65.

126 D Rothwell and T Stephens, 74.

127 D. Guilfoyle, 13.

128 G Goodwin-Gill, *The Refugee in International Law* 166.

129 However this presumption is no longer hold, since the Smuggling Protocol provides reasonable grounds for interceptions, B Miltner, 105.

believe that a vessels intended purpose is to enter the territorial sea in breach of the immigration law, the coastal state may have the right to stop and board the vessel.<sup>130</sup>

Furthermore the standard of proportionality applies.<sup>131</sup> This principle and the requirement of necessity leads in the contiguous zone to the presumption, that only the above mentioned actions, stopping and boarding are permitted.<sup>132</sup> The wording of the Article supports this view in only allowing the 'necessary' control. The custody and the escort of a vessel to a safe harbor is not authorized.<sup>133</sup> Some asylum-seekers might possess the required papers so that no infringement of the immigration laws is imminent in the vessels cruise.<sup>134</sup> Decisive here again is the individual case. The State thus has the right to intercept incoming vessels if it suspects migrants without the proper papers on board. On the other hand the State is more limited than in its territorial sea, since it is legally more critical to assume an infringement of the coastal States immigration laws far beyond its border. Also, the State does not have the capacity to punish the intention to reach its border.

## 6. High seas

The above mentioned conflict between the freedom of navigation and the sovereignty of the coastal State does not exist in the high seas. There the supremacy of the navigation is undisputed.<sup>135</sup> Each State has the right to let ships fly under its flag. The freedom of navigation is applicable to every State to the same degree.<sup>136</sup> Coercive measures are generally forbidden. Only the flag State may exercise its jurisdiction over the ship.<sup>137</sup> Measures which are applied in the contiguous zone or the territorial sea such as the stopping and searching of vessels or the alteration of the course, are generally prohibited in the high seas against vessels which fly under a flag. Flag-less vessels on the other hand can be subject to such measures.<sup>138</sup> They cannot rely on the freedom of navigation. The freedom of navigation still not grants limitless freedom to vessels which are flying a flag. On limit is found in the 'right of visit'<sup>139</sup> for Warships.<sup>140</sup>

### a) The Right of hot pursuit

Before addressing the 'right of visit' the right of hot pursuit has to be mentioned. It is a right that is deduced from the coastal State's rights but is applied on the high seas. This hot pursuit may take place according to the Convention 'may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State'.<sup>141</sup> This right is only eligible if the hot pursuit has started within the internal waters, the territorial sea or the contiguous zone.<sup>142</sup> It has to continue uninterrupted and has to stop as soon as the ship

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130 G Goodwin-Gill, *The Refugee in International Law* 166.

131 S Rah, 65.

132 R Weinzierl and U Lisson, 34.

133 This is only true as long as the ship is not unseaworthy. In this case the principles of Search and Rescue apply, see below III 2.

134 M Pallis, 354.

135 Beckert E and Breuer G, *Öffentliches Seerecht* (de Gruyter 1991) 105.

136 R Weinzierl and U Lisson, 35.

137 UNCLOS Art. 87 et seq.

138 R Weinzierl and U Lisson, 35.

139 UNCLOS Art. 110.

140 S Rah, 70.

141 UNCLOS Art. 111 No. 1.

142 UNCLOS Art. 111 No. 1.

reaches the territorial sea of any other State. This right might apply in the case of immigration control when a vessel, which entered the territorial sea contrary to the immigration rules as described above, tries to escape back to the high seas.<sup>143</sup> Such a ship can be arrested even if it is on the high seas and then escorted back to a port of the coastal State.<sup>144</sup>

#### b) The Right of visit

Art. 110 UNCLOS provides grounds for justification for interception missions against foreign vessels on the high seas. Art. 110 UNCLOS confers upon warships, and other duly authorised ships in government service, a high seas 'right of visit' against certain ships.<sup>145</sup> It is important to refer to the wording of the article which provides 'is not justified in boarding [the ship] unless there is reasonable ground'. This underlines the exceptional character of the rule. It is a limitation to the exclusive jurisdiction provided in Art. 92 UNCLOS.<sup>146</sup> Two of them are relevant in the case of undocumented persons. Reasonable grounds have to exist which suggest that 'the ship is engaged in the slave trade'<sup>147</sup> or is 'without nationality'<sup>148</sup>. If those requirements are fulfilled boarding and searching the vessel is justified. Paragraph 2 indicates the purpose of the visit and the method of its performance.<sup>149</sup> It has to be mentioned here again, that vessels flying no flag enjoy no protection from any State's action of any kind.<sup>150</sup> Having stated that, in the case of Art. 110 the warship also may proceed and request proper documentation. Ultimately, the personnel might examine the whole ship, though only with 'all possible consideration'.<sup>151</sup> Further examination is not to be used for purposes unless the stopping of the ship is warranted.<sup>152</sup> Police actions with brute force are consequently excluded. This provision puts a high burden of justification on the intercepting State. Additionally, a wrongful act might lead to a claim for justification.<sup>153</sup> Since this claim only comes into force in the case of an unjustified boarding, it may be applied often in the case of intercepting vessels which carry undocumented persons. They are easily identified through their overload and thus give reasonable grounds to believe that they do not fly a proper flag. Still this proves the point, that the regime of the 'right of visit' is a strict set of rules.

Also not encompassed is also the permission to seize persons or goods.<sup>154</sup> One can further distinguish between the right *in rem* and the right *in personam*.<sup>155</sup> According to that, a legal ground is needed to exercise jurisdiction over persons on board and the ship itself. The vessel might be seized, but the persons are still protected under their nationality. It is the State of origin then, which has the sole capacity to judge possible violations.<sup>156</sup> The 'right of visit' is thus very limited.<sup>157</sup> This all has to be taken into consideration under the premise that the ability of States to stop and search

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143 R Weinzierl and U Lisson, 35.

144 UNCLOS Art. 111 No. 7.

145 D Rothwell and T Stephens, 166.

146 M Nordquist, *vol 3* Art. 110, 245.

147 UNCLOS Art. 110 No. 1 (b).

148 UNCLOS Art. 110 No. 1 (d).

149 M Nordquist, *vol 3* Art. 110, 245.

150 See above II. 2. or e.g. Brown T, 'For the "Round and Top of Sovereignty": Boarding Foreign Vessels at Sea on Terror-Related Intelligence Tips' (2010) 59 *Naval Law Review* 63, 68.

151 UNCLOS Art. 110 No. 2.

152 M Nordquist, *vol 3* Art. 110, 245.

153 UNCLOS Art. 110 No. 3.

154 D Guilfoyle, 340.

155 E Papastavridis, 162.

156 It is hard to imagine that a violation has taken place as long as the vessels are on the high seas anyway.

157 V Moreno-Lax, 187 et seq.



flag-less vessels is one of the main justifications that is used by States.<sup>158</sup> Vessels used by migrants often do not fly under a specific flag. Against those ships the State can exercise its jurisdiction without the above mentioned limits. The requirements above primarily describe the steps that have to be taken to verify the suspicion of flying without a flag. If they prove to be right, the State can exercise its jurisdiction.

The second ground for justification of an interception mission besides the lack of nationality is the slave trade clause.<sup>159</sup> The first Convention against Slave Trade entered into force in 1926.<sup>160</sup> Since then the rules against slavery have developed rapidly. The prohibition of slave trade is now considered to be *jus cogens*.<sup>161</sup> In the UNCLOS the anti-slave trade rules are also strict. The UNCLOS provides in Art. 99 that the transport of slaves has to be suppressed with all means by all States. Slaves are considered to be free. It remains in question, whether human trafficking can be considered as a modern form of slave trade. Slave trade in the traditional sense no longer exists. Human trafficking is not mentioned in the UNCLOS in any way.

The Human Rights Council of the United Nations sees human trafficking as a form of contemporary slavery.<sup>162</sup> These definitions have the downside of being too broad though. If forms of domestic violence and economic exploitation are enfolded in the same definition of modern forms of slavery as human trafficking by the Human Rights Council of the United Nations, it necessarily weakens the term. The way UNCLOS understands the term slavery may be very broad, due to the purpose of the Convention. It is an instrument to regulate the sea and not to protect human rights. Additionally human trafficking and the slave trade have a different character as a crime. Slave trade was a constitutionalized crime. It was at least tolerated by governments if not supported. The slaves were *de jure* owned by their masters.<sup>163</sup> Human trafficking on the other hand is a crime committed by individuals. Additionally, one could argue, that the UNCLOS is only addressed at States. To penalize individual crimes is not the intention of the Convention. Other protocols serve this end. On the high seas the Convention addresses only issues that are a threat to maritime security such as piracy<sup>164</sup> or threats committed by States. Guilfoyle argues on this line that slave trade is a matter of only historic concern.<sup>165</sup> The term 'slave' cannot be transferred to cases of human trafficking. Art. 110 § 1 (b) thus does not provide sufficient legal ground to act against vessels that are trafficking human beings. But this reading falls short of a couple of issues.

Firstly the term needs to be interpreted from a modern day perspective. The helplessness and exploitation of trafficked humans constitutes itself for the victim in roughly the same way as in cases of slavery. The victims of human trafficking can be equated to slaves.<sup>166</sup> The UN defines human trafficking among others as '(...) slavery or practices similar to slavery (...)'.<sup>167</sup> Similarly

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158 B Miltner, 105.

159 UNCLOS Art. 110 No. 1 (b).

160 International Convention to Suppress the Slave Trade and Slavery (25 September 1926) 60 *UNTS* 254.

161 P Vincent, 131.

162 UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the Working Group on Contemporary Forms of Slavery on its Thirty-first Session* (22 August 2006), A/HRC/Sub.1/58/25, available at: <http://www.unhcr.org/refworld/docid/45c30b5cc.html>.

163 E Papastavridis, 165.

164 UNCLOS Art. 100 et seq.

165 D Guilfoyle, 77.

166 E Papastavridis, 173.

167 Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime (15 November 2000) [Trafficking Protocol] 2237 *UNTS* 319, Art. 3 (a).

several governments understand human trafficking as a form of modern-day slavery.<sup>168</sup> It still is slavery, which manifests itself just in a different way. Whether the above referred list of the Human Rights Council which defines human trafficking is too broad is not decisive as long as human trafficking itself can be subsumed under the term slavery. Rothwell & Stephens agree and see in human trafficking a modern form of slavery.<sup>169</sup> It is a recognized international crime, which shares similarities. Those similarities can be phrased as 'profiting from human beings against their will for economic purposes'.<sup>170</sup> Also one has to take into account the basic rules of treaty interpretation. The principle of effectiveness is one of those rules. Art. 31 § 1 of the Vienna Convention on the Law of the Treaties provides 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The term slavery hence has to be interpreted in the way that best serves its purpose. To abolish slavery in all its manifestations is one of the common objectives of public international law.<sup>171</sup> This reasoning is also supported by the *Hirsi* case that was recently decided by the European Court of Human Rights. Judge Pinto de Albuquerque accepted an analogy between these forms of trade.<sup>172</sup>

To conclude, Art. 110 § 1 (b) can also be interpreted in giving judicial grounds for intercepting boats which carry victims of human trafficking. So far States do not use this legal ground as a justification.<sup>173</sup> This might be due to the fact, that it is hard to distinguish between persons being trafficked and persons being voluntarily smuggled. The State can only board if it has sufficient information about the character of the passengers on board. This information can only be acquired in close cooperation with the State of departure. Also it has to be added that States can intercept vessels if they suspect them of trafficking human beings on the grounds of Art. 110 § 1 (b), but the responses to fight this crime are distinct from the ones concerning slave trade.<sup>174</sup> It can be assumed that the absence of a nationality continues to be the most relevant ground for intercepting vessels on the high seas.<sup>175</sup>

The question arises, whether the States' interests of preventing an infringement of its immigration laws can be properly achieved on these grounds. As described above, the scope of the 'right of visit' is limited. Even if enforcement measures against a state-less vessel may be broader<sup>176</sup>, the seizure of persons is not allowed.<sup>177</sup> Neither encompasses Art. 110 UNCLOS the turning away of refugee boats. One has to understand Art. 110 as an exception to the rule of the freedom of navigation. It is not designed to give far reaching rights to military ships on the high seas. It only gives inspecting rights. This is all the more true in comparison to the capacities of the coastal State in its territorial sea. As previously mentioned, stateless vessels cannot rely on this reservation.

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168 United Kingdom, *Action Plan on Tackling Human Trafficking*(2007), available at:

[http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/UK\\_Action\\_Plan\\_to\\_Combat\\_Human\\_Trafficking\\_en.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/UK_Action_Plan_to_Combat_Human_Trafficking_en.pdf);

See for the United States of America: Reynolds J, 'Universal Jurisdiction to Prosecute Human Trafficking: Analyzing the Practical Impact of a Jurisdictional Change in Federal Law' (2011) 34 *Hasting International and Comparative Law Review* 387.

169 D Rothwell and T Stephens, 165.

170 S Rah, 70.

171 E Papastavridis, 164

172 ECHR, *Hirsi vs Italy*, Concurring Opinion of Judge Pinto de Albuquerque.

173 E Papastavridis, 159.

174 D Rothwell and T Stephens, 165.

175 E Papastavridis, 159.

176 S Rah, 70.

177 E Papastavridis, 153.

Another ground on which enforcement measures may be applied to vessels under a foreign flag is a bilateral treaty according to Art. 110 § 1 UNCLOS.<sup>178</sup> Those treaties will not be addressed in the current paper. The relations between the Mediterranean countries and the EU are mostly regulated by the EU itself. In the case of Morocco, the EU provides a framework in which cooperation is envisaged.<sup>179</sup> In this framework the EU plays an ever increasing role. This is the reason the present paper won't address this issue with any more detail.

Other grounds for justification, which give further rights to the inspecting warship, are not included in the UNCLOS. The States are well aware of the limited scope. Specific Convention attempt to fill the gap and clarify the right against stateless vessels. In the case of illegal immigration it was addressed by the States through the Protocol against Smuggling.<sup>180</sup>

## 7. Smuggling Protocol

The Protocol against the Smuggling of Migrants by Land, Sea and Air is an instrument which is designed to combat smuggling.<sup>181</sup> It has 129 Member States. The United Nations just recently estimated that the money earned through organised crime add up to \$650 billion per year.<sup>182</sup> Hereby smuggling plays a decent part. It is so attractive to organised crime, because it has at sea only a low risk of detention.<sup>183</sup> The Smuggling Protocol is an supplementing instrument to the United Nations Convention against Transnational Organised Crime.<sup>184</sup> As such the Convention is in its wording closely linked to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>185</sup> An even closer link combines the Smuggling Protocol with the Trafficking Protocol. In this Protocol the focus lies on the forced migration in the form of human trafficking. It does not provide further competences in controlling migrants at sea and is not further addressed.<sup>186</sup>

The Protocol is an instrument to foster the cooperation in the area of fighting illegal immigration. It applies only seawards from the territorial sea.<sup>187</sup> Several cooperation schemes from information exchange duties to legislative proposal are included. The Protocol is not primarily designed to

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178 See also R Weinzierl and U Lisson, 35.

179 See for more information e.g. M Gil-Bazo M, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited' (2006) 18 *International Journal of Refugee Law* 571.

180 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000) [Smuggling Protocol] 2241 *UNTS* 507.

181 As such it has to be mentioned, that this instrument joins the list of instruments which are hampering the freedom of the seas. Another example is the Proliferation Security Initiative. According to some authors this raises concerns, notwithstanding its validity. See e.g.: R. Wolfrum, Freedom of Navigation: New Challenges, in: Nordquist M, Koh T and Moore J (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff Publishers 2009).

182 UN Office on Drugs and Crime, *Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Organized Crimes* (2011), available at: [http://www.unodc.org/documents/data-and-analysis/Studies/Illicit\\_financial\\_flows\\_2011\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf).

183 D Guilfoyle, 182.

184 Smuggling Protocol Art. 1 § 1.

185 D Rothwell and T Stephens, 437.

186 See for a more profound comparison of the two Protocols: A Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/ Migration and Labor' (2007) 36 *Denver Journal of International Law and Policy* 109.

187 E Papastavridis, 191.

enhance the legal protection of the smuggled persons but to fight organised crime. It is reflecting the interests of the States.<sup>188</sup> Through this Protocol maritime interception is implicitly recognised as a legitimate tool for border control.<sup>189</sup> Migrants rights are still mentioned in several articles of the Protocol though. The Protocol contains a 'saving clause', preventing any treaty provision from infringing individual rights.<sup>190</sup> Also it is stated expressly that migrants themselves shall not become liable to criminal prosecution<sup>191</sup>, but the individuals behind the smuggling. The protocol therefore makes it necessary to differentiate between smugglers and victims.<sup>192</sup> Art. 6 demands the criminalisation of certain offences which are related to smuggling like the provision of fraudulent documents.

The Protocol provides a number of competences for the Member States. It is supplementing the rights according to the UNCLOS. In the case of a vessel which is smuggling migrants and is flying an authorised flag, the limited '*right of visit*' gives no legal grounds for enforcement measures. Only a bilateral treaty can remedy this according to Art. 110 UNCLOS. The Smuggling Protocol now provides that:

A State Party that has reasonable grounds to suspect that a vessel (...) flying the flag (...) of another State Party is engaged in the smuggling of migrants (...) request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

- (a) To board the vessel;
- (b) To search the vessel; and
- (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures (...) as authorized by the flag State.<sup>193</sup>

This widens the capacity of the States and clarifies its competences decisively. Firstly this provision requires 'reasonable ground'. This can only be understood as amounting to more than a mere suspicion. Papastavridis demands objective criteria to determine the assumption.<sup>194</sup> The State is allowed to take the 'appropriate' measures. As stated above in the context of the means of the coastal State, this term is broad. Patricia Mallia the term has to be interpreted that 'the authorisation of the flag State is for the requesting State to take all appropriate measures deemed necessary by the requesting State'.<sup>195</sup> The custody of the persons on board as well as maneuver to force the diversion of boats can be encompassed by the wording of Art. 8. The limitation when it comes to the seizure of persons on board is thus overcome through this instrument.<sup>196</sup> These rights however are dependent on the consent of the flag State.<sup>197</sup> Neither is implicit consent nor the consent of the master of the ship sufficient.<sup>198</sup> Therefore the Protocol acknowledges the primacy of the States sovereignty.

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<sup>188</sup> S Rah, 81.

<sup>189</sup> B Miltner, 105.

<sup>190</sup> Smuggling Protocol Art. 19, see also B Miltner, 106.

<sup>191</sup> Smuggling Protocol Art. 5.

<sup>192</sup> V Moreno-Lax, 190.

<sup>193</sup> Smuggling Protocol Art. 8 No. 2.

<sup>194</sup> E Papastavridis, 192.

<sup>195</sup> P Mallia, *Migrant Smuggling by Sea- Combating a current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff Publishers 2010) 125.

<sup>196</sup> B Miltner, 105.

<sup>197</sup> S Rah, 83.

<sup>198</sup> E Papastavridis, 190.

The controlling State has to give notice of all the measures he has taken.<sup>199</sup> Interestingly, Art. 8 § 7 provides that a State Party can take the appropriate measures against vessels without nationality. As described above this right is already acknowledged through the UNCLOS itself, as a stateless vessel cannot rely on the rights that arise out of the Convention. Every State can apply enforcement measures according to his domestic law and internal law. This capacity finds its limit in the human rights of the individuals.

Art. 9 of the Protocol additionally provides a number of safeguards. Besides the requirement to ensure the humane treatment of the persons on board, environmental concerns and the safety of economic interests need to be taken into account by the intercepting State. According to Art. 18, the return of the smuggled persons shall be facilitated through better cooperation between the parties of the Protocol. Not mentioned in the whole Protocol is a duty to rescue-at-sea for the State.<sup>200</sup> It is hard to evaluate the Protocol in total. While the States intention to clarify and essentially broaden their competences was achieved, several provisions underline the importance of human rights. Gallagher on the one hand is assessing the Protocol positively<sup>201</sup> and acknowledging the serious steps that have been taken, Hathaway contends that it is dangerous for 'the advancement of human rights'.<sup>202</sup> The impact of mentioning the respect for human rights for the States practice cannot easily be assessed. It has to be recognised though, that the States' competences are widened through the granting of far reaching rights towards foreign flagged vessels if the consent of the flag State is given. The Protocol is an instrument well addressed to remedy the limits of the 'right of visit'.

## 8. Conclusion

In concluding the rights of States differ depending on the zone in which it is operating and on the status of the vessel it is intercepting. Hereby interception has to be interpreted broadly. It encompasses basically all the measures that are applied by a State to prevent the embarkation of persons on board contrary to the immigration rules of said State. That includes the diversion of vessels and the boarding of them. Not included is the seizure of persons on board. The custody of smugglers or undocumented persons is not encompassed. Neither can a rescue-at-sea mission be characterised as an interception even though the State practice is making this border line more and more blurry.

Important to note is the outstanding position of the flag State in the concept of the Law of the Sea. Only the flag State is subject to the powers and duties arising out of the UNCLOS. The flag State has the exclusive jurisdiction over the vessel. Stateless vessels are on the other hand to the most degree defenceless. The US Court of Appeal even goes so far as calling them 'international pariahs'. Still, the capacities of the coastal State shrink the more the distance to the coast is increasing. It has the most powers in its internal waters. In the territorial sea the right to 'innocent passage' is limiting his sovereignty. This right provides that vessels are allowed to pass through as long as they cause no threat to the coastal States' sovereignty. Unloading persons is rendering a passage not innocent according to Art. 19 § 2 g) UNCLOS. It is questionable whether the attempt to do so is sufficient to

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199 D.H. Anderson, *The Exercise of Jurisdiction over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction* (E. Franckx & P. Gautier eds, Bruyant 2010) 179.  
200 S Rah, 81.

201 A Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49 *Virginia Journal of International Law* 789, 847.

202 J Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 *Virginia Journal of International Law* 1, 56.

justify coastal State's enforcement measures. The Corfu Channel case by the International Court of Justice decided that subjective criteria alone are not sufficient. An 'objective indication' is required. In the case of an infringement the coastal State can take the necessary steps according to Art. 25. An interception is justified in this case. Force can only be used though if it is unavoidable, necessary and applied reasonably and appropriately. This is also true for the contiguous zone for most part.

Controversial is the situation on the high seas. Here, principally the freedom of navigation rules. While the sovereignty of the coastal State is limited by the innocent passage regime, the freedom of the high seas is limited by the 'right of visit'. This also causes a limitation to the exclusive jurisdiction of the flag State. Stateless vessels can be entered by every State and are subject to 'universal jurisdiction'. Other than absent nationality, the Convention provides the slave trade clause as a legal ground for entering ships. Even though slave trade in the original sense no longer exists, this legal ground can be applied against ships which traffic human beings. This is not applied in practice so far. The right arising out of the slave trade clause does not include the seizure of persons on board.

Those limited rights are supplemented by the Smuggling Protocol. Here the State has far-reaching intercepting rights and rights to proceed against the persons on board of a foreign vessel. Those actions require the consent of the flag State though. This is supposed to be given through a framework of cooperation. It is thus fair to say, that the States' rights are extensive. The State can take a number of actions against vessels which carry migrants and refugees. In the following it will be examined through which provisions the States' powers are limited mostly through the rights of the individuals.

### **III. Human rights obligations at sea**

The States' rights at sea are mirrored by several human rights instruments which oblige the State to respect fundamental rights. In the following chapters the scope of those obligations will be examined. Critical is certainly the duty to rescue-at-sea and the concept of 'non-refoulement', in particular its extra-territorial application. In several provisions the Convention refers to international law and states that all rights in the Convention are subject to those laws.<sup>203</sup> It is thus important to define the international laws that are applicable in the case of refugees. For the application of those laws, the status of the ship, whether it is flying a flag or not, is not important.

#### **1. States' Jurisdiction**

Firstly it has to be determined, to which degree the States can be held liable at sea. This question should not be confused with the exclusive flag State jurisdiction as addressed above. The focal point here is, whether the State has jurisdiction towards persons it intercepted and thus entails responsibility. If the jurisdiction of the State can be established, this triggers the responsibility of said State.<sup>204</sup> Opposed to opinions that have been formerly argued, the possibilities for individuals to

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203 e.g. UNCLOS Art. 2 § 3, Art. 87 § 1.

204 International Covenant on Civil and Political Rights (16 December 1966) 999 *UNTS* 171, Art. 2; International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 *UNTS* 85, Art. 2.

be a subject of rights arising out of public international law is widely accepted today.<sup>205</sup> Usually States powers are limited to its territory.<sup>206</sup> This would exclude a large scale of the States' enforcement measures which take place outside its territorial waters. It is thus qualified in maritime cases.<sup>207</sup>

The liability of the States is addressed in several statutes in the UNCLOS. The 'right of visit' and the 'right of hot pursuit' are for example accompanied by compensating rules.<sup>208</sup> This list can be supplemented by Art. 9 § 2 of the smuggling protocol where actions which are proven to be unfounded lead to a claim for compensation by the concerned party. But according to those statutes only the ship can claim damages. They do not grant rights to the persons on board. It remains questionable to what degree a State is responsible towards an individual. Essential to establish this responsibility is the effective *de jure* or *de facto* control over a territory or over persons.<sup>209</sup> The International Court of Justice stated that the power that is exercising control has than the obligation to 'secure respect for the applicable rules of international human rights'.<sup>210</sup> The UNHCR is arguing that thus people fall under the exclusive jurisdiction over whom a State has the *de facto* control.<sup>211</sup> A similar line of argument is provided by the Committee against Torture in the case *J.H.A. v. Spain*.<sup>212</sup> In this case the Spanish coast guard responded to a distress call by the vessel *Marine I*. It had capsized in international waters and was carrying 369 migrants. The Spanish then repatriated them. But this process took some time. Only after eight days the persons reached the shore of Mauritania. The majority of the migrants were transferred to third countries within one month. But 23 of them were held in custody there for over three month. They were guarded by Spanish officers. The Committee observes, that Spain maintained control from the time they boarded the vessel up to the detention in Mauritania. The exercise of effective control over the persons the whole time results in the jurisdiction of Spain.<sup>213</sup> This verdict is so interesting, because it leads to extra-territorial responsibility for a State. This states that a State who is asserting control over migrants at sea must ensure the safety and humane treatment of the persons and also respect their human rights in the wider meaning of the term.<sup>214</sup>

Additionally this reasoning is supported by the case-law of the European Court of Human Rights.<sup>215</sup> In the *Medvedyev* case a ship which was allegedly carrying drugs was intercepted by a French warship. The persons on board were put into custody and brought in front of a French judge. The Court rules that the French authorities had jurisdiction over the seized persons on board from the moment of the interception on. This control was of a full and exclusive nature, even though the ship was intercepted on the high seas. Thus the extra-territorial application of rights of the defendants is confirmed. In the *Hirsi* case, the Italian coast guard intercepted three vessels coming from Libya

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205 S Rah, 89.

206 D Guilfoyle, 8.

207 D Guilfoyle, 9.

208 UNCLOS Art. 110 § 3, Art. 111 § 8.

209 UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing* (2010) no 9, available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

210 International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment of 19 December 2005, ICJ Reports 2005, 178; see also: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 180.

211 UNHCR, *Protection Policy Paper* no 10.

212 United Nations Committee Against Torture, *J.H.A. v. Spain*, (21 November 2008) no 8.2., CAT/C/41/D/323/2007.

213 K Wouters, 17.

214 K. Wouters, 19.

215 ECHR, *Hirsi vs Italy*, no 34.; *Medvedyev and others v. France* App no 3394/03 (29 March 2010), no. 67.

with a group of two hundred individuals on board. They were planning to reach the Italian coast. Those persons were transferred to Italian warships and then shipped back to Tripoli. The Italian authorities now argued, that they did not exercise 'absolute and exclusive' control.<sup>216</sup> They add, that the operation was only a rescue mission. The Court acknowledged that extra-territorial jurisdiction can only be justified in exceptional circumstances and can only be assumed if there has been full and exclusive control.<sup>217</sup> In the present case it observes, that it can be derived from the exclusive jurisdiction Italy has over its warships, that persons that are in custody on those vessels are *de jure* under the control of Italy. In particular a State cannot escape its jurisdiction by labeling an operation a rescue operation. The argument that the persons on board only faced a minimal control is neither sufficient to deny a responsibility for the persons on board. Not addresses is the question though, whether it would be sufficient to trigger the jurisdiction of the intercepting State, if a warship had only escorted the vessel of the migrants without putting them under the direct physical control of enforcement officers. This strategy has been used by Italy before, labeling the operation a joint one and trying to avoid any physical contact with the ones intercepted.<sup>218</sup> The idea that jurisdiction can easily be circumvented through avoiding physical contact cannot be upheld against the international protection scheme. Effective control has to be defined through the *de facto* situation. The reasoning of the European Court of Human Rights is stating that the extraterritorial application of jurisdiction has to be interpreted exceptionally.<sup>219</sup> According to Goodwin-Gill those measures are also triggering responsibility as long as the exercise of control is exclusive, which he assumes in the case of maritime interception operations.<sup>220</sup> He bases this on the assumption, that the whole operation has been planned and set into being by the intercepting State, if he then avoids direct control in the last step this cannot excuse him from his jurisdiction and his responsibility. Giving the fact that the intercepting State is the causal trigger this is compelling.

Still, in the present case persons were undoubtedly under the continuous and exclusive control of the Italian personal. Hence Italy is responsible for the well-being of the intercepted persons. It follows from this case law that the assertion of physical control over vessels and or their passengers is sufficient to engage the controlling state HR obligations.<sup>221</sup>

It remains questionable however whether the jurisdiction can be shared by a couple of States.<sup>222</sup> This situation may occur if joint operations by several States are conducted or a State is conducting a operation in the territorial sea of another State. It is helpful in those situations if the involved States have clarified the responsibilities in advance. As stated above, the practice to operate in the territorial sea of another State becomes more and more common. Also Frontex is institutionalizing its cooperation more and more. This might lead to several States who are responsible for the same time. It does not limit the liability of a said State though.<sup>223</sup> Neither does extra-territorial processing divest the intercepting State of its responsibility under the international protection scheme. Bilateral agreements cannot circumvent those obligations.<sup>224</sup>

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216 ECHR, *Hirsi vs Italy*, no 64.

217 ECHR, *Hirsi vs Italy*, no 73.

218 G Goodwin-Gill, 'The Right to seek Asylum: Interception at Sea and the Principle of Non-Refoulement', 453.

219 ECHR, *Bankovic and Others v. Belgium and 16 other Contracting States* App no 52207/99 (19 December 2001), no 47.

220 G Goodwin-Gill, 'The Right to seek Asylum: Interception at Sea and the Principle of Non-Refoulement', 453.

221 K Wouters, 10.

222 UNHCR, *Protection Policy Paper*, no 11.

223 R Weinzierl and U Lisson, 79.

224 A Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20 *International Journal of Refugee Law* 273, 292, Francis though also notes, that the government of the United States is constantly violating these finding which are supported by the United States Supreme Court. In Guantanamo Bay those rules do not apply according to the US, see 303 et seq.



## 2. Rescue-at-sea

In 2011 over 7000 migrants and refugees have been in a situation of distress at sea alone in the Mediterranean according to the UNCHR.<sup>225</sup> This number has been growing over the last years. Certainly the Arab Spring was a reason for an increase in the influx last year, nevertheless, one reason surely is that the vessels used by migrants are often unseaworthy. In contrast to interception operations, the duty to rescue is well established under treaty and international law.<sup>226</sup>

In rendering assistance, the States usually board the vessel in distress and assume control of the persons thereon.<sup>227</sup> Notwithstanding political reasons to stop boats from reaching the coast and the blurry line between interception and rescue at sea, there are several legal grounds out of which a duty to rescue-at-sea arises. Firstly a 'duty to render assistance' is provided in Art. 98 of the UNCLOS. In the *Hirsi* judgment judge de Albuquerque lists Art. 98 UNCLOS as a possible ground for intercepting missions on the high seas.<sup>228</sup> This article requires from every State to ensure that assistance is rendered 'to any person found at sea in danger of being lost'. It further has to 'proceed with all possible speed to the rescue of persons in distress'.<sup>229</sup> Therefore this Article gives predominantly a cohesive responsibility for the rescue of persons at sea to every State. As stated above, vessels that are used by undocumented persons are often unseaworthy. Therefore rescue missions do play a decisive role in the protection scheme for migrants and refugees.

Besides the Article in the Convention, other international legal obligations exist. One of the most important international treaties in the area of safety at sea is the International Convention for the Safety of Life at Sea (SOLAS).<sup>230</sup> The SOLAS Convention has been amended for numerous times.<sup>231</sup> In the context of rescue-at-sea missions the amendments of May 2004 are of the utmost importance. An obligation to provide assistance regardless of the nationality or the status of persons in distress was added.<sup>232</sup> The SOLAS Convention further allocates the responsibilities for a rescue mission. The responsibility lays primarily with the State in whose search and rescue zone the mission has been conducted.<sup>233</sup> Additionally the 1979 International Convention on Maritime Search and Rescue (SAR) has to be mentioned.<sup>234</sup> This Convention provides for inter-state coordination of SAR services and the delimitation of rescue zones.<sup>235</sup> It was latest amended in 2004.<sup>236</sup> It established a framework of cooperation among the Member States to provide assistance promptly and efficiently.<sup>237</sup> The SAR Convention divided the Ocean into 13 search and rescue areas. This treaty

225 UNCHR, *Selected Distress at Sea Incidents involving Refugees and Migrants in 2011* (2011), available at: <http://www.imo.org/OurWork/Facilitation/IllegalMigrants/Pages/Default.aspx>.

226 B Miltner, 88.

227 E Papastavridis, 204.

228 ECHR, *Hirsi vs Italy*, Concurring Opinion of Judge Pinto de Albuquerque.

229 UNCLOS Art. 98 No. 1 b).

230 International Convention for the Safety of Life at Sea (1 November 1974) 1184 *UNTS* 3.

231 The IMO lists 47 amendments since the Convention was adopted in 1974

<http://www.imo.org/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Documents/SOLAS%201974%20-%20Brief%20History%20-%20List%20of%20amendments%20to%20date%20and%20how%20to%20find%20them.html>.

232 IMO, Resolution MSC.153(78), *Amendments to the International Convention for the Safety of Life at Sea 1974* (20 May 2004), available at: <http://www.unhcr.org/refworld/publisher,IMO,,432aca724,0.html>.

233 S Rah, 118.

234 International Convention on Maritime Search and Rescue (27 April 1979) 1403 *UNTS*.

235 V Moreno-Lax, 195.

236 IMO, Resolution MSC.155(78), *Amendments to the International Convention on Maritime Search and Rescue 1979* (20 May 2004), available at: <http://www.unhcr.org/refworld/publisher,IMO,,432acad44,0.html>.

237 See also International Maritime Organization (IMO) information, available at:

<http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search->

allocates responsibility to rescue in the case of distress at sea to every concerned coastal State over a respective zone. The States then established search and rescue regions within the areas. The parties to the Convention are committed to provide the 'most appropriate assistance available' in the case of distress.<sup>238</sup> Distress is defined in the SAR Convention as 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.<sup>239</sup> The jurisprudence has interpreted this term broadly.<sup>240</sup> Following Moreno-Lax it is thus reasonable to understand unseaworthiness *per se* as a situation of distress.<sup>241</sup> This interpretation might be a bit too wide, since the danger has to be 'imminent', at least in a situation of severe weather conditions this argumentation can be followed. According to the following paragraph assistance needs to be provided 'regardless of the nationality or status of such a person or the circumstances in which that person is found'.<sup>242</sup> The Convention further provides distinct statutes for the delimitation of responsibility. Search and rescue services must be established by States Parties to be able to fulfill their duties arising out of the SAR Treaty.<sup>243</sup> Those Conventions give a precise duty to States, to rescue-at-sea whoever is in distress. It remains questionable, how incidents where those rules are clearly violated can still occur on regular basis.<sup>244</sup> In the quoted case the protection framework certainly did not fulfill its duties. The States concerned deny any violation though. Undoubtedly a duty to rescue at sea exists.<sup>245</sup> This duty is just as much applicable for stateless vessels.<sup>246</sup> The scope of this duty though is unclear. The IMO has adopted in 2004 guidelines on the treatment of persons rescued at sea.<sup>247</sup> Even though they are legally not binding<sup>248</sup>, those guidelines further clarify the obligations arising out of the respective treaties. They set life saving without delay and the assistance for ships that have rescued persons as priorities. They further press on the governments to enhance and improve their cooperation. Also they state, that the time should be minimized that a person is remaining aboard a ship.<sup>249</sup> The biggest issue in fact is not the rescue mission itself. It is the question which legal obligations follow the rescue mission. Where shall the rescued persons be disembarked? This issue is addressed below.<sup>250</sup>

The differentiation between a rescue-at-sea mission and an interception has to be addressed here again briefly. As stated above, a clear differentiation between those two concepts is difficult. To the same degree clear distinctions are at least *ex post* possible though. The range of justified measures is wider under an interception mission. A legitimate interception according Art. 8 § 2 of the Smuggling Protocol might encompass to deviate the course of other vessels. The overlap of the

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238 SAR Convention Chapter 2 § 2.1.9.

239 SAR Convention Chapter 1 § 1.3.11.

240 V Moreno-Lax, 195.

241 V Moreno-Lax, 195.

242 SAR Convention Chapter 2 § 2.1.10.

243 B Miltner, 88.

244 See for example: Aircraft carrier left us to die, say migrants, *theguardian*, 8<sup>th</sup> May 2011, in the situation describes by the author a boat loaded with migrants and at distress was drifting through the Mediterranean Sea for 16 days even though they encountered a number of military ships, available at:

<http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants>.

245 R Weinzierl and U Lisson, 36.

246 S Rah, 215.

247 IMO, Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued At Sea* (20 May 2004) [IMO Guidelines], available at: <http://www.unhcr.org/refworld/docid/432acb464.html>.

248 B Miltner, 111, but see for the increasing role of the IMO: C Allen, 'Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and its Member States in Implementing the 1982 Law of the Sea Convention' (2009) 10 *San Diego International Law Journal* 265.

249 IMO Guidelines no 6.8.

250 See III. 2. b)

terms is only obvious when it comes to entering the vessel or transferring the passengers onto a military vessel. Those missions do occur under legitimate circumstances<sup>251</sup>, the problem arises only so far as the possible legal implication towards the rescued persons are concerned. This issue will be addressed further below.<sup>252</sup>

Frontex itself classifies most of their operations as rescue-at-sea operations.<sup>253</sup> They still acknowledge that this goes hand in hand with interception missions to target illicit migration. Which purpose is the focus if these operations is uncertain.<sup>254</sup> The strategy of intercepting States to label maritime interception operations as rescue operations with the hope for less responsibility, is very common.<sup>255</sup> Given the fact, that a rescue-at-sea at sea mission has a better tone than an interception and a result that is often similar, it is very likely, that this is indeed a reasoning of coastal States in general. Whether the wish of the States to effectively circumvent responsibilities through a different label is examined below.<sup>256</sup> The standard situation that is envisaged by the custom of the law of the sea anticipates the wish of the rescued persons to return to their country of origin as fast as possible. In the context of maritime migration is it the other way around, those rescued want to arrive any port outside of their country of departure.<sup>257</sup> This raises the issue of the correct port for disembarkation.

#### [a) Excursion: Obligations for the master of a ship ]

The duty to rescue exists just as well for the masters of private vessels.<sup>258</sup> The SOLAS Convention provides that 'the master of a ship at sea which (...), on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance(...).'<sup>259</sup> The SAR alike commits the State parties to ensure that the shipmaster is acting in accordance with his obligation to rescue.<sup>260</sup> Plus the duty of the master of the ship is without limitations.<sup>261</sup> The importance of private vessels in the rescue at sea scheme is also underlined in the IMO guidelines. On of the priorities of rescue at sea thus is, that the shipmasters should be assisted timely after they recovered persons at sea.<sup>262</sup> Those guidelines also remind the master on his duty towards the persons in distress at sea. In practice, private vessels often disregard vessels which are carrying migrants and refugees all together.<sup>263</sup> A reason is the legal uncertainty. An infamous example is the Tampa incident.<sup>264</sup> Over 400 asylum seekers were rescued in distress at sea by a commercial vessel. This ship was then forced to stop outside the territorial waters of Australia. The master of the ship eventually decided to try to reach the nearest port due to the derogating health conditions aboard the ship. This resulted in an Australian special forces commando to board the ship. Even though this behavior is hard to justify from a legal point of view, Australia defended itself with their rights as a

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251 B Miltner, 112.

252 See III 3.

253 Frontex Homepage, Types of Operations, available at <http://www.frontex.europa.eu/operations/types-of-operations>.

254 E Papastavridis, 206.

255 B Miltner, 92.

256 III 3 c).

257 E Papastavridis, 204.

258 B Miltner, 88.

259 SOLAS Convention Chapter V Regulation 33 No. 1.

260 SAR Convention Chapter 2 § 2.4.1.1.

261 R Weinzierl and U Lisson, 37.

262 IMO Guidelines no 3.1.

263 S Rah, 106.

264 How Tampa became a turning point, Amnesty International Australia, 14<sup>th</sup> June 2007, available at:

[http://www.amnesty.org.au/refugees/comments/how\\_tampa\\_became\\_a\\_turning\\_point/](http://www.amnesty.org.au/refugees/comments/how_tampa_became_a_turning_point/).

sovereign nation to control their own borders.<sup>265</sup> Another bad example is the 'Cap Anamur' case. This ship has rescued 37 stranded African migrants in 2004. After a three week odyssey the vessel was eventually allowed to enter a port in Sicily. This resulted in an accusation for facilitating illegal immigration for the master of the German ship. After a three years trial, he was eventually was acquitted in 2009.<sup>266</sup> Still, this thwarts the motivation for private vessels to fulfill their legal obligation. This result in the risk that those at sea will be abandoned at sea by vessels unwilling to risk the burden of being unable to disembark those rescued at all.<sup>267</sup>

### b) Disembarkation

The problem of disembarkation arose along with the increase of migrants and refugees arriving via sea. Even though there is a clear duty to provide assistance, neither the flag nor the coastal State have an obligation to accept rescued persons.<sup>268</sup>

The SAR Convention defines a rescue as 'an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety'.<sup>269</sup> This last component, the place of safety, is the most controversial one. A rescue mission can only be finished through the disembarkation. As described above, private vessels which recover migrants from sea often face difficulties disembarking them. The coastal States don't want to accept responsibility for them and consequently grant them access to the asylum system. Warships or the coast guard on the other side often intend to disembark the recovered persons in the port where their journey began.

This completion of a rescue was overlooked for long.<sup>270</sup> The custom was to disembark those rescued at sea at the next port of call.<sup>271</sup> The Tampa incident was a clear signal, that the current legal regimes cannot provide sufficient clarity on this matter. The amendments to the SAR and the SOLAS Convention has to be understood subsequently to these discussions.<sup>272</sup> They address this issue and press on the States to cooperate and ensure that masters are allowed to disembark timely. For example establishes the SAR Convention now a primarily responsibility for the disembarkation and the delivery to a place of safety.<sup>273</sup> Although the duty of this State does not encompass a duty to allow disembarkation onto its own territory, an obligation for a positive result is provided.<sup>274</sup> It is promising step, but the lack of a solution to the dilemma where to disembark those rescued is criticised. Papastavridis is calling the obligation only an obligation of 'conduct rather than of result'.<sup>275</sup> In practical terms, the Rescue Coordination Centers<sup>276</sup> of the concerned State may now designate the location for the disembarkation.

In neither the SAR nor the SOLAS Convention is a definition for 'place of safety' included though.<sup>277</sup> This is neither done by the IMO guidelines, still they provide that 'a place of safety is a location where

265 M Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 *Pacific Rim Law & Policy Journal* 49, 55.

266 Freispruch für den Einzelkämpfer, Spiegel Online, 7<sup>th</sup> October 2009, available at: <http://www.spiegel.de/panorama/gesellschaft/0,1518,653762,00.html>.

267 B Miltner, 91.

268 E Papastavridis, 203.

269 SAR Convention Chapter 1 § 1.3.2.

270 B Miltner, 89.

271 UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* no 29.

272 V Moreno-Lax, 196.

273 SAR Convention Chapter 3 § 3.1.9.

274 V Moreno-Lax, 196.

275 E Papastavridis, 206.

276 SAR Convention Chapter 1 § 1.3.5.

277 B Miltner, 87.

the survivors' safety or life in no longer threatened and where the basic human needs can be met'.<sup>278</sup> It can also be a temporary transit point though, since the following sentence states that it also can be 'a place from which transportation arrangements can be made'. It remains questionable whether a ship can be a place of safety. Following this, a State could discharge his responsibility towards migrants and refugee by simply transferring them on their vessel. On the one hand according to the IMO 'a place of safety can also be 'aboard a rescue unit or other suitable vessel or facility at sea'.<sup>279</sup> On the other hand however 'an assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship'.<sup>280</sup> The ship that is rescuing the stranded persons can thus not be interpreted in every case as a sufficient location to dismiss the rescuing State from its duty to deliver the rescued persons to a place of safety. This paragraph though does not exclude an assisting vessel collectively as a place of safety. Plus the guidelines further provide as a reason for not considering a ship as a place of safety the lack of appropriate facilities. This limitation to the place of safety can hence easily be overcome by using a ship with the proper facilities. According to these guidelines, a place of safety thus can very much mean another vessel. It is correct thus to state that the disembarkation problem has not been solved by the IMO guidelines.<sup>281</sup> The guidelines still help in clarifying the primacy of disembarkation to identifying the status of persons on board.<sup>282</sup>

The UNCHR itself is arguing for prompt disembarkation in the 'next port of call'.<sup>283</sup> They argue a deviation from this principle goes along with the higher danger for the health and security of those rescued. They further argue that it is the humanitarian duty to allow vessels in distress to seek haven in their waters.<sup>284</sup> It remains questionable however how to define the 'next port of call'. It might just as well be the nearest geographical port as the next scheduled port.<sup>285</sup> Some argue that in urgent cases it can only be the nearest port.<sup>286</sup> Ultimately the master of the ship has to decide. Even the UNCHR considers that the regime of 'next port of call' is not always applicable.<sup>287</sup> Another port may be better equipped to handle the incoming migrants. The Assembly of the Council of Europe also presses, that a swift disembarkation has the absolute priority.<sup>288</sup> Those political demands have not resulted in a duty to accept those rescued in international law so far though. Closely related is finally the question of a right to access a port in a situation of distress.

### c) Right to access port in case of distress

But not withstanding the problem of disembarkation it is questionable whether vessels which are not longer fit to sail on the sea can then access the saving harbour. Generally speaking a port is based in the internal waters of the coastal State, thus in the zone with the highest sovereignty.<sup>289</sup> The UNCLOS is silent on this matter. Art. 25 § 2 provides though, that States can set the conditions for the access to their ports. The only legal ground that is to be found is Art. 11 of the Salvage

278 IMO Guidelines no 6.12.

279 IMO Guidelines no 6.14.

280 IMO Guidelines no 6.13.

281 B Miltner, 110.

282 IMO Guidelines no 6.19 et seq.

283 UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* no 12.

284 UNHCR, *Conclusions Adopted by the ExCom* no 15.

285 I von Gadow-Stehpani, *Der Zugang zu Nothäfen und sonstigen Notliegeplätzen für Schiffe in Seenot* (Springer Verlag 2006) 357.

286 K. Wouters, 5.

287 UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* no 30.

288 Council of Europe, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants* no 5.2.

289 D Rothwell and T Stephens, 52 et seq.

Convention. It still only provides that

'a State Party shall, whenever regulating (...) admittance to ports of vessels in distress (...) take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life (...).<sup>290</sup>

This Convention certainly does not grant a title to access ports for vessels in distress. It only cites the case of a vessel in distress as an example which triggers cooperation. Neither is the right to innocent passage applicable in the internal waters.<sup>291</sup> The right to access to all ports is usually only permitted through a bilateral treaty.<sup>292</sup> There is though a long established customary rule of international law which allows to enter ports for vessels in distress.<sup>293</sup> This right has not ceased to exist through State practice as described in the Tampa incident.<sup>294</sup> It was developed to address situations where accessing a port remained the only possibility to avert the loss of lives.<sup>295</sup> It thus has to be interpreted very narrowly. Not every case where the persons on board are in danger classifies as a situation of distress. The vessel itself has to be in danger.<sup>296</sup>

This right also finds its limitations in the interest of the coastal State. The literature argues the same limits apply as to the rights of innocent passage.<sup>297</sup> It ceases to exist in the case that it is prejudicial to the peace, good order or security of the coastal State. In balancing the risk of losses of life on the one side and the fear of the coastal State to process asylum claims on the other side, the answer should be clear. The difficulty lies in defining situations of distress. The health of the passengers alone is not enough. In cases of imminent danger for the ship the access to ports are accessible. In concluding a State does not have unlimited power to prohibit the access to ports.<sup>298</sup> But it is just as true to say, that there is no absolute right to access either.

#### d) Conclusion

The issue of rescue-at-sea becomes increasingly important in the context of maritime migration. The boats of the migrants and refugees are often overcrowded and unseaworthy. Their need to be rescued conflicts with the traditional well established regime of rescue-at-sea. In contrast to the traditional passenger of a ship, they want anything but be sent back to their country of origin. Without any doubt a duty to render assistance exists. The UNCLOS commits any State to help any person in distress at sea. This is supplemented by the SAR and the SOLAS Convention. They set up a framework to assist persons who are in distress at sea. As such coordination centres are established and responsibilities allocated. But they also provide for the fundamental duty to send appropriate help without any delay in situations in distress. It remains questionable whether every unseaworthy vessel is automatically in a situation of distress, but at least every case where a threat is immanent, assistance needs to be provide in this rescue scheme, notwithstanding the status of the person in distress. The guidelines of the IMO help further clarifying the standards, such as the duty

<sup>290</sup> International Convention on Salvage (28 April 1989) 1953 *UNTS* 194.

<sup>291</sup> S Rah, 89.

<sup>292</sup> E Beckert and G Breuer, 137.

<sup>293</sup> International Arbitral Awards, *Kate A. Hoff Case (General Claims Commission of Mexico and the United States (2 April 1929) Reports of International Arbitral Awards vol IV, 444 et seq.*

<sup>294</sup> I von Gadow-Stehpani, 207.

<sup>295</sup> S Rah, 93.

<sup>296</sup> I von Gadow-Stehpani, 372

<sup>297</sup> S Rah, 95.

<sup>298</sup> D Rothwell and T Stephens, 55.

to minimize the stay on the rescuing vessel, which apply in a rescue mission.

Those obligations exist just as much for a commercial or private vessel. In fact, they play a decisive role in a comprehensive rescue scheme. Major incidents such as the Tampa or the Cap Anamur case have raised legal uncertainty for the shipmasters though. In those cases the masters of ships were declined access to a port to disembark rescued persons. For a commercial vessel the risk of not being able to disembark those rescued is an impediment to their motivation to conduct a rescue mission. According to the SAR Convention a rescue mission concludes with the delivery to a place of safety. It remains questionable how this term is to be understood. This problem has been addressed by the latest SAR and SOLAS amendments. They provide for a responsibility of the State in which rescue zone the persons have been rescued to organise disembarkation. They do not provide for a duty to accept those rescued for the State itself though. The UNCHR is pressing on the next port of call as the location to disembark. This is in contrast with the State practice to disembark those rescued at their port of departure. The IMO guidelines establish at least the primacy to disembark those rescued at a place of safety over the clarification of their status. Still, they explicitly allow to satisfy this duty through handing them over to ship. This encourages the States practice to label an interception operation as a rescue mission to fulfil their responsibility towards those rescued by simply taking them on their vessel. It is further important to note that vessels in distress have a right to access a port.

Through the explicit responsibility for the party responsible as amended by the SOLAS and the SAR Convention at least some progress has been made to overcome the deficits.<sup>299</sup> The UNCHR accuses the States still of not fulfilling these obligation.<sup>300</sup> The lack of will of the States to accept refugees onto their territory is however an impediment to further developments.

### **3. Obligations arising out of international public law**

The mixed migration flows that has been discussed above, has practical implications for the intercepting State. While migration and the permission to enter a territory is a field of law which can be largely regulated by the States themselves, in the field of asylum international legal obligation set minimum rules. They have to be respected by all States. Individual rights might further derive out of the European Convention on Human Rights, the American Convention on Human Rights or the International Covenant on Civil and Political Rights.<sup>301</sup> While some statutes might apply for migrants and refugees, others do not. It is thus essential to properly draw the line in between those two groups. The cornerstone in the protection framework is the Refugee Convention.<sup>302</sup>

#### a) Refugee Convention

According to the Convention the term refugee shall apply to any person who has the:

well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the

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299 S Rah, 117.

300 UNHCR, *Refugees and Asylum-Seekers in Distress at Sea* no 8.

301 I von Gadow-Stehpani, 361.

302 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (28 July 1951) 189 *UNTS* 150.

protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>303</sup>

To be considered as a Refugee, one has thus to comply individually with four conditions. The receiving State has the responsibility to examine whether the individual can rely on the specific protection as a refugee. The persons has to be outside the country of origin, is not able or not willing to be granted protection in that country, has a well-founded fear of prosecution which is based on his race, religion, nationality, member of a particular social group or political opinion.<sup>304</sup> This definition has led to criticism, due to the fact that persons who are not individually targeted but still fear the general danger of a war or a humanitarian crisis, are not encompassed.<sup>305</sup> The UNCHR has broadened their scope to also cover those forced migrants, which are not enfolded in the definition of Art. 1 Refugee Convention.<sup>306</sup> The definition in the Refugee Convention has not been changed though. Only a small part of the persons arriving via sea fit under this definition.<sup>307</sup> The coastal State thus has to examine each person individually.

The Refugee Convention does not grant a subjective right of asylum. It is for the State to determine the status of the person.<sup>308</sup> Only Art. 31-33 of the Refugee Convention do not require a prior recognition as a refugee through the receiving State. Art. The article 33 is the decisive one for refugees at sea however. It states:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>309</sup>

This article establishes the 'non-refoulement' principle. This is considered to be one of the most important rules in the refugee protection scheme. States attempts to diminish the scope or the content of this have encountered harsh criticism by international scholars and human rights bodies.<sup>310</sup> To fall under the protection of Art. 33 a person must qualify as a refugee according to Art. 1, irrespective of the decision of the receiving State, and has to already left the State of persecution.<sup>311</sup> It is not necessary to hand in a formal application for asylum, this has only declaratory character. Those two conditions are usually met by refugees at sea. However, Art. 33 of the Refugee Convention is not applicable in the territorial sea of the State of departure.<sup>312</sup> Problematic is that only in the case of a joint operation of the State of departure and the State of destination in the territorial sea of the State of departure. In this scenario the 'non-refoulement' principle does not apply. It does apply however notwithstanding an illegal entry to a State.<sup>313</sup> It is important to note that the Refugee Convention only prohibits refoulement in the case of a threat to life or freedom. In

303 Refugee Convention Art. 1 A. (2). Originally the term was limited to events after the first January 1951. This condition was later erased by the 1967 protocol.

304 G. Goodwin-Gill, *The Refugee in International Law* 20.

305 I von Gadow-Stehpani, 363.

306 UNHCR, *UNHCR Global Report 2010- Ensuring Protection for People of Concern* (2010), available at : <http://www.unhcr.org/4dfdbf36a.html>.

307 S Rah, 130.

308 S Rah, 130. This right is neither encompassed in other international legal texts.

309 Refugee Convention Art. 33 § 1.

310 A Fischer-Lescano, T Löhr and T Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *International Journal of Refugee Law* 256, 263.

311 S Rah, 134.

312 R Weinzierl and U Lisson, 58.

313 I von Gadow-Stehpani, 363.



it sometimes argued to interpret the danger in broad sense and allow the threat of persecution alone to be sufficient to trigger Art. 33 of the Refugee Convention.<sup>314</sup> Even though this is supported by the ExCom conclusions, such an interpretation is contrary to the wording. Nevertheless in practice, the threat of persecution does contain the threat of being taken into custody and consequently contain an infringement to the freedom.

In the context of a maritime refoulement some scholars have argued, that a refusal at the sea border is not similar to a direct exposure to a risk.<sup>315</sup> It does not inevitably result in a danger, since the vessel can decide for a different course. Due to the often limited supply of food and gas of such vessels, and due to the proximity of the persecuting State, this reasoning is not convincing.<sup>316</sup> It is further interesting to note that the prohibition is not limited on States, but on territories, a term which is much broader. This also implies, that not only the State of departure is a zone excluded for refoulement purposes, but every territory where the refugee might be in danger. In concluding the protection under the Refugee Convention also encompasses the refoulement right at the border.<sup>317</sup> It also needs to be added that the prohibition of refoulement is not limited to an exact defined conduct but includes all measures which have the practical effect for the refugee to end up in a territory where he is threatened.<sup>318</sup> It has to be taken into account that the statute itself uses not only 'expel' but also 'return'. The latter must be given separate significance.<sup>319</sup> The wording of the article gives indication only for a broad interpretation. This however does not lead to a right for asylum. The States still have the inalienable right to apply their own criteria to grant or not to grant a permission to stay. The duty not to refouler someone, yet is applicable from the frontiers on.<sup>320</sup>

One limitation is provided in Art. 33 Refugee Convention itself though. Paragraph two contains an exception for refugee who are on reasonable grounds considered to be a 'danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.' This provision is interpreted as a concession to State's sovereignty.<sup>321</sup> A further exception to the application of the Refugee Convention as a whole is to be found in Art. 1 F. Since this latter provision has more severe consequences in excluding the application of the whole Convention it's requirements are stricter. A person thus might not fall under Art. 1 F but still be excluded from the 'non-refoulement' principle through Art. 33 § 2.<sup>322</sup> Persons that have committed serious crimes are excluded from the protection under the Convention Germany for example has incorporated this provision in its national legislation.<sup>323</sup> Those two provisions cannot be applied mechanically though.<sup>324</sup> In the individual case the interests of the State and the individual have to be balanced. The danger that is awaiting an individual in hit country of origin has to be weighted against the security interest of the host State.<sup>325</sup> A formal prior sentence is not necessary to trigger the exceptions of Art. 1 F of the Refugee

314 Sir E Lauterpacht and D Bethlehem, 'Deuxieme partie Le Non-Refoulement' in Feller E, Türk V and Nicholson F (eds), *La Protection des Refugies en Droit International* (Iarcier 2008) 156.

315 B Miltner, 94.

316 J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 312 et seq.

317 S Rah, 160.

318 Sir E Lauterpacht and D Bethlehem, 143.

319 A Fischer-Lescano, T Löhr and T Tohidipur, 268.

320 Sir E Lauterpacht and D Bethlehem, 145.

321 A Fischer-Lescano, T Löhr and T Tohidipur, 270.

322 Sir E Lauterpacht and D Bethlehem, 161.

323 Aufenthaltsgesetz [Law on Residence] Bundesrepublik Deutschland (25.02.2008) *BGBL*. I S.162, § 60 (8) ; see also: Asylverfahrensgesetz [Asylum Procedure Law] Bundesrepublik Deutschland (02.09.2008) *BGBL*. I S. 1798, § 3 (2).

324 A Zimmermann, 'Bedeutung und Wirkung der Ausschlussstatbestände der Artikel 1 F und 33, Abs. 2 der Genfer Flüchtlingskonvention für das deutsche Ausländerrecht' (2006) 23 *Das Deutsche Verwaltungsblatt* 1478, 1480.

325 Sir E Lauterpacht and D Bethlehem, 163 et seq.

Convention. In fact those provisions require only that the State has sufficient reasons to consider these persons a threat according to the available evidence. However this is not the case for the security exceptions in Art. 33 of said Convention. There a conviction is required. Still, this applies in both provisions only to war crimes and serious crimes though. As a basis serves the legal system of the State of current stay, not the State of departure. At least terrorist acts are undoubtedly encompassed.<sup>326</sup> This is only true in the case that this is causing a threat to the host State.<sup>327</sup> Not included are political crimes. Notwithstanding these limits, the State can effectively excluded refugees from the protection of the Refugee Convention. Be that as it may, those clauses have to be interpreted narrowly. The 'non-refoulement' principle is the essential clause in the Refugee Convention and has grown past the limited scope of this Convention.<sup>328</sup>

It remains questionable however whether the 'non-refoulement' principle has the status of *jus cogens*. The implications of such a status for the international public law is expressed in Art. 53 and 64 of the 1969 Vienna Convention on the Law of the Treaties.<sup>329</sup> It prevails over any other international obligation. Due to the positive repercussions that this would have for the protection of refugees, some scholars argue that the 'non-refoulement' principle has to be considered as such a rule.<sup>330</sup> Still, the exceptions to the rule as stated by the Refugee Convention alone is contradicting such a presumption. Also the State practice cannot support this assumption.<sup>331</sup> Undoubtedly however the 'non-refoulement' principle is considered as international customary law.<sup>332</sup> It can also be found in the Smuggling Protocol for example, even though this treaty has not the primarily focus of protecting the human rights.<sup>333</sup>

These rules necessarily also apply to refugees at sea. An individual who is intercepted within the territorial sea of another country can hence rely on the 'non-refoulement' principle.<sup>334</sup> It is important to note, that his principle is not limited in its application to interception missions. As stated above<sup>335</sup>, for the question of States' jurisdiction, the exercise of effective control is decisive. This is just as much the case in a rescue-at-sea context. The persons in distress are in under the effective control of the rescuing State. The principle of 'non-refoulement' applies in this context too.<sup>336</sup> Therefor States cannot circumvent the application of the Refugee Convention through labeling an operation as a rescue-at-sea mission.

A State is thus prohibited in the case of a rescue mission or an interception to expel or return those refugees to a territory where they are threatened, if this mission was conducted in his waters. Additionally this protections also applies in the case of refusal at the sea border, if a return could

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326 A Zimmermann, 1486.

327 Sir E Lauterpacht and D Bethlehem, 170.

328 A Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20 *International Journal of Refugee Law* 373, 377.

329 Art. 53 reads: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

Art. 64 states: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

330 J Allain, 'The jus cogens Nature of non-refoulement' (2002) 13 *International Journal of Refugee Law* 533, 541.

331 Sir E Lauterpacht and D Bethlehem, 173.

332 I von Gadow-Stehpani, 364.

333 Smuggling Protocol Art. 19.

334 S Rah, 136.

335 See III. 1.

336 B Miltner, 94.

mean harm.<sup>337</sup> The State has to properly examine the claim for asylum on an individual basis. Still, the refugee has no title to receive this status.<sup>338</sup> As stated above, this protection is only granted to refugees. However, not everyone arriving via sea can claim this status. So far as migrants are concerned, other provisions might provide an equivalent level of protection.

### b) Convention against Torture

The prohibition on refoulement is related to the absolute prohibition on torture.<sup>339</sup> The prohibition of torture is widely accepted as a rule of *jus cogens*.<sup>340</sup> This close connection is further seen in the Convention against Torture (CAT) itself. Art. 3 of the CAT contains an express 'non-refoulement' provision.<sup>341</sup> This principle has to be understood in the same way as the term in the Refugee Convention. However, it adds an additional layer of protection, since also persons who cannot be considered as refugees but might be subject to torture are protected. This has in practice the result, that migrants and refugees regardless of their exact status have to be accepted, if no safe third country is willing to do.<sup>342</sup> This rule does only apply in the case of a threat of torture- the danger of inhuman treatment alone is not sufficient. The protection is hence somewhat limited. The CAT applies where a State has the *de jure* or the *de facto* control.<sup>343</sup> According to the Committee against Torture this rule applies in 'all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised.'<sup>344</sup>

### c) European Convention on Human Rights

Although the European Court of Human Rights, the judicial mechanism of the Convention, only presides over the limited regional spread, its judgments influence other jurisdictions.<sup>345</sup> Additionally it is important to note, that the Convention does not list duties for the Member States but grants a title to the individuals, on which they can bring an action in front of the Court.<sup>346</sup> The above mentioned Hirsi case serves as a good example. Even if a proper protection is not granted under the above mentioned norms, the European Convention on Human Rights (ECHR) thus can serve as a legal basis.<sup>347</sup> Art. 3 of said Convention reads: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'<sup>348</sup> This Art. 3 of said Convention is interpreted to grant protection against refoulement.<sup>349</sup> Out if the risk of being subjected to inhuman treatment in a country in which a person should be evicted arises the public duty to grant access to the territory of

337 M Pallis, 343.

338 I von Gadow-Stephani, 368.

339 A Duffy, 373 et seq.

340 S Rah, 224.

341 Art. 3 § 1 CAT reads as follows: 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

342 S Rah, 222.

343 A Duffy, 381

344 UN Committee Against Torture (CAT), *Conclusions and Recommendations, United States of America* (25 July 2006) no 15, CAT/C/USA/CO/2, available at: <http://www.unhcr.org/refworld/docid/453776c60.html>.

345 A Duffy, 378.

346 S Rah, 211.

347 A Zimmermann, 1478.

348 European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) *Council of Europe Treaty Series* No. 5, Art. 3.

349 Sir E Lauterpacht and D Bethlehem, 185.

a safe State.<sup>350</sup> Under this provision refoulement is also in those cases prohibited, where the danger of inhuman treatment awaits.<sup>351</sup> The scope of this protection is thus broader than the protection under the CAT, since it is not limited on the danger of being tortured. The provision is also understood to offer more protection than the Refugee Convention, due to the absence of exceptions and its application to everyone and not only refugees.<sup>352</sup> Its application is not limited to the territory of its Member States but also encompasses extra-territorial conduct.<sup>353</sup> The same rights can be deduced out of Art. 2 ECHR if a refoulement results in danger to life.<sup>354</sup>

#### d) International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) contains no express 'non-refoulement' duty.<sup>355</sup> Art. 7 however provides a ban to 'torture or to cruel, inhuman or degrading treatment or punishment'.<sup>356</sup> Art. 6 provides a right to life. These provisions too are interpreted to contain a 'non-refoulement principle'.<sup>357</sup> A State that is extraditing someone to a State where he has to fear that his rights under the Covenant are violated violates the Covenant itself.<sup>358</sup> Art. 2 provides for the scope of the ICCPR and states that each State party has to respect the rights of all individuals 'within its territory and subject to its jurisdiction'. A refusal of migrants and refugees at sea, with results in the threat of their life is thus prohibited. To some scholars this also includes the refusal of unseaworthy vessels.<sup>359</sup> This results in practice into a right to access a port in those cases.

#### e) Extra-territorial application of non-refoulement

It remains questionable however whether those rights can also be applied extra-territorial. A direct permission to apply the human rights standards and the principle of 'non-refoulement' in particular extra-territorial is not existent. According to Art. 29 of the Vienna Convention on the Law of the Treaty 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.' This undoubtedly includes the territorial sea of a coastal State. As stated above, interceptions and rescue-at-sea missions are more frequently conducted on the high seas though. As was described above, the relevant human rights bodies interpret its geographical scope not based on the territory but on the effective control that a State is exercising.<sup>360</sup> Some Conventions expressly mention this enlargement of its application. They add the term 'under its jurisdiction', to this definition of its application.<sup>361</sup> This view is to a large degree supported by the literature<sup>362</sup>. Decisive is only, that the persons are within the competence of a State. As stated above, the jurisdiction of the States is not limited to its territory either. This reasoning can

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350 S Rah, 214.

351 Sir E Lauterpacht and D Bethlehem, 189.

352 A Duffy, 378.

353 S Rah, 211 et seq.

354 A Zimmermann, 1478.

355 B Miltner, 98.

356 Art. 7 ICCPR.

357 Sir E Lauterpacht and D Bethlehem, 185.

358 A Duffy, 382.

359 S Rah, 221.

360 B Miltner, 98.

361 S Rah, 223.

362 Sir E Lauterpacht and D Bethlehem, 142.

only lead to the conclusion, that the 'non-refoulement' principle applies when persons fall under the jurisdiction of a coastal State which is a member to one of the above mentioned international treaties.<sup>363</sup> This supports the presumption, that this principle is not limited in its application on the territory of a State. The crossing of an international border is generally not necessary to be protected by this regime.<sup>364</sup> It can be applied wherever this State is exercising effective control. Not surprisingly does the UNHCR argue in the same way.<sup>365</sup> According to this argumentation, the intention of the human rights framework can only be properly interpreted by accepting an extra-territorial application of this principle.

This clear presumption is however not supported by a coherent State practice.<sup>366</sup> In fact it rather points into the opposite direction.<sup>367</sup> Particular relevance has in this case the *Sale* Judgement of the US Supreme Court.<sup>368</sup> Haitian refugees were picked up in international waters and sent back. In that case the Supreme Court argued, that no extra-territorial responsibilities can arise out of the Refugee Convention, in particular because of the history of the Convention.<sup>369</sup> This judgement was heavenly criticised and attacked, even by the Inter-American Commission on Human Rights.<sup>370</sup> In addition, other American sources come to a different conclusion.<sup>371</sup> Even though the States' practice does not unanimously support this application of this principle, it can neither provide a clear exception to the application of the 'non-refoulement' principle.<sup>372</sup>

Disclosure provides the *Hirsi* case that was already addressed above. In that case the Italian coast guard intercepted a boat with refugees and migrants on board. They then transferred those persons back to Libya. Even though the interception mission took place on the high seas, the Court found a violation of Art. 3 of the ECHR.<sup>373</sup> It further clarified, that the responsibility of a party of the ECHR might also arise out of an action it has exercised outside its national territory but under its effective control.<sup>374</sup> This responsibility contains an obligation to safeguard the rights provided in the ECHR. In the case of migrants that are taken onto a warship, this control is resulting in *de jure* jurisdiction over those concerned. The Court also notes that 'Italy cannot circumvent its "jurisdiction" under the Convention by describing the events at issue as rescue operations on the high seas.'<sup>375</sup> This only underlines the conclusion stated above, that the State has jurisdiction where it exercises effective control. It is hence a false conception, that a the protection in a rescue-at-sea mission is lower. It further contradicts the attempts of the Italian authorities to minimize interaction with those concerned, to claim a lack of effective control. The application of the 'non-refoulement' principle is thus universally applicable in the case of a State action on the high seas.

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363 V Moreno-Lax, 204.

364 This is not the case for the Refugee Convention though, since a person is not protected as long as he still is on the territory of the State of departure.

365 *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007) no 32 et seq., available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

366 A Fischer-Lescano, T Löhr and T Tohidipur, 266.

367 D Guilfoyle, 225.

368 *Sale v. Haitian Ctrs. Council*, 509 US 155, 156 (USSC 1993).

369 R Weinzierl and U Lisson, 59.

370 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement* no 24.

371 R Weinzierl and U Lisson, 60.

372 A Fischer-Lescano, T Löhr and T Tohidipur, 266.

373 ECHR, *Hirsi vs Italy*, no 136.

374 ECHR, *Hirsi vs Italy*, no 73.

375 ECHR, *Hirsi vs Italy*, no 79.

Given this explicit analysis of the Court for the case of an interception mission at sea, labelled as a rescue mission, the extra-territorial application of said principle should be undisputed at least on an European level. Since the other international treaties are interpreted also in a way which constitutes extra-territorial jurisdiction, this has to be confirmed as a general character of the 'non-refoulement' principle. The State practice so far as it is contravening this conclusion can only be used so far it is not contrary to the individual protection as the purpose of those treaties.<sup>376</sup>

#### f) Conclusion

In summarizing, there exist different international treaties which obligate the States conducting an operation at sea. The most prominent is the Refugee Convention. This Convention protects refugees from refoulement to a State where their life or their freedom is threatened. It has the downside however, that only persons who are in danger of being individually persecuted fall under the term refugee. The protection of the Convention depends on this term though.

In Art. 33 the principle of 'non-refoulement' is incorporated. It includes refusal at the sea border. The term has to be interpreted broad and encompasses all measures which have the practical effect for the refugee to end up in a threatening situation. This does still not mean, that the States have to grant asylum to the refugees. It is based on the national decision to grant this status. However, the practical effect of the 'non-refoulement' rule is, that a State has to examine individually, whether the person has a right to asylum. There do exist a security exception in Art. 33 § 2. In the case that a person is threat to the security of the host State, it has the competence to reject him. Since even in this scenario this assessment can only be made by balancing the interest the individuals interest with the State's interest, a individual examination is required.

The principle of 'non-refoulement' is notwithstanding its crucial role in the protection scheme of migrants and refugees not to be considered a rule of '*jus cogens*'. It is thus theoretically possible to derogate from this principle. As an other international treaty provides the CAT a 'non-refoulement' rule. It does not require the refugee status to grant this protection, however it is limited to the case of a threat of torture. The ICCPR adds another layer and includes the danger of inhuman treatment to the protection scope of the principle. This is also the case in the ECHR, which also has the benefit of providing a coherent framework of protection through its court.

If a person thus cannot rely on the protection of the Refugee Convention, he still can rely on the protection of the other agreements. Nonetheless, the person needs to be in fear of some kind of harm. Hence those rights cannot apply, if a safe third country exists, where no such harm can be expected. Each person has consequently at least a right of a fair screening process, where his danger of being subject to a harmful treatment in a possible country into which he might be extradited is examined.

#### **IV. Concluding remarks**

The situation at sea of migrants and refugees is closely related to the interplay of States' duties and obligation. One has to differentiate between the competence to even intercept a vessel and then the obligations towards the persons on board, if such an action has taken place. The legal situation is ambiguous. This is due to the fact that the sea, in particular the high seas, is a realm in which no

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<sup>376</sup> S Rah, 178.

State can claim full sovereignty. Still, it is nothing like an area of lawlessness. The dominant role of the regime of the flag State underlines this presumption. Whether or not a State can act against a vessel is depending on the zone in which it is operating and on the status of a ship. Generally speaking, stateless vessels are subject to universal jurisdiction. Every State can stop and search them according to its national legal regime. This is in clear contrast to the protection a foreign flagged vessel has even in the territorial sea of a coastal State. It can only be stopped if its infringing special rules. Such a rule is the prohibition to unload persons contrary to the immigration rules. It has been established above, that the attempt or even the intention to do so is sufficient, to stop and divert them. On the high seas, ships can be visited by warship only under certain conditions. The lack of nationality is one of them, but also if they are engaged in slave trade. Since doubts persists whether the smuggling of migrants is enfolded by this exception, the Smuggling Protocol provides further clarity. If the flag State gives his consent, the intercepting States has far reaching competences in the case of migrant smuggling. This system is institutionalized.

These competences are mirrored though by the duty to render assistance at sea. The becomes increasingly important, since the refugees and migrants often use unseaworthy vessels. To fulfill this duty effectively, a whole framework was set up through the SAR and the SOLAS Convention. This obligation exists regardless of the status of the persons concerned. But not only the through the framework assigned State have to come to assistance without delay, this is also the case for masters of private vessels. Due to legal uncertainties in particular as regards the disembarkation of those rescued, this rule is violated frequently. The problem of a proper place for disembarkation concerns just as much public actors. Since the disembarkation to a place of safety is a duty confirmed through the relevant treaties, but the place of safety is not defined itself, the legal uncertainty persists. It is argued, that a place of safety has to be the closest port that is safe, others grant more power to the State in evaluating the right place. So far the States can only agree, that the assigned State in which a rescue mission is conducting bears the responsibility to coordinate and find a port to disembark. It thus has no duty to accept those rescued himself. Progress is in the question would prove to be benefit those rescued tremendously. However, this problem is interrelated with the lack in will to accept those rescued. On a European level, a change in the current Dublin system of disposition would be necessary. Otherwise the rescuing State is carrying the responsibility alone, even though the destination of migrants and refugees might be States further north.

Interesting is the States' practice to label an operation as a rescue-at-sea mission. This is done under the impression, that such a mission does not only provide for the moral high ground, but also exclude the State from further duties as soon as those rescued have been delivered to a place of safety. It is sometimes argued, that such a place can already be the rescuing vessel. Any further transportation is then without any conditions for the State. But as established above the State has to grant just as much protection in a rescue-at-sea mission. It is thus surprising why this misconception of a lower responsibility in a rescue mission continues to exist.

This lack of a positive obligation to accept persons in need can also be found in the second big legal concept that is safeguarding human rights at sea. The Refugee Convention provides a 'non-refoulement' principle. This is interpreted in a broad sense and demands an individual examination, if someone might be subject to harm in the State in which the intercepting State want to extradite him. But even though this rights grants some protection for the refugee, it does not provide for a title for asylum. This is in the competence of the national legislation. Other treaties such as the ECHR grant further rights which are not limited in its application to refugees and do not require, that someone is individually persecuted, but that he fears to be subject to inhuman treatment or

torture upon return. This right which is provided in various treaties and requires the States to check each rescued and intercepted individually is also applicable on the high seas. This extra-territorial application is based on the concept, that jurisdiction arises on the high seas out of exercising effective control over someone. This rule is thus just as much applicable in the context of a rescue-at-sea mission. The application of the 'non-refoulement' principle is thus universally applicable.

To conclude, the protection of persons at sea is including a variety of measures. The State has hence to overcome a number of barriers, before he can legally extradite someone he has picked up at sea to a country. All those conditions serve the interest of refugees and migrants at sea. Those rights still not mount up to a level, where they fulfil the core wish of those trying to reach a country via sea: a full right to access.



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