

## 6 | Interdiction at sea

### 6.1 INTRODUCTION

The phenomenon of refugees and undocumented migrants travelling by sea gives rise to a number of distinct issues under international law. It raises the question of the allocation of responsibilities for the protection of refugees; it questions the duties of states to preserve life at sea; and it questions the international competence of states to control the sea as an instrument of immigration policy. These are topics which challenge the interpretation and application of the right of asylum and other human rights, but also the rights and freedoms under the Law of the Sea.

Not all these issues are new. Some of them came to the fore in the context of the Vietnamese exodus of 'boat people' in the 1970s, when thousands of refugees fled the coasts of Vietnam in small fishing boats, hoping to be rescued by freighters on busy shipping lanes on the high seas.<sup>1</sup> They came to the fore also in the context of the United States' Caribbean Interdiction Programme, which was initiated as early as 1981, when President Reagan concluded an agreement with the Haitian government allowing the US Coast Guard to board Haitian vessels on the high seas and redirect them to Haiti.<sup>2</sup> In more recent years, the obligations of states towards refugees found at sea attracted renewed interest in the aftermath of the international incident around the *MV Tampa*, which concerned the taking of control by Australian security forces of a container vessel which had rescued 438 asylum-seekers and which was subsequently prevented from entering Australian ports and eventually diverted to Port Moresby, the capital of Papua New Guinea.<sup>3</sup> The Tampa incident and

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1 The questions of rescue and admission of refugees found at sea have been addressed by UNHCR's Executive Committee on several occasions: EXCOM Conclusion No. 2 (XXVII), 1976, paras. (f)-(h), EXCOM Conclusion No. 14 (XXX), 1979, paras. (c)-(d), EXCOM Conclusion No. 15 (XXX), 1979, para. (c), EXCOM Conclusion No. 20 (XXXI), 1980, paras. (a)-(g), EXCOM Conclusion No. 23 (XXXII), 1981, paras. (1)-(5). For an account of the Vietnamese boat people and international law see J.Z. Pugush, 'The Dilemma of the Sea Refugee: Rescue Without Refuge', 18 *Harvard International Law Journal* (1977), p. 577-604.

2 For a historical and legal analysis: S. Legomsky, 'The USA and the Caribbean Interdiction Program', 18 *IJRL* (2006), p. 679-683.

3 For a historical and legal analysis: P. Mathew, 'Australian Refugee Protection in the Wake of the Tampa', 96 *AJIL* (2002), p. 661-676; E. Willheim, 'MV Tampa: The Australian Response', 15 *IJRL* (2003), p. 159-190; C.M.J. Bostock, 'The International Legal Obligations owed to the Asylum-seekers on the MV Tampa', 14 *IJRL* (2002), p. 279-301.

the subsequent installment of Australia's Pacific Solution served as a catalyst for debate and action of both UNHCR and the International Maritime Organization (IMO), in particular on the issues of treatment and disembarkation of asylum-seekers rescued at sea.<sup>4</sup>

This chapter discusses migrant interdiction practices at sea employed by EU Member States. It focuses not on the general question how EU Member States, the European Union, or the international community at large should cope with refugees at sea, but deals specifically with those instances where EU Member States on their own motion or in accordance with international arrangements engage in interdiction strategies at sea. The chapter seeks to delineate firstly, the international competences of states to interdict boat migrants and, secondly, the circumstances under which EU Member States can be held responsible under international law for the manner in which these interdictions affect the rights of persons seeking asylum.

Various terms are used in describing enforcement actions relating to migrants at sea. In policy documents, Frontex and the European Commission employ the terms 'interception' and 'diversion', without specifying the nature of the distinction.<sup>5</sup> International maritime law usually distinguishes between on the one hand, measures amounting to the boarding and searching of a ship (or visit) and, on the other hand, the taking of coercive measures which may include the arrest of the persons on board and the seizure of the ship (including the placing of the vessel under (forcible) escort).<sup>6</sup> This chapter will use the more general term 'interdiction' to describe all forms through which states make contact with migrant vessels in the course of sea border controls and will specifically refer to appropriate maritime law terminology where relevant.<sup>7</sup>

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4 See extensively section 6.3.2.2. below. Australia's Pacific Solution, entailing the transfer of all unauthorised boat arrivals to processing centers in the Pacific region, is extensively discussed in chapter 7.

5 European Commission, Commission Staff Working Paper, Report from the Commission on the Evaluation and Future Development of the Frontex Agency, Statistical Data, 13 February 2008, SEC(2008) 150/2; Frontex News Release 17 February 2009, 'HERA 2008 and NAUTILUS 2008 Statistics'. In the latter document, it is mentioned that 'migrants diverted back' are '[p]ersons [...] who have either been convinced to turn back to safety or have been escorted back to the closest shore.'

6 According to Guilfoyle, international maritime law generally distinguishes between 'boarding' or 'search' on the one hand, and 'seizure' on the other hand. D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press (2009), p. 4, 9. See in particular Articles 105, 109(4) and 110(2) United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 396.

7 UNHCR commonly employs the term 'interception', which it has defined as measures employed by States to: '(i.) prevent embarkation of persons on an international journey; (ii.) prevent further onward international travel by persons who have commenced their journey; or (iii.) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law', EXCOM Conclusion No. 97 (LIV), 2003.

Section 2 of this chapter provides the necessary background by describing the European interdiction programme, which is comprised primarily of Member States' driven efforts to assert control over undocumented migrants traveling towards Europe by sea. Section 3 discusses relevant provisions of the Law of the Sea. These relate, firstly, to entitlements of migrants under the principle of free navigation and, secondly, to specific duties incurred by states in respect of migrants who are in distress at sea. Section 4 appreciates migrant interdictions at sea in terms of human rights. It discusses specific duties towards refugees (*non-refoulement*, disembarkation, status determination), but also duties with a wider personal scope, in particular the right to leave and the right to liberty. The chapter will argue that although the Law of the Sea leaves ample room for states to cooperate for purposes of migrant interdiction, requirements of human rights law, in particular those of a procedural nature, substantially restrict the discretion of EU Member States to subject undocumented migrants to various types of coercive measures at sea. It will conclude that the key challenge facing EU Member States employing interdictions at sea is to develop a meaningful human rights strategy which supplements and restrains the policy of sea interdiction. The development of such a framework is however controversial, as it may well imply that particular interdiction practices need to be fundamentally reconsidered.

## 6.2 THE EUROPEAN INTERDICTION PROGRAMME

The phenomenon of boat migration to Europe and the policy responses of Southern European governments have been extensively covered in other studies and need not be recounted in full here.<sup>8</sup> The picture which emerges from those studies is that the daily images of overcrowded boats with migrants from Morocco and other African countries arriving at European shores brought about a notable change in the perception of irregular migrants arriving at Europe's southern border. While governmental policies as well as local communities in the beginning of the 1990s were still focused on providing humane responses based on notions of solidarity and compassion, the increase of the

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8 J. Simon, 'Irregular Transit Migration in the Mediterranean – some facts, figures and insights', in: N. Nyberg Sorensen (ed), 'Mediterranean Transit Migration' (Report), Danish Institute for International Studies (2004); S. Alscher, 'Knocking at the Doors of "Fortress Europe": Migration and Border Control in Southern Spain and Eastern Poland', The Center for Comparative Immigration Studies Working Paper No. 126, San Diego (November 2005); M. Albahari, 'Death and the Moral State: Making Borders and Sovereignty at the Southern Edges of Europe', The Center for Comparative Immigration Studies Working Paper No. 136, San Diego (June 2006); P. Cuttitta, 'The changes in the fight against illegal immigration in the Euro-Mediterranean area and in Euro-Mediterranean relations', CHALLENGE working paper (22 January 2007); H. de Haas, 'Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends', IOM Migration Research Series, IOM Geneva (2008).

number of illegal entries and often negative media coverage lead to a corresponding decrease in the willingness of states and communities to provide shelter to large amounts of them. Several authors have described the change in attitude of Southern European societies towards boat migrants as a process in which 'a spirit of humanitarian reception and solidarity' gradually gave way to a fear of an 'invasion of the poor'.<sup>9</sup> This process was accompanied by acute governmental efforts to seal off the maritime border.

It is difficult to draw an exhaustive picture of what this sealing off exactly amounts to. There is not one model employed by EU Member States for the surveillance and control of the sea border. The deployed strategies have varied in time, from one Member State to the other and they may further differ according to the third country from where the migrants have embarked on their journey (and with which agreements may or may not have been concluded). For the purposes of this study it suffices to focus on those interdiction measures which may preclude asylum-seekers from gaining access to a EU Member State. In this connection, it is possible to identify three general models of migrant interdiction which are of particular interest.

The first are joint operations in territorial waters of a third country. Especially Spain and Italy have been active in concluding agreements with several North-African countries which allow them to participate in border patrols in the territorial seas of those third countries. Since 2003, Morocco and Spain have collaborated in joint naval patrols and Spain later concluded similar agreements with Mauritania (2006), Senegal (2006), Cape Verde (2007) and with Gambia, Guinea and Guinea Bissau (2008).<sup>10</sup> In 1997, Italy signed an exchange of letters with the Albanian government, followed up by a Protocol, allowing the Italian navy to enter the territorial waters of Albania and to interdict vessels carrying undocumented migrants.<sup>11</sup> In the years 2000-2007, Italy entered into several agreements with Libya for cooperation on irregular migration, including a protocol of 29 December 2007, which foresees in joint Italian and Libyan patrols in the territorial waters of Libya, together with the transfer of Italian coast guard cutters to Libya to be manned by mixed Italian and Libyan crews.<sup>12</sup> What makes it difficult to comprehensively describe the modus operandi of these joint controls with third country authorities is that

9 Alscher (2005), p. 14; Albahari (2006), p. 3-5, 8-12.

10 P. García Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in: B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston: Martinus Nijhoff (2010), p. 319.

11 ECtHR 11 January 2001, *Xhavara a.o. v Italy and Albania*, no. 39473/98 (under 'B. Relevant domestic law'); A. di Pascale, 'Migration Control at Sea: The Italian Case', in: Ryan and Mitsilegas (2010), p. 293-296.

12 Di Pascale (2010), p. 297-300; J.J. Rijpma, *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union*, dissertation Florence (2009), p. 342. The contents of the protocol have not been published. A formal launch ceremony for the joint Italian-Libyan patrols was held in the southern Italian harbour of Gaeta at May 14, 2009.

virtually all the agreements on the joint conducting of border patrols are outside the public domain.<sup>13</sup> One of the few disclosed agreements providing specific details of how the operations are carried out is the 2008 Agreement between Spain and Cape Verde on joint monitoring of maritime areas under the sovereignty and jurisdiction of Cape Verde.<sup>14</sup> This treaty foresees in the conducting of joint patrols along the 'shiprider model', where Cape Verdean personnel is placed on board Spanish vessels, with the former being exclusively competent in deciding upon the visit and arrest of vessels and those on board.<sup>15</sup> It does appear that this shiprider model is commonly followed in joint operations of border control in the territorial sea of third countries. As noted above, the Italian-Libyan Protocol foresaw in the delivery of Italian coast guard gutters to be manned by mixed Italian and Libyan crews. The Frontex operational plan for the Hera III operation, which implements bilateral agreements between Spain and Mauritania and Senegal, also mentions the compulsory placement of Senegalese and Mauritanian agents on board vessels of EU Member States, who are exclusively competent in sanctioning visits and arrests.<sup>16</sup>

The second group of interdiction practices can be classified as the interdiction and summarily return of migrants to a third country, which have also been called 'push-backs'. These interdictions are normally undertaken at the high seas and also presuppose that a third state is willing to accept the return of the migrants. The most prominent example of these push-backs are the interdictions accompanied with immediate forcible return carried out by Italian vessels in respect of migrants having embarked in Libya or Algeria, in accord-

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13 See, for an overview of the agreements concluded between Spain and African countries allowing for joint border controls, Rijpma (2009), p. 341. Also see Guilfoyle (2009), p. 216-220.

14 Agreement between the Kingdom of Spain and the Republic of Cape Verde on Monitoring Joint Maritime Areas Under the Sovereignty and Jurisdiction of Cape Verde (Acuerdo entre el Reino de España y la República de Cabo Verde sobre vigilancia conjunta de los espacios marítimos bajo soberanía y jurisdicción de Cabo Verde, done at Praia, 21 February 2008.

15 Ibid, Articles 3 (1)(b) and 6. On shiprider agreements, see eg Guilfoyle (2009), p. 72-73.

16 According to the operational plan for the Hera III mission, the task of Member States would consist *inter alia* of carrying out 'an optimal maritime and aerial surveillance of the waters close to Mauritania and Senegal, with the authorization of the Mauritanian and Senegalese authorities, carrying onboard the E.U. vessels personnel from these countries that are the responsible of the operations and are the people that must send back the immigrants to the national authorities in the coast', Frontex, Operational plan Hera III, (partly public accessible, on file with the author), para. 19.1. Also see Frontex press release 9 September 2008, 'HERA 2008 and NAUTILUS 2008 Statistics', in which it is explained that 'Spain concluded agreements with Mauritania and Senegal which allow diverting of would-be immigrants' boats back to their points of departure from a certain distance of the African coast line described in the agreements that Spain has between Mauritania and Senegal. A Mauritanian or Senegalese law enforcement officer is always present on board of deployed Member States' assets and is always responsible for the diversion.'

ance with agreements concluded with these two countries.<sup>17</sup> According to the Italian authorities, from 6 May 2009, when the operations were first implemented, to 31 July 2009, it had returned 602 migrants to Libya and 23 to Algeria.<sup>18</sup> Since that period, the push-back operations have continued.<sup>19</sup> This has resulted in a substantial fall of the number of migrants embarking by boat from Libya.<sup>20</sup> Despite submissions of UNHCR that it had found that many of the interdicted persons were seeking international protection, the Italian authorities officially acknowledged that they did not proceed with a formal identification of the pushed back migrants and that there is no procedure in place for entertaining asylum applications.<sup>21</sup> Apart from such formalized return policies, EU Member States have been reported to engage in diversions of informal nature, with the goal of either preventing migrants entry into their territorial waters or to drive them back to the high seas.<sup>22</sup> In the absence of return agreements with a third country, these diversions are primarily aimed at preventing irregular entries.

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17 For an extensive appraisal of these push backs and their legal basis see: CPT, Report to the Italian Government on the visit to Italy from 27 to 31 July 2009, 28 April 2010, CPT/Inf (2010) 14. Also see UNHCR Press Release 7 May 2009, 'UNHCR deeply concerned over returns from Italy to Libya'; UNHCR Press Release 14 July 2009, 'UNHCR interviews migrants pushed back to Libya'; Human Rights Watch Press Release 7 May 2009, 'Italy/Libya: Forced Return of Migrants Violates Rights'; Human Rights Watch, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum-seekers, Libya's Mistreatment of Migrants and Asylum-seekers' (report), September 2009.

18 CPT Report on Italy (2010), para. 13. The figure reported by UNHCR to the CPT was over 900.

19 Ibid.

20 Ibid. According to media reports, in Malta, while during 2008 a total of 84 boats with 2,775 illegal immigrants arrived from Libya, this number dropped to 17 boats with a total of 1,475 illegal immigrants in 2009. The majority of the arrivals in 2009 moreover reached Malta in the months before the push-backs were started; *Times of Malta*, 'Frontex patrols stopped as Malta quits. Italy, Libya patrols proving to be very effective', 28 April 2010.

21 CPT report on Italy (2010), paras. 13-14. The Italian government submitted that no migrant encountered in the operations expressed an intention to apply for asylum and that there was accordingly no need for their identification.

22 These informal diversions may take a variety of forms. It was reported for example that in August 2009 a patrol boat, allegedly belonging to Malta, had provided the passengers of a ship which had been adrift for twenty days with fuel and directions for the Italian island of Lampedusa; Migration Policy Group, *Migration News Sheet*, Brussels, Sept. 2009, p. 12. Diversions have also been reported to include lamentable practices such as the puncture of rubber dinghies of migrants or the dissuasion of migrants from further passage by intimidating encircling maneuvers or the deliberate creation of waves. See eg Foundation Pro Asyl and Group of Lawyers for the Rights of Refugees and Migrants, 'The truth may be bitter but it must be told. The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard' (Report) (October 2007); mentioning practices such as encircling manoeuvres, the puncture of dinghies, and the robbing and beating of migrants. Spanish border guards were also allegedly involved in cutting holes in inflatable dinghies; Migration Policy Group Brussels, *Migration News Sheet*, Brussels, April 2008, p. 8.

A third model of migrant interdictions relevant for this study are rescue operations followed by disembarkations in a third country. Rescue operations of migrants who are in distress at sea are by their nature conducted on an ad hoc basis. This has on multiple occasions resulted in rather protracted situations whereby EU Member States and/or third countries entered into toilsome negotiations as to the appropriate place of disembarkation of the rescuees. Although it is possible to infer from past experiences that irregular migrants rescued by Member State coast guards are usually allowed to disembark in one or another Member State,<sup>23</sup> it has also occurred that third countries were persuaded in taking in the migrants. One prominent example is the *Marine I* case, concerning the 369 passengers of African and Asian origin of a boat which had gone adrift in international waters and which was towed by a Spanish rescue tug to the territorial waters of Mauritania. After a standoff which lasted a week, the Mauritanian government eventually allowed the Spanish Guardia Civil to offload the passengers in one of its ports, after Spain had guaranteed that it would arrange for their repatriation.<sup>24</sup> The Council Decision for maritime Frontex operations stipulates, as a general rule of thumb, that in respect of rescue operations taking place in the context of border controls coordinated by Frontex, priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through which territorial waters or search and rescue region the ship transited.<sup>25</sup>

A final distinction of legal relevance in discussing European practices of sea interdiction is between interdictions with and without involvement of the EU external borders agency Frontex. This distinction is primarily relevant for issues of attributing conduct. Here, the question may rise to whom a migrant should direct a claim if he feels his human rights are unjustifiably interfered with on account of the conduct of an officer who receives his salary from and wears the uniform of one Member State, but who also wears a blue armband with the insignia of the European Union and who receives his instructions from yet another Member State.<sup>26</sup>

### 6.3 MIGRANT INTERDICTION AND THE LAW OF THE SEA

In chapter 4 of this book, it was addressed at length how international law puts limits to the freedom of states to engage in extraterritorial conduct. As a general rule, and failing the existence of a permissive rule to the contrary, a state may not enforce its authority outside its own territories. This means

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23 See also the examples mentioned in section 6.3.2. of this chapter.

24 M. den Heijer and K. Wouters, 'The Marine I Case: a Comment', 22 *IJRL* (2010), p. 1-19.

25 Council Decision 2010/252/EU, Annex, Part II, para. 2.1. See further section 6.3.2.2.

26 Article 10 (3)(4) Regulation 2007/2004.

that the freedom of states to enforce their migration policies, but also to secure human rights, within another country may face the obstacle of the other state asserting its territorial sovereignty. Interdictions at sea do not take place within the exclusive territorial sovereignty of one state or another but are governed, instead, by the specific regime of the Law of the Sea, which distributes international legal titles and obligations within the different maritime zones. Most relevant for the topic of this chapter are those norms of the Law of the Sea pertaining to the Member States' control powers in the different sea areas and duties of search and rescue of migrants who are in distress.

The EU Justice and Home Affairs Council also identified these two topics as warranting special scrutiny in the course of border controls at sea.<sup>27</sup> Addressing these issues, the European Commission presented a Study on the international law instruments in relation to illegal immigration by sea in May 2007, in which it sought to identify possible obstacles sprouting from the Law of the Sea for the effective exercise of maritime controls and surveillance.<sup>28</sup> This study prompted the further installment of an informal working group consisting of representatives of Member States, Frontex, IMO and UNHCR to draft specific guidelines for Frontex operations at sea which should *inter alia* set out the competences of states in taking measures in the course of sea border control operations by paying due respect to norms of international maritime law and human rights law. After it transpired that the working group could not agree on issues such as human rights implications and the identification of the places of disembarkation, the European Commission proposed a draft implementing decision under Article 12 (5) Schengen Borders Code based on the provisional outcomes of the working group.<sup>29</sup> Due to several Member States opposing a binding regime for rescue operations and the disembarkation of migrants, the Council subsequently divided the proposal in a set of binding rules for the conducting of interceptions in the course of sea border controls coordinated by Frontex and non-binding guidelines for search and rescue situations and disembarkation.<sup>30</sup> The relationship of this Decision with the Schengen Borders Code was discussed in chapter 5.

Section 6.3.1 examines the interdiction powers of states in the different maritime areas and questions the extent to which migrants and refugees may

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27 JHA Council Conclusions 2 December 2004, 'Conclusions evaluating the progress made with regard to the implementation of the Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union', 15087/04 FRONT 201 COMIX 709, p. 7. Also see Presidency Conclusions 15/16 December 2005, Annex I, 'Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean', 15744/05 ASIM 66 RELEX 761, p. 4.

28 European Commission, Study on the international law instruments in relation to illegal immigration by sea, Brussels, 15 May 2007, SEC(2007) 691.

29 COM(2009) 658 final.

30 Council Decision 2010/252/EU



rely on the principle of free navigation. Section 6.3.2 discusses the contents of international maritime obligations of search and rescue. Where relevant, references are made to the Commission study on the international law instruments in relation to illegal immigration by sea and Council Decision 2010/252/EU.

### 6.3.1 The right to interdict

#### 6.3.1.1 *The territorial sea*

In respect of the powers of the state to regulate conduct within the territorial sea, the doctrine has come to prevail that 'the rights of the coastal state over the territorial sea do not differ in nature from the rights of sovereignty which the state exercises over other parts of its territory.'<sup>31</sup> This is now confirmed in Article 2 UNCLOS and Article 2 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

That the state's sovereignty extends to its territorial sea does not mean that its municipal laws automatically apply to the territorial sea.<sup>32</sup> The question whether, for example, an immigration statute applies to persons having crossed the borders of the territorial sea but who have not yet set foot on land, must be answered on the basis of relevant domestic law provisions.<sup>33</sup> The United States, in this connection, has installed a 'wet-foot/dry-foot policy', under which those Cuban migrants 'touching' the US soil, bridges, piers or rocks become subject to US immigration processes. If their feet are 'wet', on the other hand, they are generally returned to Cuba, unless they establish a credible fear of prosecution, in which case they are taken to the naval base at Guantanamo Bay for further status determination and possible removal to third country.<sup>34</sup> Australia entertains a distinction between 'offshore entry persons' and 'onshore' arrivals, to the effect that all aliens who have first entered Australia at an 'excised offshore place' without lawful authority – which includes all persons arriving by boat without the valid visa – are detained and transferred to Australia's Christmas Island, where their reasons for being

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31 Report of the International Law Commission covering the work of its eighth session, *YBILC* 1956, II, p. 265.

32 R.R. Churchill and A.V. Lowe, *The Law of the Sea*, Juris Publishing, Manchester University Press (1999), p. 75.

33 Goodwin-Gill and McAdam observe that States generally apply their immigration laws not within territorial waters, but within internal waters, G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Oxford University Press (2007), p. 273-274. But see notes 37-40 *infra* and accompanying text.

34 See, extensively and for further references, Legomsky (2006), p. 684.

in Australia are identified.<sup>35</sup> The offshore entrants remain subject to Australian jurisdiction and the provisions of Australia's Migration Act, except for the purposes of applying for a visa, including protection visa for refugees. This means that persons claiming asylum are subject to a non-statutory refugee status assessment, where claims are assessed directly against the criteria set out in the Refugee Convention, but without a legal entitlement of entry into Australia if a person is found to be a refugee.<sup>36</sup>

Contrary to these two countries, European states have not 'excised' their territorial sea (or their overseas territories) from their domestic migration statutes.<sup>37</sup> Current European practices indicate that, even though diversions from the territorial sea reportedly occur, ships found in the territorial waters of a Member State are generally considered to be subject to the relevant asylum and immigration safeguards under either domestic, European or international law and that, rather than being pushed back to the open sea or transferred to some other place, these ships are escorted to a port and the passengers processed according to the ordinary procedures.<sup>38</sup> In order to accommodate the situation of asylum-seekers arriving at sea borders, the proposal for recasting the Asylum Procedures Directive foresees in a clarification of the territorial scope by specifying that the notion of 'territory' includes the territorial waters of the Member States.<sup>39</sup> This amendment would ensure that in the treatment of persons applying for asylum in their territorial sea, Member States must uphold the standards of the Asylum Procedures Directive.<sup>40</sup>

The main impediment for states to enforce their laws within the territorial sea is the right of innocent passage guaranteed under Articles 17-26 UNCLOS and Articles 14-20 of the Convention on the Territorial Sea and the Contiguous Zone. The right of innocent passage embodies both the right of freely traversing through the coastal state's territorial seas and the right to proceed to and

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35 Australian Government, Department of Immigration and Citizenship (DIAC), Fact sheets 60, 61, 75, 81; Australian Migration Act 1958, Sections 5, 6, 46A. The Australian programme for the offshore processing of asylum-seekers is extensively discussed in chapter 7.

36 According to the Australian government however, 'It will generally be the case that where such unauthorised arrivals are assessed as engaging Australia's protection obligations under the non-statutory refugee status assessment process, the Minister will lift the bar on making a valid visa application and they will be allowed to validly apply for a visa under the Act', DIAC Fact sheet 81.

37 See, in respect of Italy, CPT Report on Italy (2010), para. 11.

38 In the context of the Italian push-backs, Italian media quoted Berlusconi as saying: 'Our idea is to take in only those citizens who are in a position to request political asylum and who we have to take in as stipulated by international agreements and treaties,' while referring to 'those who put their feet down on our soil, in the sense also of entering into our territorial waters'; Human Rights Watch News Release 12 May 2009, 'Italy: Berlusconi Misstates Refugee Obligations'.

39 COM(2009) 554/4, Article 3 (1). This is in line with the Commission study on illegal migration and the law of the sea, which stipulated that the Community asylum instruments also extend to the territorial sea of the Member States, SEC(2007) 691, Annex, para. 4.2.2.10.

40 See, on the territorial scope of EU asylum law, chapter 5.3.3.

from a coastal state's internal waters or ports.<sup>41</sup> Passage is only innocent if it is not prejudicial to the 'peace, good order or security' of the coastal state.<sup>42</sup> Under UNCLOS, it is specified that the unloading of persons contrary to immigration regulations renders passage non-innocent.<sup>43</sup> Ships that have forfeited the right of innocent passage remain subject to the full jurisdiction of the coastal state and may be arrested for violation of local laws or in some other manner prevented from passage through the territorial sea.<sup>44</sup> States may, moreover, adopt laws in respect of innocent passage aimed at preventing infringements of its immigration laws, for example the setting of conditions of access to its ports.<sup>45</sup> Because UNCLOS excludes ships violating immigration laws from the rights of innocent passage, it is commonly considered that the law of the sea permits states to prevent irregular immigrants traveling on a ship from setting foot on land and to require the ship to leave the territorial waters.<sup>46</sup> This may, as noted above, however come in conflict with immigration guarantees under domestic or international law.

According to UNCLOS, the unloading of passengers only renders passage non-innocent if this unloading is contrary to the immigration laws of the 'coastal State'.<sup>47</sup> This begs the question whether migrant vessels which are merely traversing through the territorial waters of a state in order to enter the territorial waters (and the territory) of that of another, may also be subjected to interdiction. In its study on the international law instruments in relation to illegal immigration by sea, the European Commission considers the passage of undocumented migrants wishing to land in another Member State than the Member State through which waters they are traversing to be non-innocent, under the reasoning that, in view of the common rules on the crossing of external borders, illegal entries in another Member State must also be considered as prejudicial to the good order and security of the coastal Member State.<sup>48</sup> This interpretation would appear to textually depart from the language of UNCLOS, but an argument can also be made that, because the European Union is itself a party to UNCLOS, Member States patrolling and

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41 Art 18 (1) UNCLOS; Article 14 (2) Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 *UNTS* 205.

42 Article 19 (1) UNCLOS; Article 14 (4) Convention on the Territorial Sea and the Contiguous Zone.

43 Article 19(2)(g) UNCLOS.

44 In respect of the right to deny and suspend non-innocent passage in the territorial sea, see more extensively Churchill and Lowe (1999), p. 87-88.

45 Articles 21(1)(h) and 25(2) UNCLOS.

46 SEC(2007) 691, para. 2.1.2. For a discussion: M. Pallis, 'Obligations of States towards Asylum-seekers at Sea: Interactions and Conflicts Between Legal Regimes', 14 *IJRL* (2002), p. 355-359.

47 Articles 19(2)(g), 21(1)(h) UNCLOS.

48 SEC (2007) 691, para. 4.2.2.6.

controlling one another's coastal waters are doing so in the exercise and for the benefit of the European Union's rights under UNCLOS.<sup>49</sup>

In the framework of interstate cooperation in the suppression of undocumented migration, states increasingly conduct border patrols and subsequent interdictions within one another's territorial sea. Because these operations take place within the territorial sovereignty of another state they will require the consent of and must be conducted in accordance with the conditions set by the coastal state. Special arrangements facilitating the interdiction by one Member State in the coastal sea of another Member State are provided by the Frontex Regulation, as amended by the RABIT Regulation.<sup>50</sup> The Council Decision for maritime Frontex operations stipulates that any interdiction carried out by one Member State in the territorial sea of another requires prior authorization of the coastal Member State.<sup>51</sup> In the proposal for recasting the Asylum procedures Directive, it is further set out that asylum applications made to the authorities of one Member State carrying out immigration controls in the territory of another must be dealt with by the Member State in whose territory the application is made.<sup>52</sup> Although this provision clarifies responsibilities, it may also raise issues of indirect *refoulement*.<sup>53</sup>

Joint operations of border control in the territorial sea of a third country must necessarily be carried out in accordance with agreements between the coastal state and an EU Member State or possibly the EU itself. An anomaly in the Frontex framework defining the task and powers of guest officers is the absence of references to the law and sovereignty of the third country. The relevant provisions presume compliance with the laws of the host Member State and ordain that guest officers take instructions from the host Member State, whereas the 'shiprider agreements' concluded with several North African

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49 The European Community acceded to UNCLOS on 1 April 1998. According to Article 4(3) of Annex IX, UNCLOS, international organizations may 'exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States'. In depositing the instrument of ratification, the European Community formally declared its 'acceptance, in respect of matters for which competence has been transferred to it by those of its Member States which are parties to the Convention, of the rights and obligations laid down for States in the Convention and the Agreement'; Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention, 1 April 1998. The argument would accordingly be that in applying, for example, the Schengen Borders Code, the Member States are enforcing not merely their municipal immigration laws, but also the common Union corpus on external border controls, thus giving effect to the right of the European Union established under UNCLOS to protect the common external borders from irregular infringements.

50 See chapter 5.2.2.4.

51 Council Decision 2010/252/EU, Annex, Part I, para. 2.5.1.2.

52 COM(2009) 554/4, Article 4(5).

53 See extensively, section 6.4.1. below.

countries stipulate that not the host Member State, but the third country is ultimately competent in deciding upon visits and arrests.

#### 6.3.1.2 *The contiguous zone*

States may assert, in respect of particular subject matters, jurisdiction over the contiguous zone adjacent to the territorial sea. This zone does not form part of the territorial sovereignty of the coastal state and hence, its laws and regulations cannot apply in this zone. Article 33 (1) UNCLOS does permit states, however, to exercise the control necessary to: '(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.'<sup>54</sup> Accordingly, UNCLOS does allow for the taking of specific measures in the contiguous zone on immigration matters.

The key question here concerns the scope of these powers. Some authors consider that Article 33 (1) UNCLOS enlivens a general competence to intercept and redirect irregular migrants found in the contiguous zone.<sup>55</sup> In this vein also, Council Decision 2010/252/EU does not distinguish between enforcement activity undertaken in the territorial sea and contiguous zone. It set forth that, in respect of decisions concerning *inter alia* the seizure of the ship and persons on board or the escorting of the vessel towards the high seas, ultimate competence lies with the coastal Member State.<sup>56</sup>

But other authors have stressed the distinction in Article 33 UNCLOS between measures of prevention and measures of punishment.<sup>57</sup> Under this reasoning, the power to 'punish' refers to measures taken in response to infringements of the coastal state's law which have been committed *within* its territory or territorial sea, by analogy to the doctrine of hot pursuit. The power to prevent would, on the other hand, merely entail a right to approach, inspect and warn a vessel, rather than to take enforcement measures such as arrest, diversion or the forcible escort to a port.<sup>58</sup> This would correspond with the notion that because undocumented migrants not yet having entered the territory or territorial waters of the coastal state have not (yet) acted in contravention of a coastal state's immigration laws, there is no explicit jurisdictional basis for subjecting these persons to coercive measures. Contrary to Council Decision 2010/252/EU, the earlier Commission study on the law of the sea

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54 Also see Article 24 Convention on the Territorial Sea and the Contiguous Zone.

55 S. Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection', 12 *Max Planck Yearbook of United Nations Law* (2008), p. 233.

56 Annex, Part I, paras. 2.5.1.1.-2.5.1.2.

57 Guilfoyle (2009), p. 12-13. Also see D. P. O'Connell, *The International Law of the Sea*, vol. I, Oxford: Clarendon Press (1982), p. 1058; A. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels', 35 *ICLQ* (1986), p. 330.

58 *Ibid.*

aligned with this interpretation, in noting that it seemed impossible that a state is allowed in the contiguous zone, in addition to the right to approach the vessel and to prevent its entry into territorial waters, to arrest it or bring it to a port.<sup>59</sup> It would follow from this reasoning, firstly, that if found that there is a prospect of a vessel infringing the immigration regulations of the coastal state, the general rule of flag-state jurisdiction implicates that any further enforcement action is possible only with the consent of the flag state.<sup>60</sup> And, secondly, if the flag-state has not waived its jurisdiction, the coastal state must refrain from enforcement action until the vessel does indeed enter territorial waters – and therewith bring itself within the ordinary legal order and possible concomitant safeguards on border control and asylum of the coastal state.

### 6.3.1.3 *The high seas*

International waters, or the high seas, constitute that part of the seas which does not belong to the territorial seas, the contiguous zone, or the exclusive economic zone (EEZ).<sup>61</sup> The legal order on the high seas is based on the two foundational ideas of freedom of navigation and flag state jurisdiction.<sup>62</sup> Under the former, it is prohibited for any state to subject the high seas to its sovereignty and guaranteed that every state may sail its ships on the high seas.<sup>63</sup> The notion of flag state jurisdiction embodies the basic rule that a ship is subject to the exclusive jurisdiction of the state whose flag it flies.<sup>64</sup>

The rule of flag state jurisdiction implicates that states may not, without prior agreement or consent, interdict vessels flying a foreign flag. By analogy to bilateral treaties concluded for the suppression of drug trafficking, European states have concluded treaties amongst themselves and with third countries, in which permission is granted for the interdiction of vessels on the high seas which are suspected of carrying undocumented migrants.<sup>65</sup> Through such

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59 SEC(2007) 691, Annex, para. 4.2.4.

60 See section 6.3.1.3 below.

61 Article 86 UNCLOS. Within the EEZ or exclusive economic zone, coastal States enjoy specific rights and competences in respect of economic exploration and exploitation. For immigration related matters, the legal regime applicable to the EEZ does not differ from that applicable to the high seas; see Articles 56 and 58 UNCLOS.

62 Codified in Articles 87 and 92 (1) UNCLOS; Articles 2 and 6 (1) Convention on the High Seas, 29 April 1958, 450 *UNTS* 82.

63 Articles 89 and 90 UNCLOS; Article 4 Convention on the High Seas.

64 Article 92 (1) UNCLUS; Article 6 (1) Convention on the High Seas.

65 See above, section 6.2. Also see the Exchange of notes between the United States and Haiti constituting an agreement concerning the interdiction of and return of Haitian migrants, Port-au-Prince, 23 September 1981, providing for *inter alia*: 'Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Govern-

treaties, consent to the visit, search and seizure of the vessel may be given in advance and no further authorization is needed at the moment that a vessel wishes to conduct a boarding. Article 110 UNCLOS explicitly allows for the conclusion of such agreements.<sup>66</sup> Without advance or ad hoc permission from the flag state, a state may not subject a foreign vessel to coercive measures and it has been suggested that at best, a state may approach and warn a foreign vessel carrying undocumented migrants that it will be seized or forced back as soon as it enters the territorial sea – provided this is done, of course, in accordance with other norms of international or domestic law.<sup>67</sup> It has been observed that European states have on occasion circumvented the rule of flag state consent by interdicting migrant vessels under the pretext of search and rescue operations, also in opposition to demands of those on board the vessel.<sup>68</sup> Council Decision 2010/252/EU holds that in the absence of authorization of the flag state, a Member State may not take enforcement action, but should survey the ship at a prudent distance, unless the ship is in an emergency situation.<sup>69</sup>

One particular question which may come to the fore if a state interdicts a foreign vessel is what law applies to the vessel, its crew, its passengers and the boarding officers. This will generally depend on the contents of the agreement between the flag- and the boarding state. The rule of flag-state jurisdiction signifies that the flag state stipulates the conditions under which another state may exercise its jurisdiction over the vessel and that the flag state reserves the right to withdraw its consent and resume exclusive control over, for example, detention and subsequent prosecution.<sup>70</sup> This also means that, unless agreed otherwise, the vessel and all what happens on board remains subject to the applicable laws of the flag state. In cases where a boarding party violates the laws of the flag state, questions of immunity from foreign law enforcement may arise, which will not be further discussed here.<sup>71</sup>

#### 6.3.1.4 *The problem of stateless vessels*

More controversial is the question of the assertion of jurisdiction in the high seas over ships without a nationality. Many migrants crossing the seas between Africa and Europe, it has probably been correctly submitted, do so on board

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ment of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.'

66 According to Article 110 (1) UNCLOS: '[e]xcept where acts of interference derive from powers conferred by treaty (...)'.  
67 Guilfoyle (2009), p. 212.

68 Rijpma (2009), p. 343 (speaking of the 'forcible rescue' of persons aboard unseaworthy ships); Legomsky (2006), p. 685.

69 Annex, Part I, para. 2.5.2.6.

70 Guilfoyle (2009), p. 10.

71 See, extensively, Guilfoyle (2009), p. 299-323.

stateless vessels.<sup>72</sup> A ship may be considered stateless if, upon request, it fails to successfully claim a nationality.<sup>73</sup> In its study on international law instruments, the European Commission posits that in respect of a vessel without a nationality, a state may prevent its further passage, arrest and seize it, or escort it to a port, provided this is done with due respect for fundamental rights and other applicable norms of international law.<sup>74</sup> This interpretation corresponds with the school of thought that ships without a nationality do not enjoy the protection of any state and that, in the absence of competing claims of state sovereignty, any state can apply its domestic laws to a stateless vessel and to that purpose proceed with the boarding, searching and seizure of that vessel.<sup>75</sup> That stateless vessels are subject to such deprivational measures is further explained by the fact that the registration of ships and the need to fly the flag of the country where the ship is registered are considered essential for the maintenance of order on the open sea and to prevent the open sea from becoming a region of lawlessness and anarchy.<sup>76</sup> The paramount principle that each vessel sailing the high seas must fly a flag is recognised under Article 92 (1) UNCLOS, stipulating that any vessel must have a nationality – and one only.

But this view is not uncontested. Churchill and Lowe maintain that there must be some further jurisdictional nexus for a state to extend its laws to those on board a stateless ship and enforce the laws against them.<sup>77</sup> Article 110 (1)(d) UNCLOS clearly allows states to assert jurisdiction over ships without nationality, but it speaks only of a ‘right of visit’. This is defined as the right ‘to proceed to verify the ship’s right to fly its flag’, which includes the boarding of the vessel, the checking of documents, and, if suspicion remains, a further examination on board the ship ‘which must be carried out with all possible

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72 SEC(2007) 691, Annex, para. 4.3.1.3.

73 This can either mean that the shipmaster of the vessel does not claim the vessel to have a nationality or that the claim is denied by the State whose registry is claimed. See, on issues of nationality, flags and registry: H.E. Anderson, ‘The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives’, 21 *Tulane Maritime Law Journal* (1996), p. 140-170.

74 SEC(2007) 691, Annex, Para. 4.3.1.3. This approach is followed in Council Decision 2010/252/EU, Annex, para. 2.5.2.5. Note however that the Council Decision further requires reasonable grounds to suspect that the ship is engaged in the smuggling of migrants.

75 According to *Oppenheim’s International Law*: ‘In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatsoever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State’, R. Jennings and A. Watts (eds), *Oppenheim’s International Law*, vol. I, London: Longman, 9th edition, (1996), p. 546. Also see P. Malanczuk (ed.), *Akehurst’s modern introduction to international law*, London: Routledge, 7th rev. ed (1997), p. 186; R.G. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, Leiden/Boston: Martinus Nijhoff (2004), p. 57.

76 *Oppenheim’s International Law* (1996), p. 727; and, extensively, M.S. McDougal, W.T. Burke and I.A. Vlasic, ‘The Maintenance of Public Order at Sea and the Nationality of Ships’, 54 *AJIL* (1960).

77 Churchill and Lowe (1999), p. 214. Also see Anderson (1996), p. 141; Pallis (2002), p. 351.



consideration'.<sup>78</sup> Surely, if such verification leads to suspicions as regards criminal activity over which the inspecting state may assert jurisdiction (such as piracy, the slave trade, unauthorized broadcasting, human smuggling or human trafficking<sup>79</sup>), the state can enforce its criminal jurisdiction over the ship and its crew in accordance with the relevant provisions of international law. But, in contrast with the other instances under which Article 110 UNCLOS allows for a right to visit, neither UNCLOS nor other parts of the Law of the Sea confer an explicit right upon states to subject an interdicted stateless vessel, its crew or its passengers to such far-reaching measures as seizure or arrest.<sup>80</sup> Guilfoyle submits therefore, that 'treaty practice' is consonant with the requirement of a further jurisdictional nexus permitting coercive action, but he also admits that state practice would appear to favor the absence of a general prohibitive rule on further coercive action taken in respect of stateless vessels.<sup>81</sup>

The main problem with the requirement of a specific or further jurisdictional link allowing a state to enforce its laws upon stateless vessels is that it is premised on the idea that the system of the Law of the Sea would indicate that interdiction of stateless vessels is only allowed if it provides for a clear permissive statement to that effect. But it is questionable whether such explicit entitlement needs to exist in respect of stateless vessels. Under UNCLOS and the Law of the Sea in general, the freedom of navigating the high seas, and all related freedoms (including the right of innocent passage through the territorial sea discussed above), are exclusively endowed upon states.<sup>82</sup> The implication of this state-centered view of the Law of the Sea is that it removes stateless vessels from the general safeguards on the freedom of navigation and that, therefore, a state subjecting a stateless vessel to its jurisdiction does not act contrary to any of the rights recognized under the Law of the Sea. It is precisely on the basis that the law of the sea accords protection only to ships flying the flag of a state and not to stateless ships, that national courts, including in the United Kingdom and the United States, have considered international maritime law to permit any nation to subject stateless vessels to its

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78 Article 110 (2) UNCLOS.

79 In respect of migrant smuggling, see section 6.3.1.5. below.

80 See, with regard to piracy and unauthorized broadcasting, Articles 105 and 109 UNCLOS, which explicitly provide for arrest and seizure.

81 P. 17, 296.

82 See eg Article 87 (1) UNCLOS ('The high seas are open to *all States*, (...'); Article 90 UNCLOS ('*Every State* (...) has the right to sail ships flying its flag'); emphasis added. According to Article 92 (1) UNCLOS, the principle of exclusive jurisdiction only accrues to ships flying under the flag of a State. Accordingly, it is perhaps better to speak not of the open sea as being common to all mankind but rather as common to all nations.

jurisdiction.<sup>83</sup> In literature, this view is also endorsed, and explained by the fact that, were it otherwise, stateless vessels would become ‘floating sanctuaries of freedom from authority’, which is an unacceptable situation for a universally applicable system of international law.<sup>84</sup> Accordingly, the reasoning would be that, in the absence of any specific rights or freedoms endowed by the Law of the Sea on stateless vessels *and* in the absence of any competing claims of states in respect of such vessels, international law sets no barriers for states to subject stateless vessels to their domestic laws, implying that the state is empowered to assert its full jurisdiction, both of legislative and enforcing nature, over those ships.

This does, on the other hand, not mean that interventions against stateless vessels take place outside the realm of international law. It has rightly been observed that the interdiction of vessels without a nationality may lead, firstly, to assertions of diplomatic protection by the state whose nationals are on board the intercepted stateless vessel.<sup>85</sup> Secondly, and for our purposes of the utmost relevance, the taking of coercive measures in respect of any vessel and those on board is likely to come within the ambit of human rights law. As is extensively addressed in section 6.4.3 below, deprivations of liberty or other interferences with human rights are as a rule only permitted if they have a basis in law and if this legal basis is of sufficient quality. This will ordinarily

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83 United States Court of Appeals, Eleventh Circuit 9 July 1982, *United States v. Marino-Garcia*, 679 F.2d 1373, paras. 12, 17: ‘Vessels without nationality are international pariahs. They have no internationally recognized right to navigate freely on the high seas. (...) Moreover, flagless vessels are frequently not subject to the laws of a flag-state. As such, they represent “floating sanctuaries from authority” and constitute a potential threat to the order and stability of navigation on the high seas. (...) [I]nternational law permits any nation to subject stateless vessels on the high seas to its jurisdiction. Such jurisdiction neither violates the law of nations nor results in impermissible interference with another sovereign nation’s affairs. We further conclude that there need not be proof of a nexus between the stateless vessel and the country seeking to effectuate jurisdiction. Jurisdiction exists solely as a consequence of the vessel’s status as stateless.’ In the *Asya* case (1948), the United Kingdom Privy Council held it to be lawful for a State to seize a stateless ship on the high seas. The case concerned a ship with illegal immigrants on its way to Palestine but seized in the high seas by a British naval vessel and escorted to a Palestinian port, where the passengers were sent to a clearance camp. In respect of the argument that the illegal immigrants could rely on the freedom of navigation, the Privy Council held: ‘the freedom of the open sea, whatever those words may connote, is a freedom of ships which fly and are entitled to fly the flag of a State which is within the comity of nations. The *Asya* did not satisfy these elementary conditions. No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails.’ The Council further confirmed that, having been brought involuntarily in Palestinian territorial waters, the passengers had become subject to the Ordinances dealing with immigration into Palestine and on that basis liable to deprivation measures. Judicial Committee of the Privy Council 20 April 1948, *Naim Molvan v. Attorney General for Palestine (The “Asya”)*, [1948] AC 351.

84 H. Meijers, *The Nationality of Ships*, Den Haag: Martinus Nijhoff (1967), p. 319.

85 Churchill and Lowe (1999), p. 214; D. Guilfoyle, *Maritime Interdiction of Weapons of Mass Destruction*, 12 *Journal of Conflict & Security Law* (2007), p. 10; Guilfoyle (2009), p. 18.

imply that coercive measures taken in respect of persons on board stateless vessels may only be taken pursuant to domestic (or, if existent, international) law provisions setting the conditions and limits for engaging in coercive activity.

#### 6.3.1.5 *The UN Protocol on Migrant Smuggling and extraterritorial criminal jurisdiction*

From the challenges posed by the phenomenon of undocumented sea migration consensus has emerged that, similar to activities as piracy, unauthorized broadcasting, the slave trade and drug trafficking, international law should broaden the basis for states to assert criminal jurisdiction over the offence of migrant smuggling, also when committed at sea. Studies suggest that, not least due to the sharpening of maritime controls and surveillance, migrants increasingly make use of the services of smugglers in their efforts to cross the seas to Europe.<sup>86</sup> The Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted in Palermo in 2000, obliges states to criminalize migrant smuggling, defines the term 'migrant smuggling' and provides specific rules on the interdiction of migrant smugglers at sea.<sup>87</sup> The Protocol is annexed to the UN Convention against Transnational Organize Crime (UNTOC),<sup>88</sup> which expressly permits state Parties to establish (prescriptive) jurisdiction over offences listed in the Convention which are *inter alia* committed outside their territory, if they are committed 'with a view to the commission of a serious crime within its territory'.<sup>89</sup>

Because serious crimes are defined as those offences 'punishable by a maximum deprivation of liberty of at least four years',<sup>90</sup> it will depend on the national laws criminalizing the facilitation of illegal entry whether the Migrant Smuggling Protocol, read together with UNTOC,<sup>91</sup> allows for the vesting of criminal jurisdiction over smuggling which takes place outside the state's territory. That there must be a link between the smuggling and a punishable offence within the state's territory further implicates that UNTOC only provides for the establishment of jurisdiction on the basis of the principle of protection and not on the principle of universality, from which it follows

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86 *Supra* n. 8.

87 UN doc. A/RES/55/25 (2001), Annex III (hereafter Migrant Smuggling Protocol), Articles 3, 6 and 7-9. The Migrant Smuggling Protocol was adopted together with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. Unlike the Migrant Smuggling Protocol, the Human Trafficking Protocol contains no specific provisions on the maritime interdiction of persons suspected of engagement in human trafficking. Not all EU Member States have as of yet ratified the protocol.

88 15 November 2000, 2237 UNTS 39574.

89 Article 15 (2)(c).

90 Article 2(b).

91 According to Article 1 (2) of the Migrant Smuggling Protocol, the provisions of UNTOC apply unless the Protocol provides for a *lex specialis*.

that states may only undertake coercive activity in accordance with the Protocol in respect of smugglers who wish to enter their territory. But because the establishment of prescriptive criminal jurisdiction over offences committed abroad is not commonly considered as being subject to general permissive statements under international law, the Protocol does not in itself prevent states from proscribing the extraterritorial offence of migrant smuggling in a wider manner.<sup>92</sup>

One of the specific aims of the Migrant Smuggling Protocol is to expedite the cooperation of states in the interdiction of vessels which are suspected of being engaged in migrant smuggling. The Protocol's provisions in this respect follow the general maritime rule of flag-state jurisdiction, implying that a state wishing to interdict a vessel flying another state's flag may only do so upon prior authorization of the flag state.<sup>93</sup> The flag state is not obliged to comply with such a request, but it is under a duty to respond to requests expeditiously.<sup>94</sup> The flag state may, further, set the conditions for waiving its jurisdiction to the other state.<sup>95</sup> In its study on the international law instruments in relation to illegal immigration by sea, the European Commission suggests to consider a broadening of the criminal (enforcement) jurisdiction of States, so as to allow states to interdict any vessel engaged in migrant smuggling or human trafficking, either along the model of universal jurisdiction as applicable to the crime of piracy, or along the model of unauthorized broadcasting, where, apart from the flag state, the state of nationality of the suspect or the state receiving the transmission may proceed with the arrest, seizure and prosecution of the vessel and suspects on board.<sup>96</sup>

The Migrant Smuggling Protocol also specifically provides for states to interdict stateless vessels suspected of engagement in migrant smuggling.<sup>97</sup> In case of stateless vessels or when flag state consent is obtained, states may proceed with the boarding and search of suspected vessels.<sup>98</sup>

If evidence confirming the suspicion is found, the state may take further 'appropriate measures with respect to the vessel and persons and cargo on board'.<sup>99</sup> Presumably, to 'take appropriate measures' must be taken to correspond not only with what is necessary to suppress the vessel from being used for migrant smuggling, but also with the conditions set by the flag state

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92 Permanent Court of International Justice 7 September 1927, *S.S. 'Lotus' (France v. Turkey)*, 1927 PCIJ Series A. No. 10, p. 13. Also see European Committee on Crime Problems, 'Extraterritorial criminal jurisdiction' (Report), Strasbourg: Council of Europe (1990), p. 20-30.

93 Article 8(2).

94 Article 8(2)(4).

95 Article 8(5).

96 SEC(2007) 691, Annex, para. 4.3.2.4. The specific regimes on piracy and unauthorised broadcasting are laid down in Articles 105-109 UNCLOS.

97 Article 8(7).

98 Article 8(2)(7).

99 *Ibid.*

and/or the form and degree in which states have established prescriptive criminal jurisdiction over the offence of migrant smuggling by sea. Because states are expressly allowed under the Migrant Smuggling Protocol and UNTOC to establish extraterritorial criminal jurisdiction over the offence of migrant smuggling, the taking of appropriate measures would, subject to the rule flag state consent, necessarily seem to imply a right to seize the ship and to place the crew under arrest and to instigate prosecution.<sup>100</sup>

A crucial question left unaddressed by the Protocol is what this power to 'take appropriate measures' implies for the migrants who are the objects of the smuggling. Article 5 of the UN Migrant Smuggling Protocol prohibits the criminalization of migrants who have been the object of migrant smuggling, raising the question on what legal basis a state could subject the migrants – instead of the smugglers – to coercive measures such as arrest, detention or forcible escort into its territory. Even though it may well be that to bring migrants who have been the object of migrant smuggling forcibly to a port will be the only practicable option a state may have which wishes to enforce its criminal jurisdiction over the offences committed on board the vessel, the express prohibition to subject migrants to criminal jurisdiction renders the Protocol an insufficient legal basis to subject the smuggled migrants to arrest or other coercive measures amounting to a deprivation of liberty.<sup>101</sup>

The logical implication of the prohibition to assert criminal jurisdiction over migrants solely on the basis that they have been the object of smuggling must be that the issue of a state wishing to subject smuggled migrants to penal or administrative sanctions must be answered on the basis of the general regime on interdictions on the high seas discussed above. This means that, on the one hand, the power to take coercive action will depend on the contents of the agreements in place between the interdicting state and the flag state. And in the case of stateless vessels and vessels flying the state's own flag, the power to subject the migrants to coercive measures must necessarily follow

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100 It may be useful here to draw an analogy with the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988, U.N. Doc. E/CONF.82/15) which similarly, and also subject to the rule of flag State consent, allows States to, '[i]f evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board' (Article 17(4)). Various national courts have interpreted this formula as necessarily implying a right to seize the ship and to place the crew under arrest and to instigate prosecution. This interpretation also finds confirmation in the Council of Europe Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (31 January 1995, *CETS* 156), which is expressly meant to carry out and enhance the effectiveness of the said provision of the UN Narcotics Convention, and which authorizes States to require the vessel and persons on board to be taken into the territory of the intervening or another State and, upon the finding of evidence that a relevant offence has been committed, to proceed with the arrest of the persons or detention of the vessel. See, extensively and with further references, Guilfoyle (2009), p. 84-85.

101 In Article 16(5) of the Protocol, the possibility of detention of smuggled migrants is mentioned, but without indication as to the basis of this detention.

from applicable domestic law.<sup>102</sup> In both situations however, a key problem which may come to the fore is that to be without proper identity- or travel documents at the high seas will not normally constitute an offence under the laws of a coastal State. Hence, in the absence of specific international agreements or domestic laws setting the conditions for asserting coercive action over smuggled migrants, a state may lack the competence to subject smuggled migrants to coercive measures, which may consequently constitute a practical obstacle for taking 'appropriate measures' in respect of the smugglers. As is further explained below,<sup>103</sup> the ultimate consequence of a lack of a proper legal basis for undertaking coercive measure against migrants at the high seas could be that human rights law prohibits the taking of such measures, which may greatly constrain the possibility of states to seize vessels engaged in migrant smuggling and bring them to a port.

### 6.3.2 Obligations of search and rescue

The issues of which EU Member State should be responsible for saving migrants at sea and where the rescued persons should be disembarked have been subject to intense debate in the context of operations concerning the EU's sea borders coordinated by Frontex. The debate essentially evolves around the reconciliation of humanitarian aspirations with fears of having to carry the migrant burden.

In terms of international law, the two key principles to be reconciled are, on the one hand, the duty of both private shipmasters and coastal states to provide assistance to those who are in peril at sea and, on the other hand, the equally well established sovereign right of states to control the entry of non-nationals into its territory. In the context of the Vietnamese exodus, Pugash described the plight of the boat people as the 'Catch 22 of the Law of the Sea': 'The shipmaster of a freighter in international waters off Indochina is obligated to rescue Vietnamese sea refugees, but no nation is bound to take the refugees once they have been rescued.'<sup>104</sup>

Despite attempts of UNHCR, the International Maritime Organization (IMO) and, on a regional level, the EU, this anomaly remains prevalent today.<sup>105</sup> In the European context, migrants having embarked on the often perilous sea journey to the European continent have often found themselves in distress and, after being rescued, wound up as subjects in international negotiations

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102 This is also the manner in which the USA had organised the competences of the US Coast Guard to interdict any vessel carrying undocumented aliens. See Executive Order 12324 – Interdiction of Illegal Aliens, September 29, 1981; and Executive Order 12807 – Interdiction of Illegal Aliens, May 24, 1992.

103 See section 6.4.3.

104 Pugash (1977), p. 578.

105 See n. 143-148 *infra* and accompanying text.

on their disembarkation, sometimes resulting in rather protracted situations. In one incident in May 2007, the shipmaster of a tuna pen flying the Maltese flag had rendered assistance to a group of 28 irregular migrants whose ship had sunk in the rough seas of the Mediterranean but had, for both financial and security reasons refused to allow the migrants on board. And because Malta, Italy nor Libya were under a clear obligation to allow the migrants to disembark in one of its ports, the migrants were compelled to desperately cling to the buoys of a tuna fishing net for three days before finally being brought to the shore of the Italian island of Lampedusa.<sup>106</sup> In another incident in July 2006, the Maltese government had refused to allow the disembarkation of fifty-one migrants rescued by the Spanish fishing trawler *Francisco y Catalina* by affirming that it had been Libya's responsibility to rescue them and, given that a Spanish vessel ended up doing so, the migrants had become Spain's responsibility. After a standoff lasting eight days, it was agreed that Malta, Libya, Italy, Spain and Andorra would all take in a share of the migrants.<sup>107</sup> A similar exchange of arguments took place in April 2009, when Italy refused a Turkish-owned vessel which had rescued 140 migrants entry into its territorial waters, positing that, because they were found in the search and rescue area of Malta, they had to be disembarked in Malta. Malta disagreed, arguing that the migrants needed to be landed in Lampedusa, since that was the nearest safe port. The row ended with the Italian government authorizing the migrants to disembark at Lampedusa.<sup>108</sup> A final peculiar example of how EU Member States grapple with burdens posed by rescued migrants is the fate of the 27 mostly African passengers of a small boat which had ran into trouble in late May 2005 and drifted off the coast of Sicily for eight days while other vessels passed it by but refused to help. The Danish-registered container ship *MV Clementine Maersk* eventually picked up the migrants and continued its scheduled voyage to Felixtowe, Britain, prompting the British *Daily Express* to bring the rescue operation on its front page with the headline: 'MAD: Illegal immigrants rescued in the Mediterranean and the ship's captain brings them 2,000 miles... to Britain.'<sup>109</sup> Guidelines for search and rescue situations and for disembarkation in the context of sea border operations coordinated by the Frontex Agency have now been laid down in the non-binding Part II of the Annex of Council Decision 2010/252/EU.

In addressing the plight of migrants in distress at sea, legal studies often focus on issues of effectiveness, compliance and enforceability of relevant obligations under the Law of the Sea.<sup>110</sup> Another and more general legal angle

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106 The incident has been widely reported. For a summary: Migration Policy Group, *Migration News Sheet*, Brussels, July 2007, p. 11.

107 Migration Policy Group, *Migration News Sheet*, Brussels, August 2006, p. 16-18.

108 Migration Policy Group, *Migration News Sheet*, Brussels, May 2009, p. 8

109 *Daily Express* 8 June 2005.

110 Pugash (1977); M. Davies, 'Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea', 12 *Pacific Rim Law & Policy Journal* (2003), p. 109-141.

is the extent to which migrant interdictions and sea border controls may increase risks involved for migrants, attracting obligations not only under the Law of the Sea but possibly also under human rights law.<sup>111</sup> Although highly important, the current study is not as such interested in the causes and remedies for the migrant death toll at sea. It is concerned, rather, with the smaller question of delineating the obligations of states for undertaking rescue operations at sea and to subsequently identify the obligations relevant for disembarkation. It is in this connection that international maritime obligations on search and rescue are particularly relevant because they, firstly, lay down a general duty to render assistance to persons in distress at sea which distorts the ordinary maritime regime defining the interdiction powers of states in the various maritime zones. Secondly, the duty of search and rescue encompasses the duty to bring rescued persons to a place of safety, touching upon the crucial question of the appropriate place of disembarkation.

#### 6.3.2.1 *The duty of search and rescue*

The duty to assist persons in distress at sea is an essential constitutional element of the law of the sea and codified in a variety of treaties, most notably in Article 98 UNCLOS, the International Convention for the Safety of Life at Sea (SOLAS), and the International Convention on Maritime Search and Rescue (SAR).<sup>112</sup> It is a duty incumbent on all shipmasters: both private and governmental.<sup>113</sup>

The duty to render assistance applies anywhere at sea and to anybody in distress.<sup>114</sup> What exactly amounts to distress and how far a shipmaster's duties to provide assistance stretch is not always specified. The SAR Convention defines a distress phase 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>115</sup> A ship need not be dashed against the rocks before it can successfully invoke a claim of distress, nor is the fact that the vessel may be able to come into port under its own power

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111 T. Spijkerboer, 'The Human Costs of Border Control', 9 *EJML* (2007), p. 127-139.

112 International Convention for the Safety of Life At Sea, 1 November 1974, 1184 *UNTS* 3; International Convention on Maritime Search and Rescue, 27 April 1979, 1405 *UNTS* 23489. The SOLAS and SAR Conventions provide for an expedient amendment procedure, see Article VIII SOLAS and Article III SAR Convention. The SAR Convention was amended by IMO Resolution MSC. 70(69), adopted May 1998 and IMO Resolution MSC.155(78), adopted May 2004. The 1998 amendments put greater emphasis on regional cooperation and co-ordination between maritime and aeronautical SAR operations. The 2004 amendments aim to facilitate the disembarkation of rescued persons. References to the SAR and SOLAS Conventions hereunder are made to the consolidated versions.

113 Art 98 (1) UNCLOS.

114 Art 98(1) UNCLOS; SAR, Annex, para. 2.1.10; SOLAS, Annex, Chapter V, Regulation 33 (1).

115 SAR, Annex, para. 1.3.13.



conclusive evidence that a plea of distress is unjustifiable.<sup>116</sup> Arguably, passengers threatening to kill themselves or throw children overboard bring themselves in distress, thereby triggering a legal duty of rescue and/or assistance.<sup>117</sup> It has been suggested that 'preservation of life' is the appropriate criterion in determining whether a distress situation exists.<sup>118</sup> EU Member States do not interpret the term distress uniformly. Malta, for example, considers a ship to be in distress only if a distress call has been issued and if there is an immediate danger to the life and safety of those on board. Italy, on the other hand, considers all unseaworthy ships to be in distress and is reported to have commenced rescue operations also against the will of migrants on board the concerned vessels.<sup>119</sup> Council Decision 2010/252/EU stipulates that the assessment of whether a distress situation exists should take account of a range of factors, including the existence of a request for assistance, the seaworthiness of the ship, the presence of qualified crew and safety equipment and the weather and sea conditions.<sup>120</sup>

Apart from the duty to provide assistance to persons in distress, international maritime obligations imposed on states in connection to search and rescue at sea comprise the duty to establish and maintain adequate and effective search and rescue services; and the duty to cooperate with neighbouring states to ensure that assistance is rendered.<sup>121</sup> The SOLAS and SAR Conventions oblige states to ensure that necessary arrangements are made for coast watching.<sup>122</sup> Detailed provisions on the establishment of rescue co-ordination centres, the designation of rescue units and the equipment of rescue units are laid down in Chapter 2 of the SAR Annex.<sup>123</sup> The term 'necessary' indicates that the establishment of rescue services must be commensurate with past experiences relating to accidents at sea and the knowledge of navigational risks, which is also apparent from the SOLAS Convention, which refers to 'the density of the seagoing traffic and the navigational dangers'.<sup>124</sup> Given the rampant incidents of migrants perishing in the seas between Africa and Europe, it may

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116 General Claims Commission United States and Mexico, Opinion rendered 2 April 1929, *Kate A. Hoff v The United Mexican States*, 4 UNRIIA 444, reprinted in 23 *AJIL* (1929), p. 860-865.

117 On situations of self-inflicted distress, see D.J. Devine, 'Ships in distress – a judicial contribution from the South Atlantic', 20 *Marine Policy* (1996), p. 231-232, who emphasises that self-inflicted distress must still be seen as distress.

118 Churchill and Lowe (1999), p. 63; Barnes advances a wider definition of distress, which does not necessarily require that the very existence of the person concerned is in jeopardy. R. Barnes, 'Refugee Law at Sea', 53 *ICLQ* (2004), p. 59-60.

119 Rijpma (2009), p. 343.

120 Annex, Part II, para. 1.3.

121 The general duties of coastal States are summarized in Art 98 (2) UNCLOS.

122 SOLAS, Annex, Chapter V, Regulation 7(1). Also see SAR, Annex, para. 2.1.1.

123 See esp. SAR, Annex, paras. 2.2.-2.6.

124 SOLAS, Annex, Chapter V, Regulation 7(1).

be questioned whether all involved states in the region take this duty sufficiently serious.<sup>125</sup>

A key obstacle for identifying clear obligations on the side of coastal states to respond to distress calls or to provide a place of safety for rescued persons is a lack of clarity concerning the allocation of responsibility between states. Addressing this issue, the SAR calls upon states to jointly agree upon the establishment of national search and rescue regions (SRRs or SAR regions), which are expressly *not* related to the delimitation of national boundaries between states, within which each state has primary responsibility for overall co-ordination of search and rescue operations.<sup>126</sup> The division of the world's oceans in SAR regions was undertaken within the framework of the International Maritime Organization and general agreement was reached on the establishment of a SAR plan for the Mediterranean Sea in 1997.<sup>127</sup> Apart from having responsibility for overall co-ordination, the responsibility of states within their SAR regions embodies the duty to use search and rescue units for providing assistance to persons in distress within the specified area – an obligation phrased in imperative and unconditional terms.<sup>128</sup>

Although the establishment of search and rescue regions has helped clarify the state having primary responsibility for providing assistance, it does not always appear to function effectively in the Mediterranean. Libya, although a party to the SAR Convention, has repeatedly refused to answer distress calls from within its SAR region.<sup>129</sup> Malta, on the other hand, has on occasion referred to the delimitation of the sea into SAR regions as a pretext to eschew responsibility for undertaking rescue operations, by pointing out that the troubled vessels were within another state's search and rescue area.<sup>130</sup> It must be emphasised however, that the SAR regions do not establish mutually exclusive areas of responsibility. A preponderant feature of the legal regime pertaining to coastal state search and rescue obligations is the duty for coastal states to cooperate in ensuring that assistance is provided to persons who are in distress at sea. Article 98 (2) UNCLOS urges State Parties to conclude mutual

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125 Note that the SOLAS and SAR Conventions also acknowledge that not all States may be equally capable to arrange for search and rescue services, SOLAS, Annex, Chapter V, Regulation 7(1) and SAR, annex, para. 2.1.1.

126 SAR, Annex, paras. 2.1.3-2.1.12.

127 Agreement adopted at IMO Mediterranean and Black Seas Conference on Maritime Search and Rescue (SAR) and the Global Maritime Distress and Safety System (GMDSS), Valencia (Spain), 8 to 12 September 1997.

128 SAR, Annex, para. 2.1.9.

129 Rijpma (2009), p. 344.

130 Late May 2007, the Maltese government refused to provide assistance and to take in the 26 migrants rescued by the Spanish tug *Monfalco*, by arguing that 'the incident took place 27 miles inside Libya's search and rescue area and 17 miles outside Malta's SAR zone, and that Libya was therefore responsible for the peoples' safety about 60 nautical miles from the Libyan coast'; Migration Policy Group, *Migration News Sheet*, Brussels, July 2007, p. 11 and 15. Also see the incident concerning the *Francisco y Catalina*, n. 107 *supra*.

regional arrangements to this effect and a range of provisions in the SAR Convention call for the establishment of close cooperation between the rescue services of states.<sup>131</sup> Paragraph 3.1.7 of the SAR Convention explicitly stipulates that each State Party must ensure that 'its rescue coordination centres provide, when requested, assistance to other rescue coordination centres, including assistance in the form of vessels, aircraft, personnel or equipment'. Further, any search and rescue unit being alerted of a distress incident must take immediate action if in the position to assist.<sup>132</sup> These provisions make clear that states do not have mutually exclusive zones of responsibility for undertaking rescue operations but rather the obligation to cooperate in ensuring that assistance is provided.

#### 6.3.2.2 *Disembarkation and a 'place of safety'*

The definition of 'rescue' in the SAR Convention includes the duty to deliver persons in distress to a place of safety.<sup>133</sup> What is meant by a 'place of safety' is not explained in the SAR Convention. The safety of the people rescued, and the safety of the rescuing vessel and crew, will primarily determine the most appropriate course of action, including finding a 'safe' port for disembarkation.<sup>134</sup> One author notes that it is common maritime practice to disembark rescued persons at the next port of call, but merely as a matter of commercial expedience rather than as definite rule.<sup>135</sup> On the basis of this practice, UNHCR's Executive Committee has in the past suggested that 'persons rescued at sea should normally be disembarked at the next port of call'.<sup>136</sup> UNHCR has later explained that the next port of call can either mean the nearest port of call, the next scheduled port of call, the port of embarkation, or even the best equipped port of call.<sup>137</sup> IMO has further observed that a place of safety may also be an assisting vessel capable of safely accommodating the survivors.<sup>138</sup> Yet, given the paramount consideration of preserving life at sea, detrimental circumstances on board a ship may well place limits on the shipmaster's freedom to choose an appropriate port of call. In this regard, it

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131 See especially SAR, Annex, paras. 3.1.1-3.1.8.

132 SAR, Annex, para. 4.3.

133 SAR, Annex, para. 1.3.2.

134 According to the Guidelines on the Treatment of Persons Rescued at Sea, adopted under IMO Resolution MSC. 167(78), 20 May 2004, paras. 6.12-6.14, 'a place of safety [in the meaning of the SAR Convention] is a . . . place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination'.

135 Barnes (2004), p. 51-52.

136 UNHCR EXCOM Conclusion No.23 (XXXII), 1981, para. 3.

137 UNHCR, 'Background note on the protection of asylum-seekers and refugees rescued at sea', Geneva, 18 March 2002, paras. 30-31.

138 IMO Resolution MSC. 167(78), 20 May 2004, para. 6.13.

is not uncommon that a vessel coming to the rescue will find itself in distress after a rescue operation.<sup>139</sup> A lack of food and water or medical supplies, or a lack of sufficient safety equipment for the amount of persons a vessel is licensed to carry may severely limit the options a shipmaster has in choosing a place of safety. Depending on the circumstances, a shipmaster may have no other option than to deliver the rescued persons to the nearest port without any delay.

UNHCR has underlined that legal obligations of states under international refugee law must also inform the choice as to the port for disembarkation.<sup>140</sup> Although disembarkation in a potentially unsafe country may certainly raise issues under the prohibition of *refoulement* (see section 6.4.1 below), it can be questioned whether one should incorporate the notion of safety under refugee law (understood as being safe from proscribed ill-treatment or persecution) into the concept of safety under the Law of the Sea. Within the latter body of law, 'safety' refers to the preservation of life at sea and does not as such deal with refugee considerations. Further, while the obligation to bring rescued persons to a safe place is addressed to both governments and shipmasters under the Law of the Sea, the prohibition of *refoulement* applies to governments of Contracting States only.<sup>141</sup> Rather than reading one obligation into another one, the duties to bring rescued persons to a place where their basic and medical needs are met and to respect the prohibition of *refoulement* are best conceived as two distinct but complementary obligations. It is not unimaginable that situations may arise in which states can find it difficult to reconcile the different safety concepts.<sup>142</sup>

In more recent years, the question of disembarking rescued migrants attracted renewed interest on both the international level and the level of the European Union. Partly in response to Australia's *Tampa* affair, the International Maritime Organization proposed to identify existing inconsistencies and ambiguities in internal maritime law instruments with a view to ensuring

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139 A strong case has been made that the asylum-seekers taken on board the *MV Tampa* were in distress. See Bostock (2002), p. 296. For a discussion, Barnes (2004), p. 59-61. For European examples, one may refer to the adventures of the private rescue vessel *Cap Anamur* which had picked up 37 migrants, of whom some suffered nervous breakdowns and wanted to throw themselves overboard when the ship was refused entry in the port of Empodocle, Sicily. Only when the ship issued an emergency call was permission given to enter port. Migration Policy Group, *Migration News Sheet*, Brussels, August 2007, p. 12-13.

140 UNHCR, 'Background note on the protection of asylum-seekers and refugees rescued at sea', Geneva, 18 March 2002, para. 31

141 See also, *ibid.*, para. 22, where UNHCR explains that the private shipmaster of a rescuing vessel 'will not be aware of the nationality or status of the persons in distress and cannot reasonably be expected to assume any responsibilities beyond rescue' and that, therefore, '[t]he identification of asylum-seekers and the determination of their status is the responsibility of State officials adequately trained for that task'.

142 One can think, for example, of situations where the state of health of the passengers requires their immediate disembarkation but where refugee concerns oppose such disembarkation.

that survivors of distress incidents are provided assistance, are delivered to a place of safety and are treated in accordance with humanitarian maritime traditions, while minimizing the inconvenience to assisting ships.<sup>143</sup> As a result, the IMO's Maritime Safety Committee adopted several amendments to the SOLAS and SAR Conventions in May 2004, together with the Guidelines on the Treatment of Persons Rescued at Sea.<sup>144</sup> Included in the amendments is a prohibition imposed on the owner, the charterer or the company operating a ship to prevent or restrict a shipmaster from engaging in a rescue undertaking and the obligation of shipmasters to treat embarked persons in distress at sea with humanity.<sup>145</sup> Most pertinent is the amendment setting forth some sort of procedural mechanism for ensuring that shipmasters who have provided assistance are released from their obligations and that disembarkation is effectuated.<sup>146</sup> This provision endows 'primary responsibility' for ensuring cooperation between the parties involved in finding a place of disembarkation upon the state in whose SAR region the persons have been rescued. In this cooperation, the involved Parties are under a joint duty to arrange disembarkation to be effected as soon as reasonably practicable. Even though they do not designate by default the state where disembarkation should take place, the 2004 SOLAS and SAR amendments were not accepted by Malta, because it considered that persons rescued at sea should always be disembarked at the nearest safe port – and because it would be 'manifestly unfair to expect a country of the size and population density of Malta to bear any greater share of the burden of illegal immigration than it already does'.<sup>147</sup> In the non-binding Principles Relating to Administrative Procedures for Dis-

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143 IMO Resolution A.920(22), November 2001. Also see: 'F.J. Kenney, Jr. and V. Tasikas, 'The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea', 12 *Pacific Rim Law & Policy Journal* (2003), p. 143-177.

144 IMO Resolutions MSC.153(78), MSC. 155(78) and MSC.167(78), adopted 20 May 2004. The amendments entered into force on 1 July 2006. Under the SAR and SOLAS Conventions, an expedient 'tacit acceptance' amendment procedure applies, whereby amendments are deemed accepted by a specified date unless a required number of Parties object.

145 SOLAS, Annex, Chapter V, Regulations 33(6) and 34-1.

146 SAR, Annex, para. 3.1.9.; and (under identical terms) SOLAS, Annex, Chapter V, Regulation 33 (1.1): 'Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable'

147 Letter of the Permanent Representative of Malta to the Permanent Representative of Germany and COREPER Chair, 8 June 2007; *Times of Malta* 23 April 2009, 'Editorial: An unnecessary diplomatic stand-off'.

embarking Persons Rescued at Sea issued by IMO's Facilitation Committee in January 2009, the responsibility of the government in whose SAR region the persons have been rescued is taken further. These guidelines stipulate that, if disembarkation cannot be arranged swiftly elsewhere, the government responsible for the SAR area should accept the disembarkation of the rescued persons.<sup>148</sup>

On the level of the European Union, Council Decision 2010/252/EU proposes to address the question where the migrants should be disembarked somewhat differently. The guidelines posit that 'priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited and if this is not possible, priority should be given to disembarkation in the host Member State unless it is necessary to act otherwise to ensure the safety of these persons.'<sup>149</sup> The term host state refers to the Member State whose borders are the object of control of the Frontex operation.<sup>150</sup> The guidelines do note that this is 'without prejudice to the responsibility of the Rescue Coordination Centre', probably referring to the responsible SAR state.<sup>151</sup> Because the guidelines are addressed at the Member States participating in Frontex operations and not at third countries, the priority of disembarking persons in a third country will necessarily depend on further agreement with the third state concerned. The alternative allocation to the host Member States may well be instrumental in averting ad hoc disagreements between Member States on the issue of disembarkation, but it is also the most controversial element of the Decision. Malta, likely to be a host of Frontex operations, opposed the adoption of the Council Decision on the basis of precisely this element. In the words of a spokesperson of the Maltese government: "if we decide to host the Frontex mission, we will get funding to operate, but that would mean that we would have to take in people rescued off the sea from as far away as Crete."<sup>152</sup> Instead, Malta continues to favor a system where rescued migrants are as a rule taken to the nearest port of call and has threatened to refrain from future participation in Frontex operations.

On the one hand, rules or guidelines setting by default the state responsible for allowing disembarkation appear imperative for the effective implementation of duties of search and rescue. Clear guidelines may resolve the problem of private shipmasters being reluctant to render assistance for a fear of not being allowed entry into a port and may ensure that the needs of rescued migrants

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148 IMO Facilitation Committee, 22 January 2009, FAL.3/Circ. 194, para. 2.3.

149 Annex, Part II, para. 2.1.

150 See recital 5.

151 Annex, Part II, para. 2.1

152 The Malta Independent Online 4 February 2010, 'Malta and Frontex missions: 'No chance if the rules are changed''; *Times of Malta* 1 February 2010, 'Angry Malta protests over new Frontex rules'.

are attended to as soon as practicable. On the other hand, any default rule, regardless of which state is appointed, is problematic in view of the fact that each distress situation is different. IMO has underlined that, given the variety of factors to be taken into account, selection of a place of safety must always depend on the unique circumstances of each case – by referring to such matters as medical needs and the situation on board the ship.<sup>153</sup> Although one may therefore criticize the Law of the Sea for not providing a crystal clear rule as to the appropriate place of disembarkation, the nature of the duty to bring persons to a safe place would seem to inherently require a certain level of flexibility.

It can further be observed that past disputes between EU Member States on the issue of disembarkation were not, in essence, grounded in a lack of clarity of the scope of maritime obligations or the relevant interests to be taken into account. References by governments to a perceived imprecision of the Law of the Sea or even outright differences of interpretation have been used, rather, as a pretext obscuring the much more fundamental discord on the question of taking in the migrant burden. In other words, it is not the imprecision – or flexibility – of the Law of the Sea which undermines compliance with obligations of rescue and of bringing persons to a safe place, but the fact that the person in distress is also a migrant which is the cardinal factor explaining why states find it difficult to comply with relevant maritime obligations. One may question, in this connection, whether the Law of the Sea constitutes the appropriate framework to address this issue. The Law of the Sea has not been designed to regulate questions of migrant burden sharing and these issues are likely to be much more effectively resolved by regional arrangements, such as in the context of the European Union. From this perspective, Council Decision 2010/252/EU, despite its shortcomings and controversial contents, may be regarded as an example of how a regional instrument can contribute to the proper implementation of obligations of search and rescue. Other examples of burden-sharing arrangements which are perceived as having successfully contributed to ensuring and speeding up the disembarkation of rescued people are the Disembarkation Resettlement Offers (DISERO) and Rescue at Sea Resettlement Offers (RASRO) schemes established by UNHCR in the 1980s in response to the Indochinese refugees.<sup>154</sup> These schemes created a special reserve of

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153 IMO Resolution MSC.167(78), para. 6.15. This need for flexibility is well illustrated by the choice of a Spanish patrol boat, taking part in Frontex operation Nautilus in the seas between Italy and Libya, which had rescued 26 migrants among whom a woman and her baby born only three days earlier, not to sail to the nearby island Lampedusa but to Malta since both child and mother required urgent medical assistance which was not available on Lampedusa. Migration Policy Group, *Migration News Sheet*, Brussels, August 2007, p. 13.

154 UNHCR, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, EC/SCP/18, 26 August 1981; UNHCR, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, EC/SCP/30, 1 September 1983. Because the resettlement offers were perceived as creating a 'pull-factor', the schemes were replaced by the Comprehensive Plan of Action

resettlement guarantees to which – mainly developed – countries contributed according to fixed criteria.

#### 6.4 HUMAN RIGHTS AT SEA

The analysis above has explored the rights of states to interdict migrant vessels under the Law of the Sea. The framework and conditions for asserting rights of interdiction are properly exercisable vis-à-vis other states. In connecting this regime of law to issues of migration enforcement at sea, one must be aware that, in essence, the Law of the Sea protects the freedom of navigation of states, and that this protection is made operational through a system under which specific rights and freedoms are accorded to vessels flying under the flag of one or the other state. Crucially, this system of protection and the waiving of protection does not *in itself* regulate the powers a state may exercise vis-à-vis the *passengers* of such vessels in the course of migration control. In other terms, although the Law of the Sea sets the circumstances under which states may take particular action over migrant vessels, it does not answer the question of what action may subsequently be taken against the migrants themselves. From positing that the Law of the Sea allows for the interdiction of migrant vessels, it does not automatically follow that a state becomes competent to arrest, detain or return the migrants found on board.

These are questions which instead depend on two complementary but interlinked bodies of law. One is the general framework of the international law on aliens, and in particular human rights law on the treatment of aliens. The other is the domestic regime on immigration and border control (or, where relevant, bilateral or regional arrangements), prescribing the extent to which states consider it opportune to engage in migration enforcement at sea. One prime reason why these two regimes cannot be assessed in isolation, is that human rights law requires states not merely from refraining from activity which is in violation of human rights, but also obliges states to put in place a system of law which secures against human rights violations, which entails safeguards against arbitrariness and which ensures the availability of remedies. In the context of migrant interdiction at sea, the scope and contents of domestic laws regulating interdictions are a particularly salient issue, precisely because interdictions are often conducted outside the ordinary framework of the state's immigration policies.

It is not necessary to repeat what has been said about the extraterritorial application of human rights and in particular the 'right to asylum' in chapters 2

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for Indochinese Refugees, under which only those determined as refugees were eligible for resettlement. For an appraisal, see W. Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck', 17 *Journal of Refugee Studies* (2004), p. 319-333.



and 4 of this book. But it is helpful to start this section by noting that the European Court of Human Rights has on various occasions considered the European Convention on Human Rights to apply to interdictions at sea. In the case of *Medvedyev*, concerning the visit and subsequent seizure and arrest of a vessel and its crew at the high seas in the course of an anti-drug trafficking operation, the Court considered the arrest and detention to come within the ambit of Article 5 ECHR, protecting the right to liberty.<sup>155</sup> On a general note, the ECtHR pronounced that:

[T]he special nature of the maritime environment (...) cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a "safe haven".<sup>156</sup>

In the specific context of the interdiction of migrants and asylum-seekers, the ECtHR has considered the guarantees of Article 2 ECHR, the right to life, to apply to an incident where a boat carrying more than 50 migrants from Albania who wished to enter Italy collided with an Italian warship and sunk in international waters.<sup>157</sup> The Committee against Torture, in the *Marine I* case, considered that a rescue operation of the Spanish Civil Guard of 369 migrants whose boat had gone adrift in international waters had brought the passengers within the jurisdiction of Spain for the purposes of the complaints at issue, which included alleged violations of Articles 1 and 3 CAT, on account of the treatment of the passengers and their forcible repatriation to India after they had been disembarked in Mauritania.<sup>158</sup>

It could nonetheless be questioned whether, in analogy with the *Banković* requirement that a person must find himself within the effective control of the state, all forms of sea interdictions must necessarily entertain the human rights obligations of the interdicting state.<sup>159</sup> It has been reported that not all interdiction activities are accompanied with the boarding of migrant vessels, but that states may also employ diversion tactics without making physical contact with a migrant vessel.<sup>160</sup> Examples which can be given are the escort-

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155 ECtHR 10 July 2008, *Medvedyev v France*, no. 3394/03 (Chamber); ECtHR 29 March, *Medvedyev v France*, no. 3394/03 (2010 (Grand Chamber)). Also see ECtHR 12 January 1999, *Rigopoulos v Spain*, no. 37388/97 (adm. dec.).

156 *Medvedyev v France* (Grand Chamber), para. 81

157 ECtHR 11 January 2001, *Xhavara a.o. v Italy and Albania*, no. 39473/98 (adm. dec.).

158 UN Committee Against Torture 21 November 2008, *J.H.A. v Spain (Marine I)*, no. 323/2007, para. 8.2.

159 See extensively chapter 2.5.2.

160 See the accounts of various diversion tactics employed by States in the Mediterranean in Foundation Pro Asyl (2007); Human Rights Watch, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum-seekers, Libya's Mistreatment of Migrants and Asylum-seekers' (report), September 2009.

ing of a migrant vessel; the addressing of the captain or passengers by megaphone; the dissuasion of a vessel from further passage by making intimidating maneuvers; or even the shooting of the engine of a vessel.<sup>161</sup> But it is difficult to see why such measures should preclude persons from being brought under the personal scope of the acting state's human rights obligations. As concluded in chapter 2 of this book, it transpires from the evolving case law on the extraterritorial application of human rights that the form or manner of state activity is generally not considered decisive for enlivening the state's extraterritorial obligations but rather the question whether there is a factual assertion of state sovereignty which affects a person in such a way that he can be considered a victim of an alleged infringement of a human rights obligation.<sup>162</sup> This reasoning finds further support in the ECtHR judgment in *Women on Waves v Portugal*, in which a prohibition to enter Portuguese territorial waters imposed on a Dutch vessel and enforced by a warship of the Portuguese Navy which took position near the Dutch vessel, was considered to contravene the right of the Dutch crew to promote to the debate on reproductive rights in Portugal.<sup>163</sup>

Migrant interdictions at sea not only attract obligations specific for asylum-seekers, but may extend to the full panoply of rights laid down in the different human rights conventions. The current section explores three human rights which appear particular at issue when states subject migrants at sea to coercive measures: the prohibition of *refoulement*, the right to leave and the right to liberty. It will conclude that the manner in which several EU Member States currently control their maritime sea borders raises serious issues under all these rights.

#### 6.4.1 *Non-refoulement* obligations arising out of interdiction at sea

In situations of land arrivals of refugees at a state's border where the state wishes to exclude the refugee, the state will have the alternatives of either to send the refugee to his country of origin, possibly violating the prohibition of *refoulement*, or to send him to a third country, which may also involve either direct or indirect *refoulement* and further depends on the willingness of the other country to admit the person. In respect of sea arrivals, there is the alternative possibility of sending the refugee back to open sea.<sup>164</sup> Although sea diversions not accompanied with forced returns to another country are not necessarily at variance with the prohibition of *refoulement*, they are problematic nonetheless. Ultimately, it may result in 'refugees in orbit',

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161 Ibid.

162 See in particular the analysis in chapter 2.5.2.

163 ECtHR 3 February 2009, *Women on Waves v Portugal*, no. 31276/05.

164 Pugash (1977), p. 594.

where no country is willing to allow entry into its ports.<sup>165</sup> Because migrants at sea often travel on unseaworthy or unsafe ships and will often have limited food-, water- or fuel supplies, they cannot be expected to stay at sea indefinitely. In practical terms, this means that diversions to the open sea may result, firstly, in refugees seeing no other option than to return to the state where their life or freedom is in danger or where there is a risk of chain refoulement. This may well amount to either exposure to ill-treatment under Article 3 ECHR or 'return' (or '*refouler*') in the ordinary meaning of the term under Article 33(1) Refugee Convention and must therefore be classified as prohibited.<sup>166</sup> Secondly, also in situations short of distress, to knowingly accept the risk that a migrant vessel is forced to remain at sea for a prolonged period may endanger the life and well-being of the passengers, thus attracting the state's human rights obligations under the right to life and/or the prohibition of inhuman treatment.<sup>167</sup>

Increasingly, EU Member States seek not to merely divert vessels carrying irregular migrants, but to conclude agreements with third countries allowing for their immediate return. This practice has attracted considerable attention of legal scholars and UNHCR and touches upon the two crucial issues of where asylum-seekers should be disembarked and where and how their status should be determined.

The most immediate question in connection to summary returns of refugees who are interdicted at sea is how states should deal with asylum requests lodged by intercepted migrants. At the land border, specific mechanisms will normally regulate the lodging and processing of asylum requests. But domestic laws often remain silent on asylum requests lodged at sea, rendering the mechanism of processing asylum applications, and how to guarantee access to fair and efficient asylum procedures, manifestly unclear.<sup>168</sup> Because inter-

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165 Mathew (2002), p. 666.

166 See chapter 4.3.

167 It is reported that, on occasion, EU Member States have attempted to divert migrant vessels, also if in distress, rather than to bring them to a port. In August 2009, the five survivors of a ship carrying over seventy migrants, who had embarked in Libya, told to the Italian press that their ship had ran out of fuel and had remained adrift for twenty days, during which time only one out of several vessels passing by had stopped to provide assistance. Two days before being rescued, a patrol boat, allegedly belonging to Malta, had provided them with fuel and directed them to the Italian island of Lampedusa, *Migration News Sheet*, Migration Policy Group, Brussels, Sept. 2009, 12. On preventive duties under the right to life and border controls, see Spijkerboer (2007), p. 137-139. Council Decision 2010/252/EU expressly allows Member States participating in border operations coordinated by Frontex to order a ship to modify its course towards a destination other than the territorial waters or contiguous zone, but also obliges Member States to always respect fundamental rights and to not put at risk the safety of the intercepted passengers, Annex, Part I, paras. 1.1, 2.4(e).

168 UNHCR, 'Background note on the protection of asylum-seekers and refugees rescued at sea', Geneva, 18 March 2002, para. 21.

dictions will normally bring asylum-seekers within the jurisdiction of the state in human rights terms, a lack of guarantees of law safeguarding asylum-seekers from being returned without their claim being assessed in itself raises serious issues under the prohibition of *refoulement*. Under Article 3 ECHR, 'a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3'.<sup>169</sup> This ordains the installment of certain procedural safeguards, an obligation which likewise applies to the prohibition of *refoulement* under other treaties.<sup>170</sup> Therefore, although the question of whether a particular return measure does indeed expose a person to ill-treatment or persecution can ultimately only be answered on the basis of an assessment of the circumstances of the individual and those prevailing in the receiving country (including the possibility of onward removal), return practices not allowing for some sort of screening procedure in effect amount to a blanket determination that none of the returnees may have a valid asylum claim, without the possibility of assailing that determination.<sup>171</sup>

Crucially therefore, any interdiction practice not providing for some form of refugee screening runs counter to procedural duties which follow from the prohibition of *refoulement*, regardless of whether it concerns countries which are generally considered as unsafe, such as Libya,<sup>172</sup> or whether it concerns a safe country, as it is generally accepted that asylum-seekers must always be allowed the possibility to rebut the supposed safety of the country concerned.<sup>173</sup> Hence, interdictions of EU Member States where no specific regard is paid to refugee concerns, including the recent returns by Italy of migrants intercepted at sea to Libya, but also the interdictions and summarily returns carried out in the context of the Hera operations in the territorial waters of Senegal, Mauritania and the Cape Verde – which have not been confirmed to provide for access to an asylum procedure<sup>174</sup> – are problematic.<sup>175</sup> Out-

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169 ECtHR 11 July 2000, *Jabari v Turkey*, no. 40035/98, para. 39. On the obligation to install procedural safeguards under Articles 3 ECHR, 7 ICCPR and 3 CAT extensively K. Wouters, *International Legal Standards for the Protection from Refoulement*, Antwerp: Intersentia (2009), p. 330-331, 411-412, 513-515.

170 *Ibid.*

171 Cf. H.H. Koh, 'The Human Face of the Haitian Interdiction Program', 33 *Virginia Journal of International Law* (1993), p. 486.

172 Human Rights Watch News Release 17 January 2008, 'Libya: Summary deportations would endanger migrants and asylum-seekers'; Human Rights Watch, 'Libya: Stemming the Flow, Abuses Against Migrants, Asylum-seekers and Refugees' (Report), Volume 18, No. 5(E), September 2006; S. Hamood, 'EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?' 21 *Journal of Refugee Studies* (2008) p. 19-42. Also see the country information reproduced in ECtHR 20 July 2010, *A. v the Netherlands*, no. 4900/06.

173 J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005), p. 326-333; K. Hailbronner, 'The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective', 5 *IJRL* (1993), pp.51, 53.

174 García Andrade (2010), p. 321-322.

side the European context, interdiction practices which have been reported not to entertain meaningful screening for refugees include the returns of Haitians intercepted by the US Coast Guard to Haiti after President G.H.W. Bush had issued the Kennebunkport Order in 1992<sup>176</sup> and the return of asylum-seekers interdicted by Australia to Indonesia in the most recent decade.<sup>177</sup>

UNHCR has repeatedly underlined the necessity of identifying and subsequent processing of asylum-seekers who are intercepted at sea. In view of all sorts of practical constraints, UNHCR advises that status determination is most appropriately carried out on dry land – where access to *inter alia* translators, appropriate counsel and appeal mechanisms can be ensured.<sup>178</sup> Although not always unambiguous, UNHCR generally appears to refrain from recommending that the processing must always be conducted within the territory of the interdicting state.<sup>179</sup>

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175 The CPT has explicitly submitted that Italy's policy of pushing back migrants to Libya violates the prohibition of *non-refoulement*, CPT Report on Italy (2010), para. 48.

176 Legomsky (2006), B. Frelick, "'Abundantly Clear': *Refoulement*", 19 *Georgetown Immigration Law Journal* (2005), p. 245-275. The Kennebunkport Order (Executive Order 12807), named after the vacation home of the President from where the order was issued, declared that Article 33 Refugee Convention did not extend to persons located outside the territory of the United States and that vessels found to be engaged in the irregular transportation of persons could be returned to the country from which it came, provided that the Attorney General, 'in his unreviewable discretion', decided that a person who is a refugee shall not be returned. See, further chapter 7.2.1.

177 S. Kneebone, 'The Pacific Plan: The Provision of 'Effective Protection'', 18 *IJRL* (2006), p. 714; Mathew (2002), p. 671.

178 UNHCR, 'Background note on the protection of asylum-seekers and refugees rescued at sea', Geneva, 18 March 2002, para. 23-24. UNHCR does not exclude the possibility of onboard processing in limited circumstances. In a similar vein: IMO, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea', FAL.3/Circ.194, 22 January 2009, para. 2.2. Frelick has aptly described the inadequacies of on board identification and screening of Haitian refugees in the context of the Haitian interdiction policy: Frelick (2005), p. 245-247.

179 UNHCR Background note (2002), paras. 25-29. EXCOM had earlier recommended, in the context of rescue operations, that asylum-seekers should normally be disembarked and further processed in the country of the next port of call; EXCOM Conclusion No. 23 (XXXII), 1981, para. 3. In EXCOM Conclusion No. 15 (XXX), 1979 para. h iii, it was stated that 'intentions of asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account'. More recently, and specifically responding to rescue operations carried out by EU Member States, UNHCR recommended that '... disembarkation of people rescued in the Search and Rescue (SAR) area of an EU Member State should take place either on the territory of the intercepting/rescuing State or on the territory of the State responsible for the SAR. This will ensure that any asylum-seekers among those intercepted or rescued are able to have access to fair and effective asylum procedures. The disembarkation of such persons in Libya does not provide such an assurance'; UNHCR, Letter to His Excellency Mr. Martin Pecina, Minister of the Interior of the Czech Republic, 28 May 2009, in: UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy (Application no. 27765/09), March 2010, para. 4.3.6.

As noted above, the non-binding Part II of Council Decision 2010/252/EU sets as a default rule that, by way of priority, intercepted or rescued persons in Frontex operations should be disembarked in a third country.<sup>180</sup> The Decision does not provide specific guidelines or rules on how participating Member States should deal with asylum claims lodged at sea, but it does stipulate firstly, that no person shall be disembarked in or handed over to a country in contravention of the prohibition of direct or indirect *refoulement*; and secondly, that rescued or intercepted persons must be allowed the possibility to 'express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of *non-refoulement*'.<sup>181</sup> Further, Member States must ensure that their participating border guards are trained with regard to relevant provisions of human rights and refugee law.<sup>182</sup> Although this is the first legal instrument of the European Union codifying the extraterritorial applicability of the prohibition of *refoulement*, it does little to resolve the fundamental question of how to make operational procedural duties for deciding upon asylum claims lodged at sea. Theoretically, it leaves the Member States confronted with asylum claims the three options of either to process the asylum-seeker on the territory of one of the Member States (normally the host Member State<sup>183</sup>), to process the claim in a third country, or to process the claim at sea.

Because all three options may be problematic from either a legal, practical or policy perspective, states have on occasion sought recourse to the further possibility of entering into arrangements with a third country allowing for the identification, status determination and subsequent repatriation or resettlement in that country. In chapter 7 of this study, the merits of such external processing schemes are more extensively reviewed. It transpires from that review that although the processing of asylum claims of interdicted asylum-seekers in a third country not necessarily raises issues under the prohibition of *refoulement*, these schemes may raise a variety of other human rights issues, especially in the sphere of procedural guarantees and the availability of safeguards against arbitrary detention.

#### 6.4.2 The right to leave at sea

The right to leave can be invoked by any person, regardless of entitlements to international protection. It was concluded in chapter 4 of this book that the right to leave, laid down in Articles 2(2) Protocol No. 4 ECHR and 12(2) ICCPR may constrain the freedom of states to employ extraterritorial measures of

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180 Section 6.3.2.2.; Council Decision 2010/252/EU, Annex, Part II, para. 2.1.

181 Annex, Part I, para. 1.2.

182 Annex, Part I, para. 1.4.

183 Annex, Part II, para. 2.1.

border control. It was derived from relevant case law of the ECtHR and HRC that measures of immigration control enforced in the territorial waters of a third country can constitute an interference with the right of a person to leave that country, and that it is neither excluded that interdictions at the high seas accompanied with summarily returns to the third country may also deprive the right to leave of meaningful effect.<sup>184</sup>

Concluding that measures of border control effectuated in a foreign country attract protection under the right to leave has substantial ramifications for the manner in which those controls must be executed. Surely, states may have very good reason to require persons to only cross international borders with valid travel and identity documents. When states, to that purpose, conclude international arrangements allowing them to deny persons from exiting another country, such activity may well be brought within one of the justifiable aims for restricting a person's right to leave. The key point, however, is that *any interference* with the right to leave requires compliance with *all* the elements of the limitation clauses of Articles 2(3) Protocol No. 4 ECHR and 12(3) ICCPR. Most pertinent, in view of current practices, is the requirement of *in accordance with law*, ordaining that interferences may only take place under a procedure prescribed by law, that this procedure must be accessible and foreseeable and sufficiently precise to avoid all risk of arbitrary application.<sup>185</sup>

It is in this sphere that issues arise. This is so firstly, because interdiction practices of European states at sea which involve the summarily return of migrants to a third country are often conducted outside a clear procedural framework. And, secondly, the same conclusion applies to joint operations of border control within the territorial seas of third countries: these operations often take place under obscure arrangements, which do not set the precise conditions for refusing persons to exit a country, nor embody guarantees against arbitrary application.

It is useful here to make an analogy with the case of *Medvedyev v France*.<sup>186</sup> Although concerning the right to liberty instead of the right to leave, the judgments of both of the Chamber and the Grand Chamber of the ECtHR in that case shed light on how the requirement of 'lawfulness' should be interpreted in a situation concerning the interdiction of a vessel and the taking of coercive measures against those on board in the context of a bilateral arrangement with another country. The Court had regard to the applicable French legislation, the international law instruments on the suppression of drug trafficking and the ad hoc arrangements between France and Cambodia. It concluded that universal treaty law on the suppression of drug trafficking did provide for international cooperation in taking action against illicit drug trafficking by sea but merely referred to the taking of 'appropriate measures'

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184 See, extensively, chapter 4.4.4.

185 Ibid.

186 *Supra* n. 155.

with respect to persons on board, not specifically to depriving the crew of the intercepted ship of their liberty.<sup>187</sup> It considered French law on the carrying out of checks at sea not to apply, because the law referred to international treaties to which Cambodia was not a party.<sup>188</sup> Moreover, the Chamber had found the French law to neither make specific provision for deprivation of liberty of the type and duration of that to which the applicants were subjected.<sup>189</sup> And in respect of the diplomatic note concluded between France and Cambodia, by which Cambodia had agreed to the interception of the vessel, the Court found the agreement to solely refer to action taken against the ship itself, not covering the fate of the crew.<sup>190</sup> The Court concluded that none of the relevant provisions referred specifically to depriving the crew of the intercepted ship of their liberty, that they did not regulate the conditions of deprivation of liberty on board the ship, that they did not provide for the possibility for the persons concerned to contact a lawyer or a family member and did not place the detention under the supervision of a judicial authority. As *obiter dictum*, the Court considered that although international treaties do afford the possibility of concluding regional or bilateral initiatives setting forth a more clearly defined legal framework for undertaking coercive action, international efforts to that effect had been lacking in substance.<sup>191</sup>

The right to liberty is accorded special protection under the European Convention and not all its substantive and procedural guarantees necessarily apply to the right to leave. Nonetheless, the 'lawfulness' requirement under the right to leave does require the law to set the grounds and conditions under which it is permitted to set restrictions on persons crossing borders. The general issue which rises here is that even though several southern EU Member States have made provision in their domestic laws for suppressing irregular migration by sea, also on the high seas or in the territorial waters of third countries if this is pursuant to agreement with the flag state or coastal state, they do not appear to set forth on what specific grounds and under what conditions action may be undertaken against migrants trying to leave another country.<sup>192</sup> Neither do the applicable bilateral arrangements between EU Member States and third countries put in place a legal framework which sets forth the specific procedures to be followed in preventing persons from exiting

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187 *Medvedyev v France* (Chamber), paras. 60-61; *Medvedyev v France* (Grand Chamber), para. 95.

188 *Medvedyev v France* (Grand Chamber), paras. 90-92.

189 *Medvedyev v France* (Chamber), para 60.

190 *Medvedyev v France* (Grand Chamber), paras. 98-100.

191 *Medvedyev v France* (Grand Chamber), para. 101.

192 For an extensive appraisal of applicable Italian and Spanish legislation to interdiction at sea, see Di Pascale (2010), p. 283-289 (Italy) and García Andrade (2010), p. 313-316 (Spain). Also see Rijpma (2009), pp 339-340.



a country.<sup>193</sup> Especially problematic, in this respect, is that most of the bilateral arrangements currently in force and which allow for joint operations in the territorial waters of third countries are outside the public domain, raising issues of accessibility and foreseeability. In sum, the legal frameworks currently applicable to interceptions involving refusing individuals to leave another country, seem of insufficient quality to meet the requirement that, when human rights are at issue, the law must set limits to the discretionary power of states.<sup>194</sup>

Problems also arise under the requirement of *effective remedies*. Articles 13 ECHR and 2 (3) ICCPR require amongst other things that when there is an arguable claim that a human right is violated, administrative mechanisms must be in place ensuring that individuals have accessible and effective remedies to vindicate their rights; that allegations of violations are investigated promptly, thoroughly and effectively through independent and impartial bodies; and that states Parties make reparation to individuals whose rights have been violated.<sup>195</sup> The 'quality of law' doctrine under the limitation clause of the right to leave further requires the law to provide for an independent review to allow alleged victims of human rights violations to vindicate their rights.<sup>196</sup> It transpires from the few European cases involving sea interdiction of migrants which have been brought before a court that domestic laws on effective remedies do not always allow migrants to challenge their interception and/or return before an independent authority or court. In the *Marine I* case, the Spanish High Court had rejected claims under the Spanish human rights act lodged by the migrants rescued at the high seas because the incidents complained of were regarded as political acts which were exempted from judicial prosecution.<sup>197</sup> In the case of *Hirsi v Italy*, concerning the Italian push-back policy, the migrants, after having been intercepted in international waters, had been delivered to the Libyan authorities allegedly without having been granted the opportunity to challenge their return.<sup>198</sup> These examples indicate that EU Member States do not always accept that procedural guarantees implied in human rights govern their various interdiction policies. Given that certain

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193 See, for example, the 2008 Spain-Cape Verde Treaty, n. 14 *supra*, which speaks only in general terms of interceptions and visits and does not endow Spain with the explicit competence to prohibit intercepted migrants from leaving the third country, see Articles 3 and 6.

194 ECtHR 24 April 2008, *C.G. a.o. v Bulgaria*, no. 1365/07, para. 39.

195 See, extensively, with references to case law, P. Boeles et al, *European Migration Law*, Antwerp: Intersentia (2009), p. 380-384.

196 See, extensively, chapter 4.4.5; and Boeles et al (2009), p. 382 (with references to case law).

197 *J.H.A. v Spain (Marine I)*, para. 6.2. Note that this case concerned a rescue operation.

198 ECtHR 18 November 2009, Exposé des faits et Questions aux Parties, in the case of *Hirsi a.o. v Italy*, no. 27765/09 (Communication).

interdiction measures may very well deny migrants the possibility of leaving a country, this deficiency is difficult to sustain.

Apart from the requirements of in accordance with law and effective remedies, further issues under the right to leave may arise under the requirements of *legitimate aim* and *necessity and proportionality*. These are not further discussed here.<sup>199</sup>

#### 6.4.3 The right to liberty at sea

It is not unimaginable that coercive measures taken in respect of migrants at sea may interfere with their liberty. Similar to the right to leave discussed above, establishing that interdictions at sea may attract protection under the right to liberty is particularly relevant in the light of guarantees of procedure and good administration which must be respected when a state deprives a person of his liberty. Under Articles 5 ECHR and 9 ICCPR, deprivations of liberty must be in accordance with a procedure prescribed by law, which must be accessible and foreseeable and must afford legal protection to prevent arbitrary interferences of the right to liberty. Safeguards relating to the right to liberty include the informing of the persons who have been detained of their rights, allowing them to contact a lawyer and to bring them before an appropriate judicial authority within a reasonable time.<sup>200</sup>

Although restrictions on liberty may also fall within the ambit of Article 12 (1) ICCPR and Article 2 (1) Protocol No. 4 ECHR securing the right to freely move within a country and to choose a residence, the references in these provisions to 'lawful' presence within the territory of a state and movement within 'the State's territory' render it problematic to consider this more general right to freedom of movement applicable to irregular migrants at sea who are prevented from crossing borders.<sup>201</sup> This section is concerned only with restrictions on liberty which amount to a deprivation of liberty in the meaning of Articles 5 ECHR and 9 ICCPR. It first addresses the circumstances under which sea interdictions can be considered to come within the ambit of the right to liberty. It next addresses several issues raised by current interdictions practices under obligations of good administration and procedural guarantees.

With respect to assertions of criminal jurisdiction at sea, such as in the course of anti-drug trafficking operations, it will normally be beyond dispute that coercive activity amounting to arrest and detention of suspects on board a vessel constitutes a deprivation of their liberty in the meaning of Articles 5

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199 For some general remarks, see chapter 4.4.5.

200 Eg *Medvedyev and Others v France* (Grand Chamber), paras. 76-80.

201 On the distinction between restrictions on liberty of movement and deprivations of liberty see eg ECtHR 6 November 1980, *Guzzardi v Italy*, no. 7367/76, paras. 92-93; and HRC 18 July 1994, *Celepli v Sweden*, no. 465/91, para. 6.1.

ECRH and 9 ICCPR. This is less straightforward in sea interdictions which have the purpose of preventing irregular migration. Normally, intercepted migrants are not formally put under arrest, although they may be taken to a detention facility after arrival in a port. What renders it particularly difficult to draw a general picture on the relation between the right to liberty and the interdiction of migrants at sea is that interdictions take a variety of forms: some interdictions amount to the mere diversion of migrant vessels without the boarding of the vessel; some interdictions amount to the taking on board of the migrants; and others amount to the towing of a vessel still having the migrants on board. Further, while some interdictions result in the return of the migrants to a third country against their desire, others may be expressly welcomed by interdicted migrants, especially those involving an escort to a EU Member State. Another relevant distinction may be between rescue operations and operations expressly aimed at undertaking coercive activity in respect of the vessel and the migrants on board.

The problem of classifying coercive action taken in respect of irregular migrants at sea as deprivations of liberty is well illustrated by the Australian *MV Tampa* case, involving the refusal of the Australian authorities to allow a group of rescued asylum-seekers to disembark in its territory. After the Australian trial judge had granted *habeas corpus* relief to the persons on board the vessel on account of them having been held in custody on the vessel contrary to the powers conferred by the Australian Migration Act,<sup>202</sup> Australia's Federal Court upheld the challenge of the Australian government that the control asserted over the persons on board was incidental to the executive power to prevent the entry of non-citizens and that there was no restraint susceptible to *habeas corpus*: 'the actions of the Commonwealth were properly incidental to preventing the rescuees from landing in Australian territory where they had no right to go. Their inability to go elsewhere derived from circumstances which did not come from any action on the part of the Commonwealth. The presence of SAS troops on board the *MV Tampa* did not itself or in combination with other factors constitute a detention. It was incidental to the objective of preventing a landing and maintaining as well the security of the ship. It also served the humanitarian purpose of providing medicine and food to the rescuees.'<sup>203</sup> The dissent maintained, on the other hand, that as a practical matter 'the movements of those rescued on the ship were controlled by officers of the Special Armed Services of the Australian Defence Force and the rescued people were not allowed to leave the ship except to leave Australian territorial waters.'<sup>204</sup> Accordingly, the dissent considered the asylum-

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202 Federal Court of Australia 11 September 2001, *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs*, [2001] FCA 1297.

203 Federal Court of Australia 18 September 2001, *Ruddock v Vadarlis*, [2001] FCA 1329, para. 213.

204 *Ibid*, para. 80.

seekers to have been held in custody unauthorised by law, and that they therefore should be released on mainland Australia so that they could enjoy their right to a remedy in an effective way.

It is rather unlikely that the European Court of Human Rights would concur with the reasoning of Australia's Federal Court. The gist of the Federal Court's argument – that the inability of the migrants to go elsewhere and that hence the restraint on their liberty could not be attributed to the Commonwealth – was repudiated by the ECtHR in the case of *Amuur v France*, on the question whether the holding of asylum-seekers in the transit zone of an international airport amounted to a deprivation of liberty.<sup>205</sup> After having posited that the right of Contracting States to control the entry of aliens must be exercised in accordance with the provisions of the Convention, including Article 5 ECHR, the Court dismissed the French government's argument that the transit zone was closed on the French side but not on the outside, so that the applicants could have returned of their own accord to Syria. Instead, the Court noted that there was only a theoretical possibility for the asylum-seekers to leave the transit area and that the circumstances in which they were held were equivalent in practice to a deprivation of liberty.<sup>206</sup> The Court took account of the considerable duration of their stay (twenty days) and the fact that they were placed under strict and constant police supervision.<sup>207</sup> In so doing the Court affirmed that the right to control migration does not entail an unfettered prerogative to subject migrants to coercive measures and that Article 5 ECHR protects against factual deprivations of liberty irrespective of whether persons have voluntarily brought themselves within the scope of a state's executive power in migration matters.

There is a wealth of case law, especially under Article 5 ECHR, on the material scope of the deprivation of liberty. It transpires, as a general formula, that in pronouncing upon a deprivation of liberty, account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.<sup>208</sup> In cases not concerning placement in prisons or other specialized detention facilities, such as house arrest or compulsory hospitalization, particular relevant factors are the degree of supervision, the actual freedom of movement and the possibility to maintain contact

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205 ECtHR 25 June 1996, *Amuur v France*, no. 19776/92.

206 *Ibid*, paras. 48-49.

207 This may be different however, in a situation where there is a genuine possibility of traveling elsewhere, see: EComHR 5 April 1993, *S.S., A.M. and Y.S.M. v Austria*, no. 19066/91; ECtHR 8 December 2005, *Mahdid and Haddar v Austria*, no. 74762/01 (both cases concerning asylum-seekers in a transit area at an airport).

208 Eg *Guzzardi v Italy*, para. 92; *Amuur v France*, para 42.

with the outside world.<sup>209</sup> A further relevant factor is whether the constraining measure was taken with a view to protect the person concerned.<sup>210</sup> This latter factor may, in the context of the present chapter, also be of relevance for rescue operations at sea. As regard the specific situation of placing restrictions on liberty of persons on board a ship – where the freedom to move is necessarily confined to the physical boundaries of the ship and where they may accordingly not be a particular need for additional constraining measures – the ECtHR in *Medvedyev v France* further considered the factor relevant whether the ship's course was imposed by the state's authorities.<sup>211</sup>

These factors lend themselves for meaningful application in the context of interdictions of migrants at sea. Especially interdictions which involve the taking of control of the vessel and which are accompanied with strict police supervision over the persons on board may well come within the ambit of the right to liberty.

By way of further illustration of how these criteria are to be applied to interdiction activity, it is useful to refer to the *Marine I* case.<sup>212</sup> Although the right to liberty was not expressly at issue in this case, the facts do shed light on how, deliberately or not, rescue or interception activities may factually result in migrants being severely restrained in their liberty. The case had initiated as a rescue operation where a Spanish maritime rescue tug responded to a distress call of a vessel carrying 369 migrants which had gone adrift in international waters and which was subsequently towed into the territorial waters of Mauritania. Instead of being allowed to disembark however, Spanish Civil Guard personnel took control of the vessel, which remained anchored off the Mauritanian coast for eight days. The complainant had submitted, amongst other things, that during that period 'the migrants were crammed together below deck, receiving food by means of ropes, and that no medical personnel was able to provide assistance or board the vessel to ascertain their state of health.'<sup>213</sup> Although the facts of the case do not precisely indicate the degree of supervision over the migrants and the scope of their freedom of movement while on board the vessel, the vessel had clearly ceased to be a mere object of a rescue operation but instead became the object of an operation of migration control. The presence of security forces on board the vessel, the prolonged stay of the migrants, the restrictions on contacts with

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209 ECtHR 28 November 2002, *Lavents v Latvia*, no. 58442/00, paras. 63; ECtHR 26 February 2002, *H.M. v Switzerland*, no. 39187/98, paras. 44-48; ECtHR 28 May 1985, *Ashingdane v United Kingdom*, no. 8225/78, para. 42. See, in the context of the Article 9 ICCPR, and with references to views of the HRC, S. Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials*, Oxford University Press, 2nd Edition (2004) p. 307-308.

210 *H.M. v Switzerland*, para. 44.

211 *Medvedyev v France* (Grand Chamber), para. 74.

212 *J.H.A. v Spain (Marine I)*. Also see den Heijer and Wouters (2010).

213 *Ibid*, para. 5.2.

NGO personnel and the taking of control over the vessel including the setting of its course, support a conclusion that the situation on board did amount to a deprivation of liberty; and that, as such, the confinement of the migrants on board the vessel constituted a mere prelude to their placement in a reception facility on the mainland of Mauritania, of which it was not disputed that it amounted to a deprivation of liberty.<sup>214</sup> In these circumstances, the Spanish government's argument that the operation had only amounted to a humanitarian operation which did not attract human rights obligations is difficult to maintain.<sup>215</sup>

The significance of concluding that migrant interdictions can amount to a deprivation of liberty primarily lies with the concomitant rule that deprivations of liberty must be accompanied with norms of good administration and procedural guarantees. It is not necessary to repeat here the issues which were noted in respect of the requirements of 'in accordance with law' and 'effective remedies' under the right to leave in the section above. In the specific context of the requirement of lawfulness under Article 5(1) ECHR, the ECtHR requires the law to not only set forth the precise circumstances under which deprivations of liberty are permitted, but also to set limits as regards the duration of detention, to provide for legal and humanitarian assistance, and to allow for judicial review.<sup>216</sup> The general problem identified in respect of the requirement of 'lawfulness' under the right to leave which also raises under the right to liberty is that the domestic laws of EU Member States and bilateral agreements with third countries are often lacking in circumscribing the state's power to deprive migrants who are outside its territory of their liberty.<sup>217</sup> Neither do international conventions of a general nature expressly regulate the subject of detention of migrants on the high seas. Although international maritime law does allow for the boarding and search of vessels that are without nationality and/or engaged in the smuggling of migrants by sea,<sup>218</sup> it does not make specific provisions for deprivation of liberty of improperly documented migrants found on board such vessels.<sup>219</sup> As noted in chapter 5, Council Decision 2010/252/EU has neither succeeded in supplementing powers of interception, seizure of the ship, apprehension of persons on board and the conducting of the ship or persons on board to another country with procedural guarantees, a right to judicial review or other norms of good administration.

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214 Ibid, para. 4.3.

215 Ibid, paras. 4.3, 6.2.

216 *Amuur v France*, paras. 50, 53.

217 *Supra* n. 192 and accompanying text.

218 Article 110 UNCLOS; Article 8 Migrants Smuggling Protocol. Also see chapter 6.3.1.3-6.3.1.4.

219 Cf. *Medvedyev v France* (Grand Chamber), paras. 87-89, 101.

## 6.5 ISSUES OF ATTRIBUTION AND ALLOCATION OF RESPONSIBILITY

The previous sections examined in what manner sea interdictions may conflict with obligations of states under human rights law. A preliminary condition for establishing the international responsibility of states for wrongful conduct is that the interdiction activity must be attributable to the state or on some other account attract the state's international responsibility.<sup>220</sup> This requirement warrants special scrutiny in the context of joint operations of sea border control, where multiple actors are involved in the interdiction of migrants, in particular joint operations of EU Member States under the coordination of Frontex and joint operations of EU Member States and third countries along the shiprider model.

*The Frontex / RABIT model*

The Frontex Regulation, as amended by the RABIT Regulation, lays down specific rules on civil and criminal liability for acts committed by guest officers.<sup>221</sup> These rules are only binding as between the Member States and do not prejudice claims brought by a national of a third state.<sup>222</sup> Moreover, they only relate to claims for damages or criminal offences and do not touch specifically upon human rights claims.

It follows that, outside the context of inter-Member State claims, attribution of particular activity of a guest officer to either the host or the home Member State depends on the general rules of attribution discussed in chapter 3 of this book and in particular the rule on attributing conduct of a state organ to the state at whose disposal it is placed.<sup>223</sup> For such attribution it is necessary not only that an organ or officer of a state acts on behalf of another state, but it must also be placed within the command structure of the other state and be subject to that state's instructions. Especially Article 10 of the amended Frontex Regulation, laying down the tasks and powers of guest officers is instructive in this regard. Article 10 (3) specifies that 'guest officers may only perform tasks and exercise powers under instructions from and, as a general rule, in the presence of border guards of the host Member State'. Article 10(10)

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220 See, extensively, chapter 3.

221 Articles 10b and 10c Regulation 2007/2004. Article 10b appoints civil liability for damages incurred by acts of guest officers to the host Member State; Article 10c lays down that guest officers are treated the same way as officials of the host Member State with regard to criminal offences committed by or against them. Guest officers are border guards of other Member States than the Member States hosting the operation, Article 1a (6) Regulation 2007/2004. The rules on civil and criminal liability, together with the further specification of tasks and powers of guest officers and division of competences between Member States and Frontex, discussed hereunder, were introduced in the Frontex Regulation pursuant to Article 12 of the RABIT Regulation (863/2007).

222 This follows from the *pacta tertiis* rule codified in Article 34 VCLT and is implicitly recognized under Article 10b (3) and (5) Regulation 2007/2004.

223 See chapter 3.2.3.

specifies further that refusals of entry in the meaning of the Schengen Borders Code shall be taken only by border guards of the host Member State.<sup>224</sup> Article 10(2) lays down that guest officers shall comply with Community law and the national law of the host Member State. The only activities requiring specific authorization of the home Member State are the carrying of weapons and the use of force in the exercise of their powers.<sup>225</sup> Although the Frontex Agency is involved in the practical organization of joint operations and the drawing up of operational plans,<sup>226</sup> it has no specific power of instruction as regards the manner in which interdictions are conducted.<sup>227</sup>

Presuming that Frontex operations comply with this model, i.e. that interdictions are only carried out on instructions of the host Member State and in compliance with the laws of the host Member State, it would seem in accordance with the Law on State Responsibility to attribute possible wrongdoings ensuing from activities of guest officers to the host Member State. This does, however, not always mean that the home Member State is discharged of its own obligations under human rights law. Home Member States have the discretion to decide upon participation in Frontex operations and thus wield ultimate influence over the deployment of their officers.<sup>228</sup> They may be presumed, further, to be well aware of activity undertaken by their officers. On that account, and depending on the circumstances, home Member States may be under a positive duty to make use of material opportunities to prevent their officers from being engaged in possible wrongdoings, for example by refusing or terminating their participation.<sup>229</sup>

#### *The shiprider model*

A notorious problem with pronouncing on the international responsibility for possible international wrongs committed by EU Member States in the course

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224 This raises the further question of whether this also applies to decisions as to the stopping, boarding and searching of a vessel, the seizure of the vessel and apprehension of those on board, and the return of the ship and persons on board to a third country as now laid down in Council Decision 2010/252/EU, Annex, Part I, para. 2.4.; see the discussion in chapter 5.3.2.1.

225 Articles 10(5)(6) Regulation 2007/2004.

226 See *inter alia* Articles 3, 8e Regulation 2007/2004.

227 With regard to Rapid Border Intervention Teams, the RABIT Regulation does foresee in a closer involvement of the Frontex Agency, but it merely specifies that the host Member State shall take the 'views' of the Frontex coordinating officers 'into consideration'; Article 5(2) Regulation 863/2007. The proposal for recasting the Frontex Regulation foresees in a similar provision for other Frontex operations, COM(2010) 61 final, Article 3(c)(2).

228 But see article 8d (8) 'shall make border guards available'. Also see COM(2010) 61 final, Article 3(b)(3).

229 For a general discussion on the circumstances giving rise to such duties, see chapters 3.2.2.4 (positive obligations). Note that the 'jurisdiction' requirement may render it problematic to construe potential victims of human rights violations as being within the personal scope of the home Member State's (positive) human rights obligations, see chapter 2.5.3.



of joint patrols with and pursuant to agreements with third countries is the lack of accurate information on the relevant legal arrangements and their manner of implementation. This section will, for reasons of expedience, primarily refer to the terms of the Spain-Cape Verdean Treaty.<sup>230</sup>

That treaty foresees in joint maritime patrols, with Spain deploying air and naval assets in Cape Verdean maritime areas. These assets remain under Spanish command and Spain is competent to decide upon matters of flight and navigation.<sup>231</sup> At least one coast guard officer of the Cape Verde must be present on board Spanish ships and aircraft.<sup>232</sup> Interceptions, visits and arrests can only be made by the Cape Verdean authorities or under their direction.<sup>233</sup> It appears that this model is also followed in the context of the joint patrols Spain conducts with other third countries, notably Mauritania and Senegal.<sup>234</sup>

One difference of potential crucial nature between this shiprider model and the Frontex operations discussed above is that Spanish officers are not placed within the command structure of the host state (Cape Verde), rendering it difficult to consider them as having been put at the disposal of another state.<sup>235</sup> Rather, as long as host and guest officers function within their own state machinery, acts committed by them are properly attributable to their own state, or may in particular situations be labeled as 'joint acts', engaging the responsibility of both states involved.<sup>236</sup>

The agreement between Spain and Cape Verde speaks of coercive measures which are either carried out by Cape Verde or carried out by Spain but under the direction of Cape Verde. As regards the situation of direction, both Spain and Cape Verde will normally incur responsibility for ensuing conduct which is unlawful. This situation is specifically governed by Article 17 of the ILC Articles on State Responsibility, according to which the directing state incurs responsibility on account of it having directed or controlled the wrongful act in question. But this does not diminish the responsibility of the directed state for having itself committed a wrongful act.<sup>237</sup> The directed state would then be under the obligation to decline to comply with the instruction.<sup>238</sup>

Alternatively, where officers of the host state are engaged in wrongful activity, it will depend on the involvement of guest officers with the wrongful conduct whether the guest state can incur either derived responsibility for having facilitated the act in question or for having failed in discharging a

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230 *Supra* n. 14.

231 Article 6 (4).

232 Articles 3(1)(b), 6(4).

233 Article 6(5).

234 *Supra* n. 16.

235 See chapter 3.2.3.

236 See chapter 3.2.4.1.

237 *ILC Yearbook* 2001-II, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 69 (at 9).

238 *Ibid.*

positive duty to take measures within its power to prevent wrongdoings from occurring.<sup>239</sup> In general, for such responsibility to arise, it is required that the facilitating state has knowledge of the circumstances of the wrongful act.<sup>240</sup> This may be a potent threshold in the context of sea interdictions, as it will often be uncertain to what exact treatment interdicted migrants will be subjected. On the other hand, it is not impossible to imagine situations where a EU Member State would facilitate the interdiction of migrants by the authorities of a third country in the knowledge that those authorities commonly place irregular migrants in detention facilities where maltreatment systematically occurs, where detention can be prolonged indefinitely and where refugee claims are not examined. The problem with such a reasoning remains nonetheless, that it may be hard to identify a connection of sufficiently close nature between the interdicted migrant and the facilitating state, raising issues under both the victim-requirement and that of 'jurisdiction' under human rights treaties.<sup>241</sup>

## 6.6 FINAL REMARKS

Few areas in migration law are so contested and legally complex as the interdiction of migrants at sea. From an international law perspective, the legality of migrant interdiction at sea depends on an assessment of i) the competences of states under the Law of the Sea to interdict migrant *vessels* and ii) the limits set by human rights law to the treatment of the *migrants* found on the vessel. The chapter has observed that in several respects, EU Member States have tended to interpret competences under the Law of the Sea extensively, while they have interpreted requirements of human rights law restrictively.

For sea interdictions to be carried out in conformity with human rights standards, Member States will, either unilaterally, in the context of arrangements with third countries or on the level of the European Union, have to develop a meaningful human rights strategy which supplements and restrains the policy of sea interdiction. The chapter has argued that this not only implies the formulation of procedures to be followed in respect of asylum-seekers at sea. Current European interdiction practices attract a wider range of human rights concerns, and may also interfere with the right to liberty and the right of persons to leave any country, including their own.

The development of such a human rights framework is controversial, as it transgresses the very idea that pre-border controls and other extraterritorial coercive measures take place outside the realm of refugee and other human rights concerns. A key rationale underlying many of the current interdiction

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239 Chapters 2.5.3, 3.2.2.4, 3.3.2.

240 Ibid.

241 Chapters 2.5.2-2.5.3.

strategies is that they would prevent the migrants from making 'contact' with the domestic jurisdictions of Member States and therewith the concomitant domestic procedures and legal safeguards.

But this rationale constitutes an affront to the law on human rights. Interdictions carried out at sea, and especially those involving the taking of coercive activity, must in one way or the other be incorporated into the state's domestic immigration policy, by setting forth the grounds, conditions and safeguards for undertaking interdiction measures. This may ultimately imply that particular interdiction strategies need to be fundamentally reconsidered. The key argument of this chapter has however not been to posit that pre-border interdictions are necessarily at variance with human rights or that they should be abandoned altogether. The salient point, rather, is that European states cannot simply pretend that their policies do not entertain human rights concerns; and that, therefore, their policies must be embedded in a legal framework affording migrants *inter alia* access to a proper and fair status determination procedure, access to effective judicial oversight and adequate safeguards in relation to detention. The alternative would be the coming into being of an area outside the realm of the law, where migrants would enjoy no protection whatsoever, and where states could go forth and seize persons to their utter discretion.

Although it is increasingly acknowledged on the level of the European Union that procedural standards for maritime migrant interdictions need to be agreed upon, attempts to incorporate Member State practices into the Schengen regime on border crossings have as of yet not resulted in the laying down of a framework of procedural guarantees safeguarding against human rights violations and the provision of appropriate remedies. The recently adopted Council Decision for maritime Frontex operations sets forth a large variety of interception measures to be taken against vessels suspected of intending to circumvent border checks, but, apart from a general reference to fundamental rights and the prohibition of *refoulement*, does not lay down the precise procedures to be followed or safeguards to be respected when apprehending migrants, refusing them further passage or returning them to a third country. Hence, the Decision not only departs from the ordinary standards on border checks and refusals of entry laid down in the Schengen Borders Code as concluded in chapter 5, it neither provides detailed guidance on the appropriate respect for human rights. Further, the Decision arguably overstretching the competences of states to undertake coercive action in respect of foreign vessels in the contiguous zone.

