

Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem

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Abstract

Following in the aftermath of the Arab Spring, Europe's southern marine borders have been the showplace of human tragedies previously unseen on this scale and the issue of refugees on the high seas has assumed a newfound importance. This article examines the flawed system provided by the 'Constitution of the Oceans', the UN Convention on the Law of the Sea for the protection of the lives of migrants at sea. It submits that international refugee law is well-equipped to assume a greater responsibility in ensuring the protection of those involved. Although the concept of *non-refoulement* cannot be stretched *ad absurdum*, it may still be reasonably interpreted as providing a temporary right to disembark for the purpose of processing possible asylum applications. In the long-term, a system of burden-sharing and permanent, yet flexible, reception agreements remain the only sustainable solution.

A. Introduction

The reality of life at sea is, despite any romantic allusions to the contrary, widely accepted as being particularly harsh, unforgiving and, perhaps most importantly, dangerous. It is primarily for these very reasons that a genuine perception of the need to exercise solidarity has tended to characterize the interactions of seafarers when confronted with perilous situations at sea as well as the actions of coastal States in providing assistance. There is almost even an unwritten moral convention of exercising humanity at sea. Leaving aside any associated important yet precarious ethical issues,¹ the rescue of refugees at sea has persistently presented a number of legal dilemmas for those confronted with the situation of a vessel or persons in peril as well as the consequences resulting from a rescue. A myriad of actors,² the multitude of international Conventions and other legal instruments purporting to govern all eventualities and the often imprecise interaction between these instruments

¹ This author recognizes the difficulty of a legal order totally ignorant to the moral elements of any attempt to regulate human behavior. See I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), 27-28. Nonetheless, it is the purpose of this article to examine the legal standards applicable to the situation of refugees at sea.

² For example private mariners, chartered vessels, government enforcement vessels, coast guard crafts as well as private search and rescue charities etc.

and domestic law: These, and many other factors, add to the complexity of the situation and, as is often the case, considerations concerning the wellbeing of the persons who were initially in need of assistance are often accorded only inadequate attention. Indeed, recent examples of refugees in need of assistance at sea have tended to illustrate this situation, which is characterized by increased patrols and surveillance of border by coastal States on the high seas and at domestic borders as well as an increase in instances of failure to assist persons in distress by the masters of vessels in the vicinity.³ The activities of the European border control agency FRONTEX,⁴ for example, have been heavily criticized in the press as having resulted in asylum-seekers taking longer, more arduous journeys upon themselves so as to avoid patrols.⁵ One of the most disquieting aspects of this increased migration control is the increase in incidents of both rescues and interceptions of migrants on the high seas, an area of the sea, which, by its very nature, is not generally well suited to the application of specific positive duties such as those which are often imposed in situations where human life is endangered.⁶

Given that the events at the subject of this article are played out at sea, one could be forgiven for expecting that a solution ought to be provided for somewhere within the United Nations Convention on the Law of the Sea (UNCLOS), which, in its Preamble, purports to “settle, in a spirit of mutual understanding and cooperation, *all issues* relating to the law of the sea

³ J. Coppens & E. Somers, ‘Towards New Rules on Disembarkation of Persons Rescued at Sea?’, *25 International Journal of Marine and Coastal Law* (2010) 3, 377, 380-381.

⁴ See generally, A. Fischer-Lescano & T. Tohidipur, ‘Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX’, *67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007) 4, 1219.

⁵ I. Fisher, ‘For African Migrants, Europe Becomes Further Away’, *The New York Times*, 26 August 2007, 6; D. Johnson, ‘Weg in die Unmenschlichkeit’, *Die Tageszeitung*, 13 November 2007, 3.

⁶ R. Wolfrum, ‘Kapitel 4. Hohe See und Tiefseeboden (Gebiet)’, in W. Graf Vitzthum (ed.), *Handbuch des Seerechts* (2006), 295; R. Churchill & V. Lowe, *The Law of the Sea*, 3rd ed. (1999), 205. See also R. Weinzierl & U. Lisson, *Border Management and Human Rights. A Study of EU Law and the Law of the Sea* (2007), 34, available at http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/study_Border_Management_and_Human_Rights.pdf (last visited 21 August 2011).

[...]”⁷. UNCLOS does not, however, function within a vacuum and regard must also be had to other relevant rules and principles of general international law.⁸ To this end, related international Conventions aimed at improving the safety of maritime travel and, should the necessity arise, other areas of law which may be applicable must also be considered. This article aims to provide a solution to the problem posed by the rescue of refugees on the high seas by employing relevant norms of international refugee law as a means of ensuring that greater consideration is paid to humanitarian concerns.

B. Historical Background

Migration by boat and the hazards associated with such an undertaking regrettably have an established pedigree in modern history. The phrase “boat people”, referring to asylum-seekers emigrating in large numbers in often crudely made or ill-equipped boats, was coined in the aftermath of the communist victory in Vietnam and the subsequent mass exodus from Indo-China in the mid to late 1970s.⁹ Indeed, even earlier, during the Nazi horrors of the Second World War, some Jewish refugees fled in this manner¹⁰ but it was after the fall of Saigon in 1975 that the problem began to be specifically referred to as the “boat-people” problem.¹¹ Since then, scarcely a single considerable stretch of water has not seen some activity of this nature and incidents of tragedy at sea involving asylum-seekers remain constant.¹² Thousands of Haitians and Cubans are still

⁷ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397 [UNCLOS].

⁸ This is particularly so when one considers that it is nigh on impossible for an international Convention to regulate all matters pertaining to a particular issue and that provision must always be made for a legal interpretation which accounts for unforeseen circumstances, without, however, going as far as to strain that legal interpretation so that it would be incongruous.

⁹ Coppens & Somers, *supra* note 3, 381-382.

¹⁰ E. Papastavridis, ‘Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law’, 36 *Syracuse Journal of International Law and Commerce* (2009) 2, 146.

¹¹ B. M. Tsamenyi, ‘The “Boat People”: Are They Refugees?’, 5 *Human Rights Quarterly* (1983) 3, 348.

¹² For example, on 14 December 2010, dozens of asylum seekers were drowned after their attempt to reach Christmas Island, south of Indonesia: ‘Dozens dead in Australia boat crash’, *Irish Times*, 15 December 2010, available at <http://www.irishtimes.com/newspaper/breaking/2010/1215/breaking2.html> (last visited 21 August 2011).

making efforts to reach the USA despite the vigorous attentions of the US Coast Guard; Australia still engages in active interception measures with respect to potential refugees arriving from Indonesia and elsewhere; and in Europe the issue has also become more prevalent.¹³ For a long time, the notion of asylum-seekers attempting to immigrate by boat was not considered a European problem. This can no longer be said to be the case. However, attempts to quantify the scale of the issue are problematic as it is particularly difficult to estimate the number of persons who fail to arrive safely. The estimates provided by humanitarian NGOs such as Fortress Europe suggest that there were approximately 500 deaths in the Mediterranean in the first six months of 2009 and that, in total, almost 11,000 people have lost their lives in an attempt to reach European shores by boat in the last 20 years.¹⁴ Although this article deals specifically with the legal provisions pertaining to asylum-seekers on the high seas, the gravity of the situation is clear from the foregoing. The present article is limited for practical reasons to a depiction of the legal situation regarding refugees rescued on the high seas only and cannot account for the applicability or otherwise of human rights instruments such as the European Convention on Human Rights. With this it is by no means denied that human rights law is of utmost importance in the present context.¹⁵

C. International Law of the Sea

As mentioned above, the fundament of the pertinent legal framework is provided by UNCLOS, which is supplemented by two further treaties, namely the International Convention on Maritime Search and Rescue (SAR

¹³ M. Pugh, 'Europe's Boat People: Maritime Cooperation in the Mediterranean', *Chaillot Papers* (2000) 41, 31-33.

¹⁴ 'The massacre continues: 459 deaths in the first 6 months of 2009' (2 July 2009) available at <http://fortresseurope.blogspot.com/2007/01/eu-massacre-continues-459-deaths-in.html> (last visited on 9 June 2011). About a third are from sub-Saharan Africa, half are from the Mediterranean littoral States and the remainder originate from various other States (mainly in Asia and the Middle East).

¹⁵ See, by way of example, F. Coomans & M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004); A. Edwards, 'Human Rights, Refugees and the Right "to Enjoy" Asylum', 17 *International Journal of Refugee Law* (2005) 2, 293; K. Loper, 'Human Rights, *Non-refoulement* and the Protection of Refugees in Hong Kong', 22 *International Journal of Refugee Law* (2010) 3, 404.

Convention)¹⁶ and the International Convention for the Safety of Life at Sea (SOLAS Convention)¹⁷. The two latter treaties can be said to represent a *lex specialis* with respect to situations of maritime rescue.¹⁸ The SAR Convention is designed to encourage increased cooperation between States Parties with the aim of optimizing search and rescue operations at sea. Considering that the aim of the SAR Convention is to ensure a speedy response following a maritime incident (i.e. it is reactionary in nature), it can be distinguished from the preventive approach adopted by the SOLAS Convention, which endeavors to establish minimum standards for the construction, equipment and operation of ships (so-called CDEM measures).¹⁹ These three international treaties create a number of rights and obligations, which are variously aimed at flag States, transit States and coastal States. In the following, three duties contained in these treaties are identified, namely the duty to provide assistance, to bring to a place of safety and to provide for disembarkation.

I. Duty to Provide Assistance

A duty to provide assistance to persons in danger of being lost at sea is, without doubt, one of the most well-established, elementary tenets of the law of the sea.²⁰ It is codified in Art. 98(1) UNCLOS in the following terms:

“Every State shall require the master of a ship flying its flag, in so far as he can do without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

¹⁶ *International Convention on Maritime Search and Rescue*, 27 April 1979, 1405 U.N.T.S. 119 [SAR Convention].

¹⁷ *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 U.N.T.S. 278 [SOLAS Convention].

¹⁸ On the *lex specialis* character of SOLAS see: M. Pallis, 'Obligations of States towards Asylum Seekers at Sea', 14 *International Journal of Refugee Law* (2002) 2 and 3, 329, 331.

¹⁹ S. Bateman, 'Chapter 2. Good Order at Sea in the South China Sea', in S. Wu & K. Zou (eds), *Maritime Security in the South China Sea* (2009), 20.

²⁰ E. de Vattel, *Le droit des gens ou principes de la loi naturelle; appliqués à la conduite aux affaires des nations et des souverains*, Vol. 1 (1758), 170.

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; [...].”

From this it is clear that this duty rests not on the individual mariner, rather it requires the flag State of that mariner to ensure that an adequate transpositional law is enacted which imposes this obligation on the master of the ship; it is not a self-executing norm.²¹ Nor can the duty to assist contained in the SOLAS Convention be said to be self executing.²² The scope of the duty *ratione personae* is broadly formulated to the benefit of “any person” in UNCLOS and “regardless of [...] the circumstances in which that person is found”²³, an important factor bearing in mind that many of the persons in need of assistance are so-called “economic refugees”. Aside from the actual act of finding a person at sea, the only material requirement necessary to bring about the duty to provide assistance is the existence of a situation of distress on board, a term defined in the SAR Convention as a “situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance”²⁴. Despite the apparent clarity of the preceding provisions, the full extent of the duty to render assistance or, more precisely, the existence and scope of related duties such as bringing the rescued persons to a place of safety etc remains unclear.

II. Duty to Bring to a Place of Safety

Before examining the extent to which coastal States are required to allow for the disembarkation of persons rescued at sea, it is worth briefly

²¹ A. Proelss, ‘Rescue at Sea Revisited: What Obligations exist towards Refugees?’, *Scandinavian Institute of Maritime Law Yearbook* (2008), 10. In Germany, for example, §2 of the Regulation concerning the Safety of Seafaring in conjunction with §323c of the Criminal Code, which foresees criminal sanctions for a failure to assist, are the relevant provisions transposing Art. 98 (1) UNCLOS.

²² SOLAS Convention, annex, chapter V, reg. 10 (a); SAR Convention, annex, chapter 2, para. 2.1.10: “Parties shall ensure that assistance be provided to any person in distress at sea”; see also: UNHCR, Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea, 18 March 2002, 2, paras 5-6, available at <http://www.unhcr.org/refworld/docid/3cd14bc24.html> (last visited 21 August 2011).

²³ SAR Convention, annex, chapter 2, para. 2.1.10.

²⁴ SAR Convention, annex, chapter 1, para. 1.3.11.

stating that, despite some academic opinion to the contrary,²⁵ the flag State is under an obligation to bring rescuees to a place of safety. This obligation follows from the logical extension of the definition of rescue contained in the SAR Convention: “[A]n operation to retrieve persons in distress, provide for their initial medical or other needs, and *deliver them to a place of safety*”²⁶. Without any specific definition provided for the term “place of safety” it has become common practice (albeit without a solid footing in law)²⁷ for this term to be understood as referring to the “next port of call” of the ship. This is in keeping with the opinions expressed by the Executive Committee (EXCOM) of the UNHCR.²⁸ The EXCOM extols the virtues of a practical solution to the problems connected with the rescue of asylum seekers²⁹ and thus, with respect to the rescue of persons on the high seas, it is safe to assume that in many instances the nearest port in terms of geographical proximity will generally be the next port of call considering the overriding safety concerns involved. Similarly, the European Commission has, by making reference to the duty contained in the SAR Convention, stated that “obligations relating to search and rescue include the transport to a safe place”³⁰.

Though it may appear to be somewhat strained, the duty which the flag State is under to bring rescuees to a place of safety should nonetheless not be put on the same level as a duty to disembark. It is conceivable that a ship may itself act as a place of safety or, alternatively, it may enter a place of safety where the persons on board may receive whatever provisions or medical attention is deemed to be necessary without actually having to disembark the ship. The IMO Maritime Safety Committee has, however, stated that even in such situations where the ship “is capable of safely

²⁵ S. Rah, ‘Kein Flüchtlingsschutz auf See? Flüchtlings- und seerechtliche Probleme am Beispiel der „Cap Anamur“’, 18 *Humanitäres Völkerrecht* (2005) 4, 276.

²⁶ SAR Convention, annex, chapter 1, para. 1.3.2 (emphasis added). The non-obligatory nature of this provision must be borne in mind; nonetheless, it is indicative of the understanding shared by the States Parties to the SAR Convention as to what a rescue actually entails.

²⁷ R. Barnes, ‘Refugee Law at Sea’, 53 *International & Comparative Law Quarterly* (2004) 1, 47, 51.

²⁸ UNHCR, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009, available at <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf> (last visited 5 July 2011), No. 23 (XXXII), 31.

²⁹ *Id.*, No. 26 (XXXIII), 34.

³⁰ Commission Staff Working Document, Study on the international law instruments in relation to illegal immigration by sea, SEC (2007) 691, 15 May 2007, para. 2.3.2.

accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made³¹. Thus the question of whether the flag State is under an obligation to disembark the rescuees at the place of safety and, as a corollary, whether the coastal or port State is also under an obligation to accept this disembarkation remains to be answered.

III. Duty to Allow for Disembarkation

As is so often the case with many problems in the law of the sea, the question of whether an obligation exists to allow for the disembarkation of rescued persons at a place of safety centers on the balancing act which must be effected between the interests of flag States on the one hand and coastal States on the other. However, given that disembarkation will involve entering the territorial or perhaps even internal waters of a State, one is confronted with complex issues of territorial sovereignty. Proelss correctly pointed out that:

“Any obligation of a flag State to disembark shipwrecked persons at the next port of call would turn out to be useless, were it not logically linked with a corresponding duty of the coastal State of the next port of call to temporarily accept the rescued persons on its territory.”³²

Thus, one must first turn one’s attention to ascertaining whether the flag State is under a duty to disembark rescuees. This duty would necessarily be linked with a right to enter a coastal State’s territory, an unacceptable impingement on the territorial sovereignty of that State. Despite a small amount of academic opinion to the contrary,³³ none of the relevant international Conventions contain such an obligation. The argument advanced by proponents of an obligation to disembark is often made as follows: Given that there is a duty to provide assistance at sea, any act

³¹ International Maritime Organization (IMO), Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea (20 May 2004) available at <http://www.unhcr.org/refworld/docid/432acb464.html> (last visited 21 August 2011), annex 34, no. 6.13.

³² Proelss, *supra* note 21, 14-15.

³³ H. von Brevern & J. M. Bopp, ‘Seenotrettung von Flüchtlingen’, 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 841, 844; Weinzierl & Lisson, *supra* note 6, 38.

which would undermine the carrying out of such rescue is tantamount to a breach of international law. An absolute refusal to accept disembarkation limits the possibility or likelihood of a rescue taking place and thus it could be seen as undermining the execution of the rescue in the first place. Consequently, a right to disembarkation on the part of the rescuees must exist along with the corresponding duty on the flag and coastal States to carry out and accept the disembarkation respectively.³⁴ Any attempt to rely on para. 1.3.2 of the SAR Convention as being indicative of more than an implicit obligation to deliver to a place of safety is erroneous given that this particular provision is merely a definition without a distinct obligatory content.³⁵ In addition the point has been well made in recent literature on this issue that the actual obligatory norm merely requires that, rather than rescue, “assistance be provided to any person in distress at sea”³⁶, thereby avoiding incorporating an explicit duty on the flag State to disembark within the SAR Convention.³⁷

Notwithstanding the lack of an explicit duty to disembark, it may be plausible to rely on two alternate avenues of reasoning to infer such a duty. First, a comprehensive consideration of the notion of “rescue” as a single unified act beginning with the physical act of removing persons from the waters or from a vessel in distress and extending until the point in time at which such persons have entered a place of safety and disembarked the rescuing ship. This premise supports the practical approach advocated by the UNHCR EXCOM mentioned above in that it unburdens a ship’s master of primary responsibility as soon as possible.³⁸ Moreover, it serves the humanitarian purpose and intention of Art. 98(1) UNCLOS and the relevant norms of the SAR and SOLAS Conventions. It is based on a broad understanding of the “place of safety” criterion which cannot be considered to have been properly met if the rescued persons are to be maintained on board the rescuing vessel indefinitely.³⁹ Such an approach, however, neglects to factor in the concerns raised above regarding the non-obligatory nature of the language used with respect to “rescue(s)” and the preference shown for the term “assistance”. Second, it can be argued that, in recent

³⁴ UNHCR, *supra* note 22, Annex 1, para. 9.

³⁵ This provision is contained in a section of the SAR Convention entitled “Terms and Definitions”. Systematically, it cannot give rise to norms of an obligatory character.

³⁶ SAR Convention, annex, chapter 2, para. 2.1.10 (emphasis added).

³⁷ Proelss, *supra* note 21, 16.

³⁸ UNHCR, *supra* note 28, No. 26 (XXXIII), 34.

³⁹ UNHCR, *supra* note 22, para. 12.

years, a presumption in favor of disembarkation has developed which would *prima facie* oblige coastal States to accept the disembarkation of persons rescued at sea unless there are cogent reasons of public order militating against the application of this presumption. The pronouncements made by the MSC of the IMO in the aftermath of the 2004 amendments to SOLAS and SAR Conventions would seem to provide some evidence of this development, in particular where the Contracting Parties are required to “arrange disembarkation as soon as reasonably practicable”⁴⁰. This contention is further supported by the statement of the UNHCR Working Group on the Question of Rescue of Asylum Seekers at Sea when it stated that “asylum-seekers rescued at sea should normally be disembarked at the next port of call”⁴¹.

Despite the initially promising reading of these statements, the weak language of the latter (“should”) is immediately apparent. Moreover, there is no footing for such a presumption in treaty law as, notwithstanding the broad discretion such a presumption would afford to the coastal State to decide to deny permission to disembark, it would amount to a considerable impingement of the rights of the coastal State. Consequently, it can be stated by way of summary that despite the existence of a duty on the flag States to assist those in need and on the coastal State to ensure the existence of mechanisms to ensure assistance can be provided speedily, there is no duty on the flag State to disembark the rescued persons, nor can there logically be a corollary duty on the coastal State under the terms of the international law of the sea to accept any disembarkees.⁴²

D. International Refugee Law

Bank posits that:

“[T]he obligation of the State responsible for the respective search and rescue region is one of co-ordination and cooperation,

⁴⁰ Inter-Agency, ‘Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees’ (September 2006) available at <http://www.unhcr.org/refworld/docid/45b8d1e54.html> (last visited 21 August 2011).

⁴¹ UNHCR, Preliminary Report on Suggestions Retained by the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea, 1 October 1982, EC/SCP/24, available at <http://www.unhcr.org/refworld/docid/3ae68cbe1c.html> (last visited 21 August 2011), para. 3; Proelss, *supra* note 21, 16-17.

⁴² The concept of a port of refuge for vessels in distress may account for an exception to this statement, see Proelss, *supra* note 21, 59.

which as such does not entail an explicit duty to allow disembarkation in one of its ports. At the same time, the obligation is also one of securing a certain result: disembarkation from the assisting ship and delivery to a place of safety as quickly as reasonably practicable.”⁴³

This is even more so the case when dealing with asylum-seekers rather than “ordinary” persons in need at sea.⁴⁴ Obviously, a situation where asylum-seekers who have become rescuees are kept on board a ship following a potentially traumatic rescue experience for an undetermined amount of time is undesirable to say the least. Given that the international law of the sea does not seem to provide for this eventuality, a solution must be sought elsewhere, in this instance international refugee law. With 144 signatory States, the Convention Relating to the Status of Refugees of 1951⁴⁵ and its 1967 Protocol can be said to enjoy considerable significance with respect to regulating the fate of asylum-seekers who, having been rescued at sea, are now faced with the prospect of not being granted the right to disembark and potentially make use of their right to asylum. In particular the principle of *non-refoulement* contained in Art. 33(1) of the Refugee Convention is essential in determining whether asylum-seekers have the right to enter the territory of the coastal State. The *non-refoulement* principle contemplates a situation where a refugee may potentially be subjected to threats to his life or freedom on the basis of certain personal criteria and it acts to prevent any return of that person.⁴⁶ So, in the context of a discussion on the right to disembarkation, it would be more correct to refer to whether there is a positive duty on the coastal State not to refuse a person rescued at sea claiming the status of a refugee, i.e. the right is couched in somewhat more negative terms. Before examining the material effect of Art. 33(1) of the Refugee Convention on the rights of a rescuee, it must be determined whether it is applicable in circumstances where the refugee was found outside the territory of the State in question on the high seas, i.e. whether it enjoys extraterritorial effect.

⁴³ R. Bank, ‘Article 11 (Refugee Seamen/Gens de Mer Réfugiés)’, in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, para. 37.

⁴⁴ Such as passengers on a sinking ferry for example: Coppens & Somers, *supra* note 3, 383.

⁴⁵ Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.

⁴⁶ Fischer-Lescano, T. Löhr & T. Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’, 21 *International Journal of Refugee Law* (2009) 2, 262-263.

I. Extraterritorial Applicability of *Non-Refoulement*

In the case of persons rescued on the high seas, they will fall under the jurisdiction of the flag State, which is, however, in no way required to provide the rescuees with asylum. Indeed, the flag State is not subject to any specific obligations at international law in this regard. Hence the practice of “next port of call” outlined above. This practice necessarily implies that the coastal State is faced with the prospect of (at least temporarily) accepting the asylum-seekers under the principle of *non-refoulement*. However, “there is a clear gap between the obligation of *non-refoulement* and the obligation to accord refugees the rights provided under international law”⁴⁷, and therein lies the problem: The scope of the applicability of the Refugee Convention with regard to refugees on a vessel, even if that vessel were in the territorial sea or internal waters of the coastal State.

There are numerous examples of a State’s obligations under international law extending beyond the limits of its territory. The dictum of the European Court of Human Rights in its decision by the Grand Chamber in *Medvedyev et al v. France* indicated that, although an extra-territorial application of the Convention is exceptional, it is possible under certain limited circumstances.⁴⁸ Similar pronouncements have been made by the UN Human Rights Committee.⁴⁹ The Refugee Convention is silent of the issue of its extraterritorial applicability, yet it is submitted that there are a number of more or less compelling reasons which would seem to indicate that Art. 33(1) of the Refugee Convention ought to apply outside the territory of the States Parties. By way of a preliminary remark it is worthy to note that Art. 1(3) of the 1967 Protocol to the Refugee Convention states that the Protocol “shall be applied by States Parties hereto without any geographical limitation.” Despite its application being restricted to the Protocol, some academic commentators have interpreted this provision as

⁴⁷ Barnes, *supra* note 27, 67.

⁴⁸ *Medvedyev et al v. France*, ECHR, Application No. 3394/03, Judgment of 29 March 2010, paras 63-66; this is in line with the decision handed down in *Banković v. Belgium and others*, 11 *Butterworth’s Human Rights Cases* (2001) 435, para. 71. See further, E. Papastavridis, ‘European Court of Human Rights, *Medvedyev et al v. France* (Grand Chamber, Application No. 3394/03) Judgment of 29 March 2010’, 59 *International & Comparative Law Quarterly* (2010) 3, 867, 870; D. Guilfoyle, ‘*Medvedyev et al v. France*, ECHR’, 25 *The International Journal of Marine and Coastal Law* (2010) 3, 437.

⁴⁹ See G. S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd ed. (2007), 244-245.

being indicative of “a more general intention to the effect that the protective regime of the 1951 Convention [...] was not to be subject to geographic – or territorial – restriction”⁵⁰. A number of other factors indicating an extraterritorial application must also be considered.

First, the 1951 Convention does not contain any clause limiting the application of the Convention to a particular territory. In the absence of a clause restricting the applicability to State territory, one can fairly make the assumption that Art. 33(1) applies anywhere that a State exercises jurisdiction over an asylum-seeker.⁵¹ The litmus test for determining the exercise of jurisdiction as postulated by several international courts is that of “effective control”⁵². There can scarcely be a more obvious example of someone being under the effective control of another than being interdicted or having to be rescued from a sinking ship. Moreover, by beginning the journey in the first instance, the rescuees are making an active attempt to leave one jurisdiction and by approaching or even attempting to approach the border of another State they are attempting to subject themselves to another jurisdiction. Further, all of the provisions of the Refugee Convention that are indeed restricted to the territory of a State (such as Arts. 4, 15 and 18) make particular mention of the restriction. Applying an argument *a contrario*, Art. 33(1) contains no such limitation and thus cannot be said to be restricted to a particular territory.

Second, two textual considerations must be borne in mind. Art. 33(1) of the Refugee Convention states that a refugee shall not be returned “in any manner whatsoever.” This is an exceedingly broad formulation covering a wide range of actions which could potentially lead to the person seeking to enforce his status as a refugee being exposed to particular dangers should *refoulement* actually occur. In addition, the use of the terms “expel or return” in Art. 33(1) of the Refugee Convention indicates that there is a subtle distinction in the meaning to be afforded to these words. Return, in

⁵⁰ Sir E. Lauterpacht & D. Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, Opinion UNHCR, 20 June 2001, para. 84, quoted in Pallis, *supra* note 18, 345.

⁵¹ W. Kälin, M. Caroni & L. Heim, ‘Article 33, para. 1 (Prohibition of Expulsion or Return (*Refoulement*)/Défense d'Expulsion et de Refoulement)’, in Zimmermann, *supra* note 43, para. 87.

⁵² See e.g., Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14, 65, para. 116; Banković v. Belgium and others, *supra* note 48, para. 67; Öcalan v. Turkey, ECHR, Application No 46221/99, Judgment of 12 May 2005, para. 91.

contrast to the concept of expulsion, which implies that the person to be expelled has already entered a territory, suggests notions of sending back or bringing someone or something back to an original point of origin. This refers exclusively to the point from which the journey began and cannot be deemed to have any bearing on the place where the asylum-seeker was, in fact, found.⁵³ Thus, no “geographical restriction regarding the place where this obligation emerges [can] be understood from the wording”⁵⁴. Indeed, even if one does not follow this interpretation, it is indicative of the intention of the drafters of the Convention to attempt to prevent any circumvention of the *non-refoulement* principle. Thus there is no restriction of the scope of the Convention to within the territory of the State concerned.

Third, teleological concerns confirm the importance of upholding human rights and guaranteeing fundamental freedoms, so as to ensure the broadest possible protection of refugees worldwide. A restrictive interpretation of the terms of Art. 33(1) of the Refugee Convention, which would attempt to limit its scope to the territory of a particular State, would frustrate this aim. The considerably more dynamic approach towards interpreting international human rights treaties resulting in greater recognition of extraterritorial application has, as outlined above, attained increased importance more recently and is most effective at ensuring that the rights of the refugees’ are being adequately considered from the rescues’ point of view.⁵⁵ This is supported by reference to the Preamble of the Convention which states one of the objects and purposes of the Convention as being a desire to “assure refugees the widest possible exercise of fundamental rights and freedoms.” Some commentators have even gone as far as suggesting that a limitation of the *non-refoulement* provision to the territory of a State would amount to an opportunity to circumvent the obligations owed by that State to the international community as it would then be permissible to simply move all border controls outside the territorial waters of that State and that this would be an act in male fides to thwart the Convention’s aims.⁵⁶ This author considers it

⁵³ Contra, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), 180.

⁵⁴ Fischer-Lescano, Löhr & Tohidipur, *supra* note 46, 268. See also, UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, available at <http://www.unhcr.org/cgi-bin/txis/vtx/refworld/rwmain?docid=45f17a1a4&page=search> (last visited 21 August 2011), para. 26-27.

⁵⁵ Fischer-Lescano, Löhr & Tohidipur, *supra* note 46, 269.

⁵⁶ *Id.*, 270.

somewhat excessive to burden a State with the mark of bad faith but also that it is certainly plausible that a rejection of the extraterritorial application could amount to a breach of Art. 26 of the Vienna Convention on the Law of Treaties, 1969.⁵⁷

Notwithstanding some limited State practice to the contrary⁵⁸ as well as some statements made by delegations during the elaboration of the preparatory work of Art. 33,⁵⁹ it is submitted that these represent isolated non-authoritative inferences and that the following statement made by the UNHCR far better represents the law as it currently stands:

“[T]he purpose, intent and meaning of Art. 33(1) [...] are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be [at] risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.”⁶⁰

Consequently, the principle of *non-refoulement* applies to refugees found as rescuees on the high seas.

II. Material Applicability

It is often suggested that extra-territorial application of the *non-refoulement* principle of Art. 33(1) of the Refugee Convention, would amount to an automatic right to asylum. There is no norm whatsoever in the Convention that would require States to grant *eo ipso* a right of asylum. A distinction must be made between non-refoulement and rejection at the

⁵⁷ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 332.

⁵⁸ Germany has rejected an extraterritorial application: BMI, Effektiver Schutz für Flüchtlinge, *Press Release*, 5 September 2002, 2; Australia has made similar statements: Executive Committee of the Programme of the United Nations High Commissioner for Refugees, UN Doc A/AC.96/SR.507, 3 December 1996, para. 71; so too has the USA: *Sale v. Haitian Centers Council, Inc.*, *supra* note 53, 180. Also, Executive Committee of the Programme of the United Nations High Commissioner for Refugees, UN Doc A/AC.96/SR.508 10 October 1996, para. 30. For a comprehensive overview of State practice see, Goodwin-Gill & McAdam, *supra* note 49, 244-253.

⁵⁹ Ad Hoc Committee on Refugees and Stateless Persons, UN Doc E/AC.32/SR.40, 27 September 1950, 31 *et. seq.*

⁶⁰ UNHCR, *supra* note 54, para. 24.

border. A State is not required to admit everyone presenting at its border, however, the content of *non-refoulement* prohibits States from turning away refugees. In order for that State to adequately fulfill its treaty obligations, it must first undertake an examination of the specific individual presenting at the border in order to determine whether or not that person is a refugee and, consequently, whether the rights according to refugees, including *non-refoulement*, apply. As Kälin *et al.* have stated:

“Protection under Art. 33 of the 1951 Convention lasts for an asylum seeker as long as his or her claim to be a refugee has not been refuted in a formal procedure by a final decision. This is a consequence of the fact that formal recognition as a refugee in a refugee status determination procedure is purely declaratory and not constitutive.”⁶¹

Hence, it is apparent that governments are under a compulsion to “provide access to official proceedings in order to verify refugee status”⁶². These official proceedings may not necessarily take place on the territory of a coastal State,⁶³ but in all likelihood, in order to ensure that all administrative and legal procedures are properly executed and in order to ensure that the person whose status is being determined is in a position to exercise his right to effective legal protection, the *non-refoulement* principle requires, in practice, that States must allow “temporary admission for the purpose of verifying the need for protection and the status of the person concerned”⁶⁴. Consequently, although the principle of *non-refoulement* does not provide an absolute right to disembark, its practical completion by coastal States will usually require a temporary granting of access to a territory until such time as the refugee status of the rescuee can be determined.

⁶¹ Kälin, Caroni & Heim, *supra* note 51, para. 116.

⁶² Fischer-Lescano, Löhr & Tohidipur, *supra* note 46, 284.

⁶³ There are several recent examples of such processing being carried out on ships: the USA employed this tactic during the 1994 Haitian refugee crisis, Pallis, *supra* note 18, 347.

⁶⁴ Fischer-Lescano, Löhr & Tohidipur, *supra* note 46, 283.

E. Conclusion

The plight of refugees on the high seas raises complex legal issues combined with delicate moral dilemmas – a genuinely invidious combination. As shown above, due to the lack of a legal requirement on coastal States to accept rescuees within their territories, the international law of the sea has failed to provide an adequate solution. It was submitted that the principle of *non-refoulement* applies and that, as a consequence, refugees rescued at sea have, in the majority of cases, a temporary right of disembarkation in order for their status to be determined. That this situation is, in the long term, untenable can scarcely be denied and as certain States seem to bear the brunt of such large-scale refugee influxes, an increased focus on burden-sharing and the creation of permanent agreements to this effect would appear to be the only long-term, practically achievable solution. Such agreements remain, for the moment, purely within the realm of wishful thinking and it can only be hoped that the sense of solidarity, which, for so many centuries, has been the mast of interactions at sea can be retained or perhaps even revived and thereby prevent tragedies occurring on an even larger scale than is already the case.