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RESCUE AT SEA - HUMAN RIGHTS OBLIGATIONS
OF STATES AND PRIVATE ACTORS,
WITH A FOCUS ON THE EU'S EXTERNAL BORDERS

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in collaboration with Ciaran Burke and Alexandre Skander Galand

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GLOBAL GOVERNANCE PROGRAMME

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Rescue at Sea - Human Rights Obligations of States and Private Actors with a Focus on the EU's External Borders

Martin Scheinin,¹ in collaboration with Ciaran Burke² and Alexandre Skander Galand³

1. Introduction

This Policy Paper results from a lecture delivered as part of the Executive Seminar on global governance and transnational human rights obligations, convened at the European University Institute in late November 2011. The event was related to GLOTHRO (Globalisation and Transnational Human Rights Obligations) which forms both a research strand within the Global Governance Programme at the EUI and a research networking programme under the auspices of the European Science Foundation. The paper emanates from EUI's contribution within a project on the treatment and fundamental rights of third-country nationals at the EU's external borders", commissioned by the EU Fundamental Rights Agency and coordinated by the International Centre for Migration Policy Development (ICMPD).

2. A Human Tragedy in the Sea

The United Nations High Commissioner for Refugees (UNHCR) estimates that at least 1,500 migrants died at sea in 2011 alone, rendering 2011 the worst year since the UNHCR began to record these statistics in 2006. The largest number of fatalities previously occurred in 2007, when 630 people were reported dead or missing at sea in the region.⁴ Many of these migrants, who, risking their lives, undertook an extremely dangerous journey from the North and West African coasts to look for a better life in Europe or to get international protection, died because they were not rescued in time. The obligation to rescue at sea is clear; the deep-rooted customary humanitarian duty to assist and rescue those who are imperilled at sea has been codified and developed by numerous treaties dealing with the law of the sea. Despite this obligation, tragic events still occur. A pertinent example is the so-called "left to die boat", a dinghy which, in March 2011, after more than 10 days in distress in the Mediterranean Sea, was brought by currents to Libya, with 63 out of its 72 passengers dead.⁵ Apparently a large number of governments and fishing vessels knew the location of the "left to die boat" and its situation of distress, but all neglected to intervene and rescue the passengers on the dinghy. The Mediterranean Sea is crowded with military and other ships; such events, constitute violations of international law, and should not happen again.

The Mediterranean and West African Seas are of the busiest seas in the world. Approximately 110,000 migrants and persons without adequate documentation for entry into EU traverse the Mediterranean Sea each year. EU Member States monitor these areas, with assistance from FRONTEX, the European border security agency.⁶ The purpose of this cooperative scheme is to intercept and prevent migrants from arriving at the coasts of EU Member States. Such interceptions give rise to a problem closely related to the issue of rescue at sea itself, namely, what to do with these persons?

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⁴ See briefing note of January, 31st, 2012. Available at <http://www.unhcr.org/4f27e01f9.html> (accessed April 30th, 2012)

⁵ See Council of Europe, Parliamentary Assembly, Report, Committee on Migration, Refugees and Displaced Persons, Lives lost in the Mediterranean Sea: who is responsible? Rapporteur: Ms Tineke Strik, March 29, 2012.

⁶ The agency was created by Council Regulation 2007/2004/EC of 26 October 2004 [2004] Official Journal No. L p. 349.

Rescued and intercepted persons at sea both display a mixed composition: asylum seekers, refugees, economic migrants, and victims of trafficking. Despite the heterogeneity of the aforementioned groups, intercepted or rescued persons, taking account of their individual circumstances, are entitled to a series of rights under the international law of the sea, human rights law and refugee law.

Nevertheless, intercepted or rescued persons have, in some cases been pushed back to a country where their most fundamental rights, such as the right to life, the right to be free from torture, as well as the rights of access to an effective remedy, to seek and enjoy asylum, to be protected against *refoulement* to a place of persecution and ill-treatment, and to be free from collective expulsions, were at risk.⁷

3. The duty to rescue

The international law of the sea makes clear that there is an obligation to render assistance to those in distress at sea without regard to their nationality, status or the circumstances in which they are found. The customary obligation to rescue is codified, inter alia, in the 1910 International Assistance and Salvage at Sea Convention,⁸ the 1958 Convention on the High Seas,⁹ the 1974 International Convention for the Safety of Life At Sea (SOLAS),¹⁰ and the 1982 UN Convention on the Law of the Sea (UNCLOS).¹¹ It is firmly established that shipmasters are bound “to render assistance to any person found at sea in danger of being lost; 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”.¹²

Despite the fact that, as treaties, these conventions are, a priori, imposed on States, it is evident that the obligation to rescue is incumbent on shipmasters.¹³ This obligation is known to every shipmaster, be he professional or amateur. However, the lack of national legislation implementing this international legal duty is one of the reasons commercial vessels fail to go to the rescue of boats in distress.¹⁴ The rescue of a boat in distress has economic consequences for the rescuing vessel and its owners such as problems of delays and finding a place of disembarkation for those who are rescued. While the Salvage Convention provides for a right to equitable remuneration for acts of assistance or salvage, it remains substantially unclear who should assume this monetary compensation.¹⁵ The

⁷ See *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights, Grand Chamber, Judgment, *Application no. 27765/09*, 23 February 2012.

⁸ Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, 37 Stat. 1658 Treaty Series No. 576 (1968), Article 11.

⁹ 1958 Convention on the High Seas, in force April 29th, 1968. 450 U.N.T.S., p. 82, Article 12(1).

¹⁰ Available at [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx) (accessed March 30th, 2011), , Chapter V, regulation 10(a).

¹¹ UN Convention on the Law of the Sea, in force November 16th, 1994. UN Doc. A/CONF.62/122, Article 98 (1).

¹² *Ibid.*

¹³ C. Burke and M. Scheinin, ‘*Rescue at Sea and its Aftermath: An International and European Legal Perspective: A Preliminary Study*’, p. 8; See also Report of the 28th Session of the Executive Committee, A/AC.86/549, paras 21-36 B (d),(e); See also EXCOM Conclusions No. 23 (XXXII) (1981) and No. 38 (XXXVI) (1985); IMO Resolution 920 (22) (2001).

¹⁴ C. Burke and M. Scheinin, ‘*Rescue at Sea and its Aftermath: An International and European Legal Perspective: A Preliminary Study*’, p. 8; See also J.Z. Pugash, (1977) ‘The Dilemma of the Sea Refugee: Rescue Without Refuge’, *Harvard International Law Journal*, Vol. 18, No. 3, p. 577, at pp. 579-581

¹⁵ C. Burke and M. Scheinin, ‘*Rescue at Sea and its Aftermath: An International and European Legal Perspective: A Preliminary Study*’, p. 8; J. Parent (2010), ‘No Duty to Save Lives, No Reward for Rescue: Is that Truly the State of International Salvage Law?’ *Annual Survey of International and Comparative Law*, Vol. 12, Issue 1, p. 87, at pp. 94-105.

dilemma faced by those who should be going to the rescue of boats in distress is further accentuated by the fear of being prosecuted for trafficking or aiding and abetting irregular migration.¹⁶ These inconsistencies between national legislation and the international obligation of States to ensure that the provisions regarding the duty to rescue persons in distress at sea are effective need to be tackled.

Together with the duty to render assistance to persons found to be in distress at sea, coastal states are to co-ordinate search and rescue operations for every vessel in distress in their so-called SAR zone.¹⁷ This is provided explicitly by the 1979 International Convention on Search and Rescue (SAR),¹⁸ which complements the UNCLOS and the SOLAS. The responsibility of a State with regard to its SAR zone is essentially to ensure, through coordination and cooperation, that all persons in distress within its zone are promptly rescued and disembarked at a place of safety.

The swift disembarkation at a safe place is – notwithstanding the tragic fate of those left to die at sea – where the principal legal questions in terms of human rights and refugee law arise. As those persons rescued and intercepted at sea are mainly migrants, asylum seekers and refugees, both types of intervention will be treated jointly.

4. Refugee Law and Human Rights Law

In addition to a person's right to leave any country including her own, several norms of international law apply to rescued or intercepted persons. The person's right to leave any country, when coupled with these other norms, especially the principle of *non-refoulement*, entails that persons found at sea must not be sent to a State where they face threats of elementary human rights violations. Different facets of the prohibition of *refoulement* exist, but the *locus classicus* of the principle of *non-refoulement* is codified in the 1951 Convention on the Status of Refugees.¹⁹ Article 33 of the Convention reads as follows:

“No Contracting State shall expel or return (“refouler”) a refugee in any matter whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”²⁰

This core principle of refugee law forbids any act that would lead to the *refoulement* of the refugee to his or her country of origin, or to any third State where he or her would face the same threats. This fundamental principle has also been translated in various human rights instruments. Article 3 of the 1984 Convention against Torture,²¹ Article 7 (1) of the International Covenant on Civil and Political Rights (ICCPR),²² Article 3 of the European Convention on Human Rights (ECHR), Article 19 (1) of the EU Charter of Fundamental Rights (CFR) as well as customary international law, all prohibit *refoulement*. Although some of these instruments do not explicitly address *non-refoulement*, they

¹⁶ Council of Europe, Parliamentary Assembly, Report, Committee on Migration, Refugees and Displaced Persons, Lives lost in the Mediterranean Sea: who is responsible? Rapporteur: Ms Tineke Strik, March 29, 2012, par. 104; See the Cap Anamur incident (<http://news.bbc.co.uk/2/hi/8295727.stm>).

¹⁷ 1979 International Convention on Maritime Search and Rescue, 1405 UNTS p. 97, Annex, Chapter 1, 1.3.1.

¹⁸ 1979 International Convention on Maritime Search and Rescue, 1405 UNTS p. 97.

¹⁹ Convention Relating to the Status of Refugees, in force April 22nd, 1954. UN Doc. A/CONF.2/108 (1951), Article 33.

²⁰ Convention Relating to the Status of Refugees, in force April 22nd, 1954. UN Doc. A/CONF.2/108 (1951).

²¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in force June 26th, 1987. UN Doc. A/39/51 (1985).

²² See the detailed discussion in: M. Nowak, (2005) *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl-am-Rhein: NP Engel Publishers, second edition, Article 7, subsection 21, at p. 160.

have been interpreted as prohibiting expulsion, deportation, rejection or extradition to States where individuals would face torture, inhuman or degrading treatment.²³

While all these obligations can be singled into one general *refoulement* prohibition, they may also be treated separately with regards to protection, remedy and extra-territorial jurisdiction.

In addition prohibiting States from *refoulement* to a State where a person risks torture, the prohibition against torture, inhuman and degrading treatment means that States are obliged to ensure that such treatments are not inflicted by their own agents in their dealings with, and potential detention and screening of, migrants. The right to life adds an additional protection for the persons in question, as it prohibits States that are bound by Article 19(2) CFR and the Second Optional Protocol of the ICCPR from *refoulement* to a State where a person may face capital punishment. Furthermore, measures to push back migrants on the high seas carried out without any form of examination of each individual situation can amount to collective expulsion of aliens.

The prohibition of *refoulement* as defined in refugee law is not applicable for persons who are still in the territorial seas of their State. However, the other prohibitions stemming from the human rights regime are applicable. As per conventional obligations, a treaty binds its party *vis-à-vis* all persons within its jurisdiction, which, includes its territorial sea.²⁴ Accordingly, obligations deriving from treaties involve State responsibility in its territorial seas. Furthermore, under international law, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. The special legal status of the high seas does not render them an area where States are not liable for their sovereign acts *vis-à-vis* individuals. Where a State has *de facto* or *de jure* control over a person, whether it be in the high seas or the territorial sea of another state, it constitutes a case of an extra-territorial exercise of jurisdiction, which is capable of engaging responsibility.

The case-law of the ECtHR provides that acts carried out on the high seas by a State vessel constitute cases of extraterritorial jurisdiction and may engage the responsibility of the State concerned.²⁵ In particular, the ECtHR held in *Hirsi v. Italy* that persons are not to be pushed back after a rescue operation in the high sea, to a country where they risk being treated in violation of Article 3 of the ECHR.²⁶ Furthermore, such a measure was also considered to constitute a collective expulsion of aliens because it was done without any form of individual assessment whatsoever of the persons involved. According to the Court, the interception, in the context of a rescue on the high seas, of persons in distress by the authorities of a State constitutes an exercise of jurisdiction.²⁷

In the European Union context, *non-refoulement* is expressly prohibited, and European border authorities are under a positive obligation to provide active international protection in this regard.²⁸ The scope of the Charter of Fundamental Rights is based upon the authority responsible and not the

²³ See e.g. *ibid.*; *Soering v. UK* (Judgment), (1989), ECtHR, Appl. No. 14038/88, §§ 91. See also R.B. Lillich, (January 1991), 'The Soering Case', *The American Journal of International Law* 85 (1), pp. 128–149; See also German Institute for Human Rights, *Border Management and Human Rights. A Study of EU Law and the Law of the Sea*, December 2007, available at: <http://www.unhcr.org/refworld/docid/47b1b0212.html> (accessed 1 May 2012), p. 14.

²⁴ United Nations Convention on the Law of the Sea, Article 2 (1); this distance is also recognized under customary international law.

²⁵ *Medvedyev and Others v. France*, (Judgment) (2010) ECtHR, 3394/03; *Xhavara & Others v. Italy & Albania* (Judgment), (2001), ECtHR, 39473/98., *Hirsi Jamaa and Others v. Italy*, (Judgment) (2012) ECtHR 27765/09.

²⁶ *Hirsi Jamaa and Others v. Italy*, (Judgment) (2012) ECtHR 27765/09.

²⁷ *Ibid.*, p. 180.

²⁸ Charter of Fundamental Rights, Article 19.

territory.²⁹ The geographical scope of European fundamental rights would appear to be applicable beyond EU borders, according to ECJ case-law.³⁰

Finally, the CAT and the ICCPR apply extraterritorially and are universal in nature. Since the *non-refoulement* prohibition is established in customary international law, this rule applies beyond the extent of a State's territorial jurisdiction.³¹

5. Access to legal remedies

The prohibition of *non-refoulement* entails that persons rescued or intercepted are entitled to a thorough, individual, and substantive examination of their applications for international protection. The UNHCR,³² the EXCOM,³³ the Human Rights Committee,³⁴ and the ECtHR³⁵ have all emphasised that States are obligated to furnish access to official proceedings in order to verify refugee status or the threat of torture or inhuman or degrading treatment or punishment. Such proceedings, for obvious reasons, can not take place on board the vessel that intercepted or rescued the person. Moreover, Article 2 (3) of the ICCPR, and Article 3 of the ECHR when put in tandem with, respectively, Article 7 of the ICCPR and Article 13 of the ECHR, provide for an effective legal remedy with suspensive effect that enables a stay in-country pending a decision with regard to said remedy.³⁶ The person should be brought to a place where her individual circumstances will be subject to an independent and rigorous scrutiny by a national authority, with full respect for human rights and refugee law, and where the remedy will have a suspensive effect.

Due to the requirement of an effective remedy, it can be inferred that, implicitly within the norm, there is an obligation to allow the person to temporarily enter into State territory.³⁷ Appropriate infrastructures and personnel to ensure full and proper proceedings to examine the application exist only within the State territory. Pursuant to the Asylum Procedures Directive, asylum-seekers shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision.³⁸ The removal of an asylum seeker at sea from the jurisdiction of an EU State would seem, therefore, to be prohibited.

²⁹ Charter of Fundamental Rights, Article 51; See also N. Bernsdorff (2006), in J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union*, Baden-Baden, 2nd edition, Art. 18, para. 11.

³⁰ C. Burke and M. Scheinin, *Rescue at Sea and its Aftermath: An International and European Legal Perspective: A Preliminary Study*, p. 17; ECJ Case C-214/94, *Ingrid Boukhalfa v. Federal Republic of Germany*, [1996] ECR I-2253 para. 14.

³¹ C. Baillet (2003), 'The Tampa Case and its Impact on Burden Sharing at Sea', *Human Rights Quarterly*, vol. 25, no. 3, p. 741, at p. 751. See also E. Lauterpacht & D. Bethlehem (2003), 'The Scope and Content of the Principle of Non-Refoulement', in E. Feller, V. Türk, & F. Nicholson, (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge: University Press pp. 78–177.

³² 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'; 'Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea' ('Background Note'), 18 Mar. 2002, § 8.

³³ EXCOM, 'Note on International Protection' : UN Doc. A/AC.96/882 (2 July 1997), § 14; Conclusion No. 8 (XXVIII), § (vii).

³⁴ HRC, 'Communication No. 1051/2002: Canada, 15 June 2004' : UN Doc. CCPR/C/80/D/1051/2002 (15 June 2002), § 12.

³⁵ *Hirsi Jamaa and Others v. Italy*, (Judgment) (2012) ECtHR, 27765/09.

³⁶ *Hirsi Jamaa and Others v. Italy*, (Judgment) (2012) ECtHR, 27765/09.

³⁷ C. Burke and M. Scheinin, *Rescue at Sea and its Aftermath: An International and European Legal Perspective: A Preliminary Study*, p. 18.

³⁸ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

The disembarkation to a third state where the person would not be under threat of persecution could also be considered. Such disembarkation would imply an extensive analysis of the general human rights situation into the place of disembarkation. The concept of a “super safe” country has been adopted in the Asylum Procedure Directive;³⁹ however, this concept has raised a lot of criticism, since such status may be revoked.⁴⁰ With regard to the current state of affairs, the safe third country concept knows no practical application.

6. Disembarkation in a Place of Safety

When a person is rescued from a perilous situation at sea there will be a pressing need to provide to this person adequate sustenance (food and water) and medical care. International treaties relating to the law of the sea and rescue operations, especially the SAR Convention, provide that States must provide for medical care for those who are rescued and must deliver them to an area of ‘safety’. The particularly vulnerable situation of those rescued at sea entails that a swift disembarkation must occur in order to meet their physical needs. Also, the bringing of those rescued to a place of safety must be implemented while respecting the prohibition of *refoulement* and other human rights obligations.

Although there might not be a clear State obligation under the international law of the sea to allow disembarkation, refugee law, human rights law and EU law provide that States are obliged to allow temporary disembarkation in cases of sea rescue. Therefore, in European Border policing, any port of a European Member State is to be open to disembarkation of rescued persons, without regard to their nationality, status or the circumstances in which they were found.

While there is no legal obligation to generally admit refugees, from the principle of *non-refoulement* a basic obligation arises to accept the entry of the person for the period necessary for the examination of his or her application for international protection. In order to facilitate swift disembarkation, a model of cooperation to accommodate the respective interests of the coastal and the flag state is to be reached in order to provide for the settlement of the refugee and the protection of his human rights.

7. Conclusion and policy recommendations

Once a State has assumed a protective role over a person by rescuing her, or when it has exercised its authority by intercepting persons on the high seas in order to prevent them from reaching its border or to push them back to another State, the issue of jurisdiction is triggered as well as that of State responsibility. The high seas are not lawless. On the contrary, actions and omissions on the high seas involve a complex interplay of different legal regimes.

Policy Recommendations:

1. The EU and its Member States should take measures to ensure that international obligations arising from the law of the sea and human rights law are complied with. Firstly, while the Salvage Convention provides for a right to “equitable remuneration” for acts of assistance or salvage, it remains substantially unclear who should assume this monetary compensation. This is particularly important with regard to private ship owners, fishermen and other seafarers. The EU States should establish a fund to compensate, to a standard commensurate with the equity of the circumstances, any private

³⁹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Article 36 (2).

⁴⁰ A. Fischer-Lescano, T. Löhr, & T. Tohidipur (2009), ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’, *International Journal of Refugee Law*, Vol. 21, No. 2, p. 256, at pp. 287-288.

vessel or other seaborne actor, who independently undertakes acts of assistance and salvage in good faith, and who thereby disembarks rescued or intercepted persons to an EU port. With regard to State agents, active policies should be implemented to encourage such acts of assistance or salvage, with employees equitably compensated by the State in question for any time and effort spent in good faith on such acts.

2. In addition to the above, whether rescue or interception is undertaken by State agents or officials, or by private actors, the EU States should take action to ensure that a deliberate failure to rescue persons who are known to be in distress at sea should amount to a (serious) criminal offence – whether in the States' own territorial waters, or on the high seas in a zone which is nearby to a State or privateer vessel, and where a genuine opportunity to engage in a rescue mission exists..

3. The EU and its Member States should take cognisance of the fact that migration management policies and activities do not justify neglect of the individual circumstances of individuals at distress at sea, and are not, in and of themselves, justificatory for derogations of basic human rights norms. The Schengen Border Code should be applied with full respect afforded to refugee law and human rights law. International law and EU law provide that all State agents, including European Border police officers, are obliged to act in accordance with the principle of non-*refoulement* and other human rights norms. Domestic law and FRONTEX regulations should clearly outline these norms applicability for operations at sea, including the high seas.

4. In addition to the above, it is noted that the current FRONTEX mandate does not contain a human rights component. Nor do certain corps of border police, for example in Malta, receive specialised training pertaining to migration law, the law of the sea, and human rights norms which are particularly pertinent to situations of rescue and interception at sea. It is therefore recommended that any officials, be they FRONTEX, State border guards, police, coastguard or other, who are likely routinely to find themselves in such situations, be given specialised training related to all of the above fields.

5. With regard to disembarkation, in the aftermath of a rescue at sea operation, the rescued person must be swiftly disembarked and further arrangements must be undertaken to ensure full and proper proceedings to examine asylum applications, and to permit legal review of any decision taken. EU Member States should accept temporary disembarkation in their ports for such purposes. A burden-sharing scheme should be adopted between all EU Member States for the resettlement of those rescued, in order to make such acceptance of disembarkation easier for the coastal states.

