

The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection

Seline Trevisanut*

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“I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore”¹.

I. Introduction

This declaration of US President G.W. Bush is symptomatic of how sea-borne migration is perceived as a problem or even hassle by the destination states despite the presence of refugees in dire need of protection. Some times states deny the refugee character of a flow of migrants or invoke security concerns to refuse protection and to justify the non-admittance or the removal. Arrivals by sea of asylum-seekers challenge not only the interpretation and application of the right of asylum, and in particular the principle of *non-refoulement*, but also the existing rules related to the freedom and the safety of navigation.

Migration flows by sea are not a new phenomenon and ever since the Indochinese crisis² in the seventies, they are well known under the expression “boat people”. Dealing with arrivals of thousands of Vietnamese irregular migrants to the coasts of neighboring states, the international community was forced to notice that international law had a gap: it had no useful and effective instruments to deal with migrants at sea, and in particular with asylum-seekers.

The chief problems that still remain have been to identify the rights and the obligations of the concerned states³ in the different maritime

¹ Declaration made by US President G.W. Bush, 25 February 2004, during the Haitian crisis of late February 2004 which culminated with the forced departure of Haitian President Aristide, as reported in B. Frelick, “‘Abundantly Clear’: *Refoulement*”, *Georgetown Immigration Law Journal* 19 (2004-2005), 245 et seq.; see also S.H. Legomsky, “The USA and the Caribbean Interdiction Program”, *International Journal of Refugee Law* 18 (2006), 677 et seq. (682).

² I do refer to the Indochinese crisis in relation to the movement of refugees coming from the former French Indochina in consequence of armed conflict situations, as in Vietnam, and emergence of a dictatorial regime, as in Cambodia, cf. A. Lakshamana Chetty, “Resolution of the Problem of Boat People: The Case of A Global Initiative”, *ISIL Yearbook of International Humanitarian and Refugee Law* 1 (2001), 144 et seq. (145).

³ Several states might be concerned by the arrival of asylum-seekers by sea: first of all the coastal state or state of destination; the national state of the

zones with special regard to the organization and management of search and rescue operations at sea. Another important issue has been the question whether the decision of states to refuse the permission of entry into their territory is legally limited. This question arose mainly in relation to the treatment of asylum-seekers and refugees – possibly among the migrants – with regard to the principle of *non-refoulement*.

This article elucidates how the exercise of sovereign powers in the different maritime zones pursuant to the law of the sea and customary international law gives rise to challenges in the application of the principle of *non-refoulement* and in the protection of asylum-seekers and refugees at sea. Particular attention must be given to the so-called *non-entrée* mechanisms made principally to prevent a refugee having access to the procedures for the determination of his/her status. Among those are the interdiction at sea programs.

The analysis will not be limited to the modalities of exercising jurisdiction; their consequences must also be considered. In fact, one of the main difficulties related to the management of refugees by sea consists in the heterogeneity of the phenomenon. Case law and practice testify that each arrival is different from another. This contribution argues that there is a common aim underlying both the law of the sea and refugee law which thus can be combined in accounting for security interests of the states as well as the protection of sea-borne asylum-seekers.

The argument unfolds in five steps. First, the content and evolution of the principle of *non-refoulement* will be analyzed (II.). Then, the difficulties related to its application in the territorial waters will be highlighted (III.). Specific remarks will be made for the contiguous zone (IV.). Particular attention will be given to interdiction programs on the high seas (V.). The contribution will conclude with some critical remarks (VI.) that must be taken into account when interpreting the law of the sea and refugee law with regard to sea-borne asylum-seekers.

individuals or their state of origin; the flag state of the vessel carrying the asylum-seekers; eventually the state of transit or first port of asylum.

II. The Legal Nature of the Principle of *Non-Refoulement*: Towards the Recognition of a Peremptory Norm?

1. The Meaning of the Principle Pursuant to Article 33 of the 1951 Refugee Convention

The principle of *non-refoulement* is expressed firstly in article 33(1) of the 1951 Geneva Convention relating to the Status of Refugees (1951 Refugee Convention)⁴ which states that:

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

First and foremost this article establishes an obligation for states not to remove individuals or a certain group of persons present in their territory to the country of persecution. Two main issues arise from the application of this norm: first, *when* the rejection of an individual can lead to the violation of the principle of *non-refoulement* and, secondly, *who* are the individuals protected by this norm.

The obligation of *non-refoulement* is the core of asylum-seekers protection⁵ because it is the only guarantee that refugees will not be submitted again to the persecution which has caused the departure and responds to the refugee’s need to enter the asylum country. It does not, however, explicitly guarantee access to the territory of the destination state or admission to the procedures granting the refugee status. Actually some authors have tried to support the existence of an additional obligation aimed at binding states to admit individuals applying for protection into their own territory but, for the moment, state practice cannot confirm these attempts⁶.

⁴ UNTS Vol. 189 No. 150, page 137 et seq.

⁵ E. Lauterpacht/ D. Bethlehem, “The Scope and Content of the Principle of *Non-Refoulement*: Opinion”, in: E. Feller/ V. Türk/ F. Nicholson, *Refugee Protection in International Law*, 2003, 87 et seq. (107).

⁶ I do not consider here the issues related to the application of the principle of *non-refoulement* in a situation of expulsion from the territory of the hosting state, i.e. after the decision of the competent authorities to not admit the individual to the relevant procedures or the refusal of granting the status of refugee; situations implying other legal problems and consequences despite the phenomenon of sea-borne asylum-seekers. See G.S.

Recently, Noll gave a very interesting definition of the principle, which summarizes its evolution from the letter of article 33 to today's approach: "*Non-refoulement* is about being admitted to the State community, although in a minimalist form of non-removal. It could be described as a *right to transgress an administrative border*" (emphasis added)⁷. Starting from this conception some important consequences for the legality of the control carried out at the borders and where they must or may take place may be considered.

The application of the principle of *non-refoulement* at the frontier, in its meaning of "non rejection at the frontier", is mostly shared today⁸, but, as it will be discussed below, its application to interdiction operations on the high seas or within territorial waters is less clear⁹ because of the difficulties related to the determination of the moment of entry into the territory for sea-borne asylum-seekers. Nevertheless, the unlawful entry of asylum-seekers does not exclude them from the scope of application of the *non-refoulement* principle as guaranteed in article 31(1) 1951 Refugee Convention¹⁰. During the Indochinese crisis, the UNHCR Executive Committee (Executive Committee) affirmed:

Goodwin-Gill/ J. Adam, *The Refugee in International Law*, 3rd edition, 2007, 257 et seq.; J.C. Hathaway, *The Rights of Refugees under International Law*, 2005, 370 et seq.

⁷ G. Noll, "Seeking Asylum at Embassies: A right to Entry under International Law?", *International Journal of Refugee Law* 17 (2005), 542 et seq. (548).

⁸ Lauterpacht/ Bethlehem, see note 5, 113 et seq. Article 3 (1) of the Council Regulation 343/2003 includes the application of the principle in border situations (*EC Regulation Establishing the Criteria and the Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National*, OJEC No. L 50/1 of 25 February 2003).

⁹ Noll, see note 7, 549.

¹⁰ Article 31: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence". See Hathaway, see note 6, 386, in which the author asserts, commenting article 31, that "[p]erhaps the most important innovation of the 1951 Refugee Convention is its commitment to the protection of refugees who travel to a State party without authorization". J. C. Hathaway, "Why Refugee Law Still Matters", *Melbourne Journal of International Law* 8 (2007), 89 et seq. (91).

“It is therefore *imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment (...)*. In situation of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should *always* admit them at least on a temporary basis (...). In all cases the fundamental principle of *non-refoulement – including non rejection at the frontier – must be scrupulously observed*”¹¹. (emphasis added)

The non rejection at the frontier was included in the principle of *non-refoulement* in the instruments subsequent to the 1951 Refugee Convention, such as the 1967 Declaration on Territorial Asylum (1967 DTA)¹² and the 1967 OAU Convention on Refugees¹³, which are particularly important for the interpretation of the Convention¹⁴. Since 1977¹⁵ the Executive Committee has brought forward this argument restating it in relation to migration by sea in 1979, as follows:

“[I]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum”¹⁶.

The UNHCR has played an important role both in the evolution of the principle of *non-refoulement* to include cases of rejection at the frontier as well as in the evolution of the interpretation of article 33 in relation to the category of individuals protected by this norm. Actually, there exists a discrepancy between the *ratione personae* application of the 1951 Refugee Convention and the content of the mandate of the UNHCR¹⁷. The scope of its mandate has expanded progressively since

¹¹ Executive Committee, Conclusion No. 22 (XXXII) 1981; reaffirmed during the crisis in former Yugoslavia, in Executive Committee, Conclusion No. 74 (XLV) 1994, para. (r).

¹² A/RES/2312 (XXII) of 14 December 1967.

¹³ *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, UNTS Vol. 1001 No. 14691.

¹⁴ Lauterpacht/ Bethlehem, see note 5, 113; P. Weis, *The Refugee Convention, 1951, The Travaux Préparatoires Analysed*, 1995, 342.

¹⁵ Executive Committee, Conclusion No. 6 (XXVIII) 1977, para. (c): “the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State”.

¹⁶ Executive Committee, Conclusion No. 15 (XXX) 1979, para. (c).

¹⁷ A/RES/428 (V) of 14 December 1950, Annex, para 1.

its creation and comprises now the protection of five categories of individuals: 1.) those falling under the definition of the 1951 Refugee Convention and 1967 Protocol (see below); 2.) broader categories recognized by states as entitled to protection and assistance of the UNHCR; 3.) those individuals for whom the UNHCR exercised “good offices”; 4.) returning refugees; 5.) non-refugee stateless persons¹⁸.

On the contrary, article 33 of the 1951 Refugee Convention applies to the so-called “statutory refugee”, i.e. the individuals within the definition provided by article 1 of the same Convention, as modified by the 1967 Protocol relating to the Status of Refugees (the 1967 Protocol)¹⁹:

“[the term refugee shall apply to any person who] owing to *well-founded fear of being persecuted* for reason of race, religion, nationality, membership of a particular social group or opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”. (emphasis added)

The cornerstone of this definition is the concept of “well-founded fear of being persecuted” which restrains the Convention’s ambit of application compared to the mandate of the UNHCR. The meaning of persecution has been thoroughly debated by scholars aiming at enlarging the scope of article 1 of the 1951 Refugee Convention²⁰. State practice is not homogenous in that respect, even if it “has consistently revealed a dominant trend of offering some form of protection to ‘per-

¹⁸ UNHCR *Protection of Persons – Concern to UNHCR Who Falls Outside the 1951 Convention: A Discussion Note*, 2 April 1992, Doc. EC/1992/SCP.CRP.5, para. 11.

¹⁹ *Protocol relating to the Status of Refugees*, UNTS Vol. 606 No. 8791, page 267 et seq.; the 1967 Protocol eliminated the limits of time and place in respect of the application of the 1951 Refugee Convention, which formerly applied only to refugees stemming from Europe because of events occurred before the 1 January 1951. When I do refer to the 1951 Refugee Convention, I do refer to the Convention as amended by the 1967 Protocol.

²⁰ On this concern, among others, M. Bettati, *L’asile politique en question. Un statut pour les réfugiés*, 1985, 10; J.Y. Carlier, “Et Genève sera ... La définition du réfugié: bilan et perspectives”, in: V. Chetail (ed.), *La Convention de Genève du 8 juillet 1951 relative au statut des réfugiés 50 ans après: bilan et perspectives*, 2001, 63 et seq. (67); J. Fitzpatrick, “Revitalizing the 1951 Convention”, *Harvard Human Rights Journal* 9 (1996), 229 et seq. (230, 239).

sons whose life or freedom would be at risk as a result of an armed conflict or generalized violence if they were returned involuntarily to their countries of origin”²¹. The so called ‘*de facto* refugees’²² are not deprived of protection and enjoy the principle of *non-refoulement* as provided by the “complementary protection”²³ of human rights law.

2. The Principle of *Non-Refoulement* as the Necessary Corollary of the Prohibition of Torture and of the Right to Life

More or less serious violations of human rights are often the cause of migrations creating refugees and asylum-seekers. Independently of the causes of the departure, the Universal Declaration of Human Rights (UDHR)²⁴ states that, “[e]veryone has the right to leave any country, including his own, and to return to his country” (article 13(2))²⁵ and “[e]veryone has the right to seek and enjoy in other countries asylum from persecution” (article 14(1)). Pursuant to these two rights, everyone is entitled to flee a harmful situation in which he/she is living or

²¹ Goodwin-Gill/ Adam, see note 6, 289. Lauterpacht and Bethlehem have argued that the notion of threat contemplated in article 33(1) may be “broader than simply the risk of persecution, [...] to the extent that a threat to life or freedom that may arise other than in consequence of persecution”, enlarging thus the scope of article 33 to refugees not included in the treaty definition of article 1; Lauterpacht/ Bethlehem, see note 5, 124.

²² “[P]ersons not recognized as refugees within the meaning of Article 1 of the [Refugee] Convention [and who are] unable or unwilling for political, racial, religious or other valid reasons to return to their countries of origin”, see Council of Europe Parliamentary Assembly Recommendation No. 773 (1976) on the Situation of *de facto* Refugees, para. 1.

²³ For a historical overview of the “complementary protection”, see Goodwin-Gill/ Adam, see note 6, 286 et seq. See also Lauterpacht/ Bethlehem, see note 5, 150 et seq.

²⁴ A/RES/217 (III) of 10 December 1948. The UDHR has not formally a binding nature but most of the norms contained have progressively acquired the status of customary law and, consequently, bind the states members of the international community.

²⁵ A. de Zayas, “Migration and Human Rights”, *Nord. J. Int’l L.* 62 (1994), 241 et seq. (245); A. Grahl- Madsen, “Article 13”, in: A. Eide et al., *The Universal Declaration of Human Rights: A Commentary*, 1992, 203 et seq. (212).

risks living; but once outside the borders of his/her own country, no formal right guarantees the entry into another.

The preamble of the 1951 Refugee Convention recalls the UDHR and the 1967 DTA reaffirming the content of its article 14 clarifying that the individual does not possess a subjective right of asylum but he/she is merely entitled to request the status of a refugee and the required state has a discretionary power to accept or refuse the request²⁶. Notwithstanding the discretion of states, preventing an individual from presenting the request can imply a breach of article 14 UDHR in its meaning of “right to request” which is safeguarded by the principle of *non-refoulement*.

The *non-refoulement* principle in human rights law is guaranteed by article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)²⁷ which prohibits the removal of individuals to states where they risk being subjected to torture or other inhuman or degrading treatment. This is also affirmed by article 7 of the 1966 International Covenant on Civil and Political Rights (1966 ICCPR)²⁸. At a regional level, the protection against *refoulement* is also guaranteed by article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)²⁹, article 22(8) of the 1969 American Convention on Human Rights (ACHR)³⁰ and article 5 of the 1981 African Charter on the Protection of Human and Peoples’ Rights (Banjul Charter)³¹. Moreover article 45 of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War states:

“In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs”.

²⁶ “Asylum is viewed as an ‘act of grace by States’ and the refusal of states to accept an obligation to grant asylum is ‘amply evidenced’ by the history of international conventions and other instruments”, see M. Pallis, “Obligations of States towards Asylum Seeker at Sea: Interactions and Conflicts Between Legal Regimes”, *International Journal of Refugee Law* 14 (2002), 329 et seq. (341).

²⁷ A/RES/39/46 of 10 December 1984.

²⁸ Human Rights Committee, General Comment No. 20 (1992), Doc. HRI/HEN/1/Rev.1 of 28 July 1994, para. 9.

²⁹ UNTS Vol. 213 No. 2886.

³⁰ UNTS Vol. 1144 No. 17955.

³¹ *ILM* 21 (1982), 58 et seq.

The 1966 ICCPR also provides the obligation not to extradite, deport, expel or return an individual to a country where there are well founded suspicions concerning a risk of irreparable harm to the right to life guaranteed by article 6.³² The right to life is also guaranteed by article 2 ECHR, article 4 ACHR and article 4 Banjul Charter.

From this list of articles affirming the principle of *non-refoulement* in relation both to the prohibition of torture and the right to life, it becomes evident how three domains of international law evolve in parallel but often overlap and interact: refugee protection, human rights and humanitarian law on the basis of which an individual can assert a claim for protection towards the respective state as well as the international community as a whole³³. *Goodwin-Gill* and *Adam* support the existence of a customary norm of “temporary refuge”, “which prohibit[s] States from forcibly repatriating foreigners who had fled generalized violence and other threats caused by internal armed conflict within their own State, until the violence ceased and the home State could assure the security and the protection of its nationals”³⁴. The existence of such a customary norm can be identified, beyond the repetition of the principle of *non-refoulement* in the above mentioned human rights treaties, in the notion of complementary protection and in the practice of states related to “temporary protection”. At the European level, the Council Directive 2001/55/EC of 20 July 2001 on *Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences Thereof*³⁵ guarantees the reception and the assistance of:

“third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organizations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

³² M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR a Commentary*, 2nd edition, 2005, 186.

³³ UNHCR, *Note on International Protection*, Doc. A/AC.96/777, 9 September 1999, para. 56; UNHCR, *Note on International Protection*, Doc. A/AC.96/799, 25 July 1992, para. 1.

³⁴ Goodwin-Gill/ Adam, see note 6, 289.

³⁵ OJEC No. L 212/12 of 7 August 2001.

- (i) persons who have fled areas of armed conflict or endemic violence;
- (ii) persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights”.

The conception of temporary protection is however not homogeneous; the Australian approach³⁶, for example, consists of a temporary “protection visa” permitting refugees who have entered unlawfully into the territory to stay pending the determination of their status.

In light of the several international and domestic instruments and of state practice reaffirming the principle of *non-refoulement* it is today unanimously considered a customary norm, even if complete agreement has not yet been reached concerning its precise content regarding its territorial scope. Because of its close connection with the prohibition of torture, the peremptory nature of the principle of *non-refoulement* is more often discussed and supported.

3. The Nature of the Principle of *Non-Refoulement* and its Peremptory Importance

The question of the legal nature of the principle first arose in the seventies during the Indochinese crisis because destination states, namely Malaysia, Singapore and Thailand³⁷, were not parties to the 1951 Refugee Convention. While none of them contested the application of the

³⁶ Migration Act 1958, Act No. 62 of 1958 as amended, Part 2, Division 3, Subdivision A, Section 36. See also information available at the Australian Department of Immigration and Citizenship, available at: <www.immi.gov.au>.

³⁷ Because of the increasing number of Vietnamese refugees reaching its coasts, the Prime minister of Thailand declared in 1978 the unilateral decision of his government to close the maritime frontiers to these migration flows. The UNHCR then exposed its worries in relation to the consequences of this declaration for the existing humanitarian crisis and to the possible influence on the decision of the other interested states. See *Opening Statement by the United Nations High Commissioner for Refugees, in Consultative Meeting with Interested Governments on Refugees and Displaced Persons in South East Asia*, Geneva, 11-12 December 1978, available at: <www.unhcr.org>.

principle³⁸, they, nevertheless, invoked security exceptions as provided by article 33(2) of the 1951 Refugee Convention:

“2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”.

The first attempt to affirm the peremptory nature of the principle of *non-refoulement* is Conclusion No. 25 (XXXIII) of 1982, in which the UNHCR Executive Committee³⁹ made a step far beyond the state of the art at the time. Then, in 1989, again the Executive Committee invited states to avoid actions resulting in *refoulement* situations because these would be “contrary to fundamental prohibitions against these practices”⁴⁰, and in 1996, it reaffirmed the principle elevating it to the rank of peremptory customary law, stating:

“Distressed at the widespread violations of the principle of *non-refoulement* and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum-seekers have been *refouled* and expelled in highly dangerous situations; recalls that the principle of *non-refoulement* is not subject to derogation”⁴¹.

The question strongly re-emerged in 2001, after the attacks of 9/11, when the UN Security Council adopted S/RES/1373⁴² where it expressed an “unequivocal condemnation” of the terrorist acts and adopted measures aimed at repressing the funding and the preparation

³⁸ “In UNHCR’s experience, States have overwhelmingly indicated that they accept the principle of *non-refoulement* as binding, as demonstrated, *inter alia*, in numerous instances where States have responded to UNHCR’s representations by providing explanations or justifications of cases of actual or intended *refoulement*, thus implicitly confirming their acceptance of the principle”, UNCHR, *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, para. 15.

³⁹ “Reaffirmed the importance of the basic principles of international law protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law”, para. (b).

⁴⁰ Executive Committee, Conclusion No. 55 (XL), 1989, para. (d).

⁴¹ Executive Committee, Conclusion No. 79 (XLVII), 1996, para. (i).

⁴² S/RES/1373 (2001) of 28 September 2001.

of terrorist attacks. In particular, in operative para. 3, the Security Council invited states to:

“(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists”.

Allain deduced from this text an attempt of the Security Council to modify the content of article 1F(b) of the 1951 Refugee Convention stating that an individual found guilty of a serious non-political crime outside the country of refuge cannot enjoy statutory protection⁴³. Bearing in mind the uncertainty related to the definition of terrorism in international law⁴⁴, and according to the wording of S/RES/1373, a state would be allowed to classify as terrorist an opposing armed group or organization and thus to exclude *a priori* members of this group from the status determination procedures. Moreover, if the crime of terrorism is equally considered a “serious crime” pursuant to article 33(2), this would have the consequence of allowing the state in which the individual has been found guilty to expel him/her even to the territory where there is a risk of being submitted to torture or other inhuman or degrading treatments; thus having a big impact on the practice concerning *non-refoulement*⁴⁵. Recognizing the peremptory nature of the *non-*

⁴³ J. Allain, “The *jus cogens* nature of *non-refoulement*”, *International Journal of Refugee Law* 13 (2001), 533 et seq. (545).

⁴⁴ E. Ahipeaud, “Etat du débat international autour de la définition du terrorisme international”, in: M.J. Glennon/ S. Sur, *Terrorisme et le droit international*, 2008, 157 et seq.; B. Saul, “Definition of “Terrorism” in the UN Security Council: 1985-2004”, *Chinese Journal of International Law* 4 (2005), 141 et seq.; J.M. Sorel, “Some Questions About the Definition of Terrorism and the Fight Against Its Financing”, *EJIL* 14 (2003), 365 et seq.

⁴⁵ The UNHCR is concerned about exclusion clauses adopted by some states on a collective basis, rather than on an individual one, undermining thus the individual nature of the right of seeking asylum, UNHCR, *Note on the Impact of Security Council resolution 1624 (2005) on the Application of Exclusion under Article 1F of the 1951 Convention relating to the Status of Refugees*, 9 December 2005, available at: <www.unhcr.org>. See also

refoulement principle, as suggested by some authors⁴⁶, it should prevail on instruments of different nature, such as Security Council resolutions or agreements on extradition, when there is a threat of human rights violation.

In the opinion of *Orakhelashvili*⁴⁷, “doubtful wording of the Council’s resolutions must always be construed in such a way as to avoid conflict with fundamental international obligations”. Pursuant to this approach, and bearing in mind the uncertain definition of terrorism, the application of S/RES/1373 should not imply a changing of the content of article 1F(b) of the 1951 Refugee Convention.

The state of the art is not yet permitted to affirm the peremptory nature of the principle of *non-refoulement*. The principle remains, however, of peremptory importance as a “tool” for guaranteeing the efficiency and the effectiveness of the prohibition of torture and the protection of fundamental human rights. This is the reason why it is extremely relevant in determining when, where and how sea-borne asylum-seekers are entitled to its protection.

UNHCR, *Background Paper Preserving the Institution of Asylum and Refugee Protection in the Context of Counter-Terrorism: the Problem of Terrorist Mobility*, 5th Special Mtg of the Counter-Terrorist Committee with international, regional and sub-regional Organizations, 29-31 October 2007, Nairobi – Kenya.

⁴⁶ Allain, see note 43; id., “Insisting on the “*jus cogens*” nature of non-refoulement”, in: J. van Selm, *The Refugee Convention at Fifty : a View from Forced Migration Studies*, 2003, 81 et seq.; R. Bruin/ K. Wouters, “Terrorism and the Non-derogability of *Non-refoulement*”, *International Journal of Refugee Law* 15 (2003), 5 et seq. (24-26); D. Shelton, “Normative Hierarchy in International Law”, *AJIL* 100 (2006), 291 et seq. (316). Shelton reminds, in particular, the Swiss practice in which the peremptory nature of the principle of *non-refoulement* has been declared since 1985.

⁴⁷ A. Orakhelashvili, “The Impact of Peremptory Norms on the Interpretation and Application of the United Nations Security Council Resolutions”, *EJIL* 16 (2005), 59 et seq. (64, 80); id. “The Acts of the Security Council: Meaning and Standards of Review”, *Max Planck UNYB* 11 (2007), 143 et seq.

III. The Notion of Maritime Frontier for the Purposes of Applying the Principle of *Non-Refoulement*

1. The Notion of Maritime Frontier and the Exercise of Sovereign Powers in the Territorial Waters

Article 2(1) of the United Nations Convention on the Law of the Sea (UNCLOS)⁴⁸ provides that, “[t]he sovereignty of a coastal State extends, beyond its land territorial and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea”.

This maritime zone cannot exceed the 12 nautical miles (article 3 UNCLOS). The only general exception to the exclusive powers of the coastal state in its territorial sea consists of the right of innocent passage as stated in article 17 UNCLOS⁴⁹. The coastal state shall not hamper the innocent passage of foreign ships through the territorial sea (article 24 UNCLOS) but it can regulate the conditions of the passage in the fields listed in article 21(1), *inter alia* “(h) the prevention of infringement of the customs, fiscal, *immigration* or sanitary laws and regulations of the coastal State”. (emphasis added)

The coastal state can also prevent a passage which it considers not innocent and suspend the related right in specific areas of its territorial sea when this “is essential for the protection of its security” (article 25(3)). Moreover, the coastal state shall not exercise its criminal jurisdiction on foreign vessels crossing its territorial sea except if the consequences of the offence extend into its territory or if the offence is of a kind to disturb the peace or the security or the good order of the territorial sea (article 27(1)(a)-(b)).

Pursuant to the above-mentioned articles, to enter the territorial waters of a state does not necessarily mean falling under its jurisdiction. As pointed out by *Goodwin-Gill* and *Adam*, “[n]either branch of law (law

⁴⁸ *United Nations Convention on the Law of the Sea of 10 December 1982*, *ILM* 21 (1982), 1276 et seq.; M.H. Nordquist (ed.), *UNCLOS 1982, A Commentary*, Vol. 2, 1993, 266 et seq.

⁴⁹ Article 17: “Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea”. Only when the conditions for exercising the rights of innocent passage are infringed coastal states enjoy fully their sovereignty in the territorial sea (arts 18-19) ; see T. Treves, “La navigation”, in: R.J. Dupuy/ D. Vignes (eds), *Traité du nouveau droit de la mer*, 1985, 688 et seq. (755).

of the sea and refugee law) resolves the question of whether entering a State's territorial waters constitutes entry to State territory"⁵⁰.

The variety of situations is unlimited. A fundamental distinction can be drawn, however, between the instance of a vessel merely exercising its right of innocent passage in the territorial waters of a foreign state without being directed to its coasts, and the situation of a vessel crossing the territorial sea of the coastal state to reach its territory.

In the first situation the coastal state has no jurisdiction on the passing vessel unless it considers the presence of unlawful passengers, the undocumented refugees, as a breach of the conditions for enjoying the right of innocent passage. Consequently, the state could refuse the entry of the vessel into its territorial waters. Such refusal can have consequences for individuals' enjoyment of the right of seeking asylum and the right of *non-refoulement*. This behavior has the effect of confining the exercise of jurisdiction to the effective borders of the territorial sea; this will be discussed below.

In the second situation, the vessel is manifestly violating domestic immigration law as it is carrying irregular passengers. It is very important to distinguish the kinds of operations carried out by the authorities of the coastal state in the territorial waters. If the operation is aimed at the *expulsion* of the vessel, the coastal state exercises its power to expel those vessels or persons it considers to have unlawfully entered its territory, namely its territorial sea. It recognizes implicitly that the vessel entered its territory and therefore becomes subject to its jurisdiction. Pursuant to this thinking, the passengers of the vessel enjoy the rights guaranteed by the international obligations binding the interested state in respect to the persons submitted to its jurisdiction, among them are the principle of *non-refoulement* and fundamental human rights. In particular, article 31 of the 1951 Refugee Convention applies in this case guaranteeing immunity from penalties to refugees who entered unlawfully into the asylum state⁵¹.

On the contrary, if the intervention of the coastal state authorities is only aimed at *refusing the entry*, this implies the movement of the frontier to the area where the operation takes place. The individuals concerned are not yet under its jurisdiction and state authorities are only limited by the principle of *non-refoulement* in its meaning of non-

⁵⁰ Goodwin-Gill/ Adam, see note 6, 279.

⁵¹ The wording of article 31 is reported above, see note 10. See also Goodwin-Gill/ Adam, see note 6, 274; Hathaway, see note 10, 91.

rejection at the frontier. In this regard, the United States “wet foot/dry foot policy” shows some interesting aspects – it can be summarized as follows:

“If they [sea-borne migrants] touch the US soil, bridges, piers or rocks, they are subject to US immigration processes for removal. If they are feet wet [*sic.*], they are eligible for return by the Coast Guard in accordance with Executive Order 12807”.⁵²

This policy is a good example of the so-called “mechanisms of *non-entrée*” aimed at denying access to the territory through the non-authorization of entry or through the creation of international zones in which neither domestic nor international law apply⁵³. In relation to sea-borne asylum-seekers there is the somewhat original Australian “territorial excision” of more than 3,500 of its islands. This is a self declared “migration zone”. As pointed out by *Hathaway*:

“[T]he result would be that refugees arriving at one of the excised islands – including not only main destinations for those arriving by boat from Southeast Asia, such as Christmas Island, but even an island only 2 km from the coast of the Australian mainland – would

⁵² US Coast Guard, “Alien Migrant Interdiction”, as reported in Legomsky, see note 1, 684, footnote 44. The Executive Order No. 12.807, so called “Kennebunkport Order”, was adopted the 24 May 1992 by US President G. Bush for suspending the screening process of Haitian irregular migrants on US vessels, created in 1982 with the Executive Order No. 12.324. The Kennebunkport Order authorised the US authorities to interdict Haitian vessels on the high seas and to redirect them directly to Haiti. This concern is studied below.

⁵³ The international zones created in the international airports are quite well known in relation to the English case law *R. (European Roma Rights Centre and Others) v. Immigration Officer in Prague Airport* [2003] EWCA Civ 666 (Eng. CA May 20, 2003) in which, about the pre-screening system of the Prague airport, the Court of Appeal affirmed: “[Article 33 1951 Refugee Convention] applies in terms only to refugees, and a refugee is defined... as someone necessarily “outside the country of his nationality” (...). For good measure, article 33 forbids “*refoulement*” to “*frontier*” and, whatever precise meaning is given to the former term, it cannot comprehend an action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier” (para. 31).

not be entitled to have their claims assessed under Australia's refugee status determination system".⁵⁴

The mechanisms of *non-entrée* do not completely avoid the application of the principle of *non-refoulement* and an analogy with operations carried out on the high seas can support this approach. As far as the territorial sea is concerned, two behaviors can particularly violate the obligations deriving from the principle in its meaning of non-rejection at the frontier: the refusal of entry into the territorial sea and the denial of access into the port or of disembarkation.

2. The Refusal of Entry into the Territorial Sea

Pursuant to article 29 of the Vienna Convention on the Law of Treaties (1969 Vienna Convention)⁵⁵, article 33 of the 1951 Refugee Convention applies to States parties' territory including the territorial sea. The wording of article 33 confirms this statement as it prohibits *refoulement* to "the frontiers of *territories* where his life or freedom would be threatened" (emphasis added). The use of the term "territories" in the plural, instead of state or nation, indicates the irrelevance of the formal status of the part of the territory concerned⁵⁶ and of the state actually exercising its jurisdiction on the territory where the refugee or asylum-seeker would be endangered⁵⁷.

⁵⁴ Hathaway, see note 6, 298, especially footnote 105. Moreover the author defines this mechanisms as a "legal ruse in order to avoid formal acknowledge of the arrival of the refugee" and concludes that "[t]here is (...) no international legal difference between opting not to consider the refugee status of persons present in "international zones" or "excised territory" and refusing to consider the refugee status of persons clearly acknowledged to be on the state's territory. Where the refusal to process a refugee claim results, directly or indirectly, in the refugee's removal to face the risk of being persecuted, Article 33 has been contravened"; *ibid.*, 321-322. See also *Migration Amendment (Excision from Migration Zone) Act 2001, No. 127, 2001*, adopted on 27 September 2001, available at:<www.comlaw.gov.au>.

⁵⁵ *Vienna Convention on the Law of Treaties*, UNTS Vol. 1155 No. 18232, article 29: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

⁵⁶ Lauterpacht/ Bethlehem, see note 5, 121.

⁵⁷ European Court of Human Rights, *T.I. v. United Kingdom*, Appl. 43844/98, Decision on the Admissibility, 7 March 2000, 15-16.

Since the first state of arrival has the duty to host refugees, at least temporarily, pursuant to the concept of “territorial asylum”⁵⁸, the vessel transporting refugees cannot be impeded from entering into the territorial sea upon its arrival at the border of the territorial sea, nor can it be *refoulé* to high seas or to territories where the above-mentioned risks of persecution exists. The regime of “territorial asylum” was conceived and developed during the Indochinese crisis to guarantee minimum standards of protection and a first hosting place; it corresponds to the idea of “temporary refuge”. At that time, the notion of a “safe third State”⁵⁹ emerged. After their status determination pursuant to the procedures of the state of arrival, the refugees were voluntarily redirected according to the agreement concluded with the “safe third State”⁶⁰. The aim was clearly to share the burden represented by the thousands of refugees and to avoid refusal of entry. Notwithstanding the existence of the temporary refuge rule, states continue to refuse access into their territorial waters invoking the fact that there is no proof of the presence of refugees on board and thus they can justifiably preclude the entry of a vessel. They thereby manifestly violate their immigration law. Two cases are quite self-explanatory in this respect: the case of the Norwe-

⁵⁸ *Declaration on Territorial Asylum*, see note 12.

⁵⁹ The “safe third State” approach is nowadays largely used in states practice through networks of readmission agreements. European states in particular have developed this mechanism collaborating intensely with the southern Mediterranean countries, which are often countries of origin or of transit of irregular migration flows. The European legislation (Council Directive 2005/85/EC of 1 December 2005 on *Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, OJEC No. L 326/13 of 13 December 2005) has set several criteria for determining what has to be considered a safe third state (article 27) and, if the asylum-seeker comes from one of these safe states, he/she is precluded from requiring asylum to a Member State. Hathaway ironically identifies in the definition given by the directive the notion of “super safe third country”; Hathaway, see note 6, 295 et seq. See also S. Taylor, “Protection Elsewhere/Nowhere”, *International Journal of Refugee Law* 18 (2006), 283 et seq. (293).

⁶⁰ In 1989, during the Indochinese emergency, an intergovernmental conference was held in Geneva which concluded with the adoption of the “Comprehensive Plan of Action” (CPA). The agreement aimed at the management of the Vietnamese boat people through the organisation of the arrival and the creation of a resettlement network. For a critical comment on the CPA, S. A. Bronée, “The History of the Comprehensive Plan of Action”, *International Journal of Refugee Law* 5 (1993), 534 et seq.

gian vessel *Tampa*, involving Australia, and the case of the German vessel *Cap Anamur*, involving Italy.

The *Tampa*⁶¹ was a Norwegian merchant ship which rescued an Indonesian fishing boat in distress on 26 August 2001 on the high seas. The *Tampa* had to keep all the 433 passengers of the Indonesian boat on board, notwithstanding that it was formally only allowed to transport 50 persons maximum. Having arrived at 13.5 nautical miles from the Australian island of Christmas, the master had to stop as the Australian authorities denied access into the territorial waters. In light of the health conditions of the passengers, among them pregnant women and wounded men, the master took the decision to contravene the denial and entered the Australian waters looking for sanitary assistance. The vessel stopped 4 miles from the shore. The Australian government sent special army corps to give first medical aid and to avoid the disembarkation of the migrants. The *Tampa* then refused to leave the territorial waters because of the unsafe situation of the vessel due to the excess of people on board. Finally on 1 September, the Australian government declared that it had reached an agreement with New Zealand and transferred the passengers to a navy vessel bringing them to two Australian military bases in New Zealand. From there, the migrants arrived on the soil of New Zealand and Nauru.

This case rises mainly two issues concerning the law of the sea: the duty to give assistance to vessels in distress – an issue discussed below in relation to the high seas – and the application of the right of innocent passage.

Norway, the flag State of the *Tampa*, invoked a violation of the above-mentioned right of innocent passage, arguing that Australia, refusing entry to its territorial waters, had breached its obligation not to hamper the innocent passage of a vessel, as stated in article 24(1) UNCLOS. On the other hand Australia declared that the passage violated its domestic law on migration – a field of jurisdiction of the coastal state pursuant to the list of article 19(2) – and thus, pursuant to article 25(1) UNCLOS, it had the right to “take the necessary step in its territorial

⁶¹ On this episode, C. Baillet, “The *Tampa* Case and its Impact on Burden Sharing at Sea”, *HRQ* 25 (2003), 741 et seq.; M.N. Fornari, “Soccorso di profughi in mare e diritto di asilo: questioni di diritto internazionale sollevate dalla vicenda della nave Tampa”, *Comunità Internaz.* 57 (2002), 61 et seq.; M. White, “Tampa incident: Shipping, international and maritime legal issues”, *The Australian Law Journal* 78 (2004), 101 et seq.; id., “Tampa incident: Some subsequent legal issues”, *ibid.*, 249 et seq.

sea to prevent a passage which is not innocent". However, it is not well established in doctrine⁶² if the violation of the coastal domestic law does amount to a threat to "peace, good order or security" of the coastal state (article 19(1)). The practice generally confirms that a violation of the law in one of the sectors listed in article 19(2) UNCLOS implies automatically a prejudice to the security of the coastal state, in turn justifying a suspension of the right of innocent passage and the closure of a part of its territorial waters as provided by article 25(3).

Moreover, Australia had the right to arrest the *Tampa* 4 miles from its coast according to article 25(2):

"In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject".

From the point of view of the right of innocent passage, Australia seems to have acted lawfully. It did, however, violate the principle of *non-refoulement*. Australia breached its obligation by redirecting the vessel and refusing to carry out the first screening of the passengers; this amounts to a *refoulement de facto*. As a matter of fact, to expel a vessel that has entered in the territorial sea violating the domestic immigration law and thereby breaching the condition of the innocent passage, and to oblige it to return to the high seas, is a right of the coastal state. However, this right is not unlimited. Its execution must comply with international obligations and in particular the principle of *non-refoulement*. It must be noted that the two countries of destination chosen by Australia, i.e. New Zealand and Nauru, present all necessary guarantees of fair treatment and respect of international standards in human rights and asylum law. Yet, the passengers intended to enter Australia. Australia, as first country of arrival, had the duty of temporary refuge and of first screening of the asylum requests. Only afterwards could it have proceeded to transfer the refugees to a safe third state for the final determination of the status and to repel those not eligible.

Similarly, the *Cap Anamur*, a German vessel owned by the homonym humanitarian organization, rescued on the high seas of the Mediterranean Sea 37 persons on 20 June 2004 and then sailed to the Italian

⁶² N. Ronzitti, "Il passaggio inoffensivo nel mare territoriale e la Convenzione delle Nazioni Unite sul diritto del mare", *Riv. Dir. Int.* 68 (1985), 32 et seq. (37-39); R.R. Churchill/ A.V. Lowe, *The Law of the Sea*, 3rd edition, 1999, 85.

coast of Sicily. At 17 nautical miles from the shore, the Italian authorities ordered the vessel to stop. On 11 July, the master finally received the authorization to enter the territorial waters and to have access to the port, but not yet to disembark. The authorization for the disembarkation arrived only 24 hours after the access to the port. This incident was strongly criticized by the UNHCR⁶³ and the question of innocent passage arises here in the same way as in the *Tampa* case.

In the 21 days in which the *Cap Anamur* could not enter in the Italian waters, a lively debate started between the Home Affair Ministers of Italy, Germany and Malta about which country was responsible for the screening of the asylum requests presented by the irregular passengers⁶⁴. Italy, the coastal state, and Germany, the flag state, argued that Malta, the alleged first port of arrival, was the responsible state pursuant to the criteria of attribution by Council regulation (EC) No. 343/2003, of 18 February 2003, *Establishing the Criteria and the Mechanisms for Determining the Member State responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National*⁶⁵. Pursuant to article 10 of the regulation, if asylum-seekers crossed irregularly the border of a Member State and this can be proved, this Member State is responsible for the examination of the application. As highlighted by the European Commission, “generally speaking and by definition, a clandestine operation leaves no offi-

⁶³ *UNHCR urges Disembarkation on Humanitarian Grounds*, UNHCR Briefing Notes of 9 July 2004; *UNHCR Welcomes Decision to allow Boat People to Disembark in Italy*, UNHCR Briefing Notes of 13 July 2004; *UNHCR Criticizes Handling of Cap Anamur Asylum Claims*, UNHCR Press Release of 23 July 2004; *UNHCR Expresses Strong Concern to Italian Authorities*, UNHCR Briefing Notes of 23 July 2004; *Handling of Cap Anamur Asylum Claims was Flawed, says UNHCR*, UNHCR News Stories of 23 July 2004; available at: <www.unhcr.org.>

⁶⁴ “La Cap Anamur non può attraccare”, in: *Il Corriere della Sera* of 7 July 2004; “Italia e Germania accusano Malta”, in: *Il Messaggero* of 12 July 2004. See also S. Trevisanut, “Le Cap Anamur: profiles de droit international et de droit de la mer”, *Annuaire du Droit de la Mer* 9 (2004), 49 et seq.

⁶⁵ See note 8. This regulation and Commission regulation (EC) No. 1560/2003, of 2 September 2003, laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 (OJEC No. L 222/3 of 5 September 2003), have substituted the Dublin Convention of 1990 and they compose the so called “Dublin 2” system. S. Barbou des Places, *Le dispositif Dublin 2 ou les tribulations de la politique communautaire d’asile*, EUI Working Paper LAW No. 2004/6, available at: <www.iue.it.>

cial traces”⁶⁶ and the alleged passage in La Valetta port was grounded on some passengers’ testimonies; the logbook pages concerning the days in which this passage should have taken place were mysteriously lacking and the Maltese authorities did not receive any communication about the entry of irregular migrants in their port. Pursuant to article 50 UNCLOS, port waters are part of the internal waters of the coastal state that exercises its full sovereignty there, but the question of the effective control on foreign ships present in ports raises some practical difficulties because a vessel is a self-contained unit and coastal states generally cannot survey in detail all ships entering their internal waters without a well-founded doubt concerning the legality of their presence⁶⁷. Consequently it is difficult to argue that the alleged passage in La Valetta port could consist of an entry into the Maltese territory – even if the vessel was in its internal waters⁶⁸.

The *Cap Anamur* case is also an example for transferring the maritime frontier into the internal waters. The access to the territory, in the meaning of entry in the jurisdiction of the coastal state, may be brought about by the authorized admission to the port waters or by disembarkation. This argument certainly does not apply to vessels participating in smuggling migrants and acting in such a way as to hide the moment of entry and disembarkation.

⁶⁶ Commission Staff Working Paper: *Evaluation of the Dublin Convention*, SEC(2001)756 of 13 June 2001, 6.

⁶⁷ Churchill/ Lowe, see note 62, 65; P. Daillier/ A. Pellet, *Droit international public*, 7th edition, 2002, 1155 et seq.; M. Giuliano/ T. Scovazzi/ T. Treves, *Diritto internazionale II*, 1983, 161 et seq. Coastal states cannot exercise their criminal and civil jurisdiction against foreign ships present in their territorial sea or ports except in the hypothesis provided in arts 27 and 28 UNCLOS.

⁶⁸ The *Cap Anamur* case also points out the perverted consequences of a system such as the one created by EC regulation 343/2003: to avoid the application of the stated criteria, asylum-seekers prefer to remain clandestine until they reach their desired host state; the set criteria are prejudicial for southern European states having extended maritime frontiers. R. Rossano, “Il regolamento comunitario sulla determinazione dello Stato membro competente ad esaminare la domanda di asilo”, *Diritto Comunitario e degli Scambi Internazionali* 43 (2004), 371 et seq. (376); Trevisanut, see note 64, 55.

3. The Refusal of Access to Ports and of Disembarkation

Access to the territory is under the exclusive competence of the coastal state which decides on the entry of irregular passengers, evaluating and balancing the interests involved: the protection needed by the individuals, the security of the state or its simple unwillingness. Practice offers some examples of refusal of access to ports and of disembarkation of asylum-seekers – such as the above mentioned *Tampa* and *Cap Anamur* cases – in which the masters of the vessels were considered responsible for the passengers because they represented the legal authority on board. Two possible situations have, however, to be distinguished: either the irregular passengers are individuals rescued voluntarily by the vessel; or they are *stowaways*.

A *stowaway* is defined by the 1957 *Brussels Convention relating to Stowaways* which never entered into force, as:

“une personne qui, en un port quelconque ou en un lieu à sa proximité se dissimule dans un navire sans le consentement du propriétaire du navire ou du capitaine ou de toute autre personne ayant la responsabilité du navire et qui est à bord après que le navire a quitté ce port ou ce lieu” (article 1)⁶⁹.

International law does not regulate the question of the disembarkation of stowaways and the port state has no obligation to authorize it. Actually the port state can oblige the master of the vessel to keep stowaways on board. The question of the “arrest on board” was dealt with by French jurisdictions in 1997 in the *Ben Salem et Taznaret* case⁷⁰, concerning the refusal of disembarkation of two stowaways, from Morocco, in the port of Honfleur from a vessel sailing under Antigua flag. The ship-owner, a German citizen, invoked a violation of his right of property and of the fundamental freedom of movement of the two unlawful passengers. The French tribunal concluded that the competent administration acted according to its prerogative but abused its authority because of the use of force in preventing disembarkation. It declared however:

⁶⁹ F. Payre, “Les passagers clandestins”, *Annuaire du Droit Maritime et Océanique* 14 (1996), 277 et seq. (286 et seq.); A. Goy, “Le régime international du passager clandestin”, *Annuaire du Droit de la Mer* 6 (2001), 169 et seq. (171 et seq).

⁷⁰ Tribunal des conflits, 12 mai 1997, *Préfet de police de Paris c. Tribunal de grande instance de Paris (Ben Salem et Taznaret case)*, *A.F.D.I.* 44 (1998), 684 et seq.; *Revue Française de Droit Administratif* 1997, Vol. I, 523 et seq.

“Que cette attitude (to avoid the disembarkation with the use of force) ait été de nature à porter atteinte à leur liberté d’aller et venir, qui est une liberté fondamentale, voilà qui n’est pas douteux, même si on peut relever (...) d’une part qu’aucun ordre de rétention à bord n’a véritablement été pris à leur rencontre – mais la mesure prise revient bien au même – d’autre part qu’ils ont en définitive fait connaître qu’il choisissaient de rester sur ce navire et de tenter leur chance lors d’une prochaine escale”⁷¹.

Bastid-Burdeau reminds us that the “*question de savoir si l’autorité locale peut (...) imposer au capitaine étranger la rétention à bord des passagers clandestins ressortit au seul droit interne*”⁷². The refusal of disembarkation of stowaways does not preclude the possibility of redirecting the vessel to another country and, in the *Ben Salem et Taznaret* case, the destination was left at the discretion of the master. The only limit consists in the principle of non-refoulement to the extent that the stowaways on board are asylum-seekers. The coastal state should then at least ascertain that in the new destination state the individual does not risk being subjected to persecution, torture or other inhuman and degrading treatments.

Moreover, such a case of voluntary redirection cannot be seen as arbitrary detention resulting from the refusal of disembarkation. On the contrary, in the *Tampa* case, an arbitrary detention was found to exist by Australian jurisdiction because the migrants on board, most of them being asylum-seekers, were under the full and exclusive control of the Australian authorities⁷³. Justice *North* of the Federal Court of Australia deemed that the 433 passengers of the *Tampa* were detained arbitrarily accordingly to the *habeas corpus* principle and requested the respondents, namely the Minister for Immigration and Multicultural Affairs, the Attorney General, the Minister of Defense and the Commonwealth of Australia, to release the passengers as soon as possible. Justice *North*

⁷¹ J. Arrighi de Casanova, “Les limites de la voie de fait (police des étrangers et liberté individuelle)”, *Revue Française de Droit Administratif* 1997, Vol. I, 514 et seq.

⁷² G. Bastid-Burdeau, “Migrations clandestines et droit de la mer”, in: *La mer et son droit, Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, 2003, 57 et seq. (64).

⁷³ *Vadarlis v. Minister for Immigration and Multicultural Affairs and Others* (V 900 of 2001 FCA 1297) of 11 September 2001; “Refugees – Detention within Australian territorial sea – Pacific solution – Migration Act”, *Austr. Yb. Int’l L.* 21 (2001), 263 et seq.

inferred the detention on the basis of an analysis of factual elements, among them that the Australian authorities unilaterally decided where the *Tampa* could go or not go and that the passengers were completely isolated on board. They were not consulted on the question of their transfer to New Zealand and Nauru. The trial judge thus affirmed that:

“Where complete control over people and their destiny is exercised by others it cannot be said that the opportunity offered by those others is a reasonable escape from the custody in which they were held. The custody simply continues in the form chosen by those detaining the people restrained” (para. 17).

This judgment was then challenged on appeal and the Full Court of the Federal Court dismissed the decision and induced several critical opinions⁷⁴. In particular it has to be pointed out that Australia did not comply with its duty deriving from the “first asylum” rule. No debate would have arisen if the coastal authorities had proceeded with the first screening of the passengers and then resettled them to New Zealand and Nauru for the final determination of their status. Because of their *de facto* detention, *Tampa* passengers were penalized for their unlawful entry into Australian waters and this is a breach of article 31 of the 1951 Refugee Convention⁷⁵. In addition, Australia did not fulfill its obligations concerning the safety of life at sea.

Before analyzing the duty to render assistance and the obligation concerning the safety of life, the specificities raised by the contiguous zone require a brief excursion.

IV. The Specificity of the Contiguous Zone

Pursuant to article 33 UNCLOS, in the “contiguous zone”, that is the maritime zone adjacent to a state’s territorial sea, the coastal state may 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

⁷⁴ *Ruddock and Others v. Vadarlis and Others* (2001) 66 A.L.J. 25 (V 1007 of 2001, FCA 1329) of 18 September 2001, para. 5, in which the Chief of Justice dissented on the admissibility of the appeal considering arbitrary the detention of the *Tampa* passengers. See also White, “(...) subsequent legal issues”, see note 61, 254 et seq.

⁷⁵ Goodwin-Gill/ Adam, see note 6, 266.

regulations committed within its territory or territorial sea”⁷⁶. The contiguous zone does not exist *ipso jure* but the coastal state has to proclaim it expressly. It cannot extend beyond 24 nautical miles from the baselines (article 33(2)). The contiguous zone is the only maritime zone not fully under the coastal state’s jurisdiction for which UNCLOS provides some explicit powers in the migratory field.

But UNCLOS does not indicate any means for the delimitation of this zone in case of adjacent states separated by less than 48 nautical miles, i.e. the sum of the maximum extension of two facing contiguous zones. Some authors⁷⁷ suggest that, considering the administrative nature of the powers attributed to the coastal state by article 33 UNCLOS, i.e. prevention and repression, these powers may be exercised concurrently by the neighboring states. Thus the question of the delimitation would be redundant⁷⁸. Consequently, the contiguous zones of two states may overlap. This approach is disputable considering, for example, the patrols of a state carried out in a maritime zone under its jurisdiction but also under the jurisdiction of the contiguous state. Conflicts of jurisdiction can easily arise⁷⁹. Moreover the extension of

⁷⁶ Concerning the evolution of the concept and the practice related to the contiguous zone, A.V. Lowe, “The Development of the Concept of the Contiguous Zone”, *BYIL* 52 (1981), 109 et seq.; L. Caflisch, “La délimitation des espaces marins entre Etats dont les côtes se font face ou sont adjacentes”, in: Dupuy/ Vignes, see note 49, 373 et seq. (392 et seq.); Churchill/ Lowe, see note 62, 132 et seq.; R.J. Dupuy, “La mer sous compétence nationale”, in: Dupuy/ Vignes, see note 49, 219 et seq. (236 et seq.); L. Lucchini/ M. Voelckel, *Droit de la mer*, Tome 1, 1990, 195 et seq.

⁷⁷ Caflisch, see note 76, 392; L. Lucchini/ M. Voelckel, *Droit de la mer*, Tome 2, Vol. 1, 1996, 78.

⁷⁸ Other answers are given to the lack of delimitation provisions in UNCLOS concerning the contiguous zone by Churchill/ Lowe, see note 62, 136; Daillier/ Pellet, see note 67, 1175; H. Pazarci, “Le concept de zone contiguë dans la convention de droit de la mer de 1982”, *RBDI* 18 (1984-1985), 249 et seq.; J. Symonides, “Origin and Legal Essence of the Contiguous Zone”, *ODILA* 20 (1989), 203 et seq.

⁷⁹ This problem was pointed out before the Italian Parliament during the session of the Committee for the fulfilment of the Schengen Agreement, on 29 September 2004, by Scovazzi, *Indagini conoscitive e documentazioni legislative n. 19, Gestione comune delle frontiere e contrasto all’immigrazione clandestina in Europa*, Roma, 2005, 163 et seq. See also T. Scovazzi, “La lotta all’immigrazione clandestina alla luce del diritto internazionale del mare”, *Diritto, Immigrazione e Cittadinanza* (2003), 48 et seq. Italy has not proclaimed a contiguous zone yet, notwithstanding the usefulness of such

the contiguous zone cannot be more than 24 miles; it can certainly be less. For these reasons a precise delimitation of the space where coastal state authorities have to perform their function of prevention and repression is preferable and enhances the efficiency and the functional nature of the contiguous zone.

The contiguous zone has an exclusively functional nature⁸⁰ as supported by the wording of article 33(1) and the use of “necessary” to qualify the controls that the coastal state may exercise in the listed fields. Controls in migratory issues highlight the contrast between two legal regimes applicable in this maritime zone. On the one hand, the coastal state has the sovereign prerogative to exercise its powers of prevention and repression in relation to violations of its domestic immigration law. On the other hand, the same state must comply with international obligations deriving from the customary principle of *non-refoulement* and from the right to seek asylum guaranteed by article 14 UDHR. In this respect, the exercise of the preventive function raises the following problems.

In the contiguous zone the practice of interception and redirection of vessels transporting unlawful migrants, among whom there may well be some asylum-seekers, is encompassed in the prevention powers pursuant to article 33(1)(a). In fact unlawful migration may only be committed upon crossing a national border. At sea this generally corresponds to the external limit of the territorial sea⁸¹. Any intervention of the authorities in the contiguous zone in such a situation cannot be justified by the attributed repressive powers. The practice of the intercep-

an act for a country constantly facing unlawful migrants arrival by sea; in particular this would give an incontestable legal basis to competent authorities' operations accomplished beyond the territorial waters.

⁸⁰ Treves, see note 49, 706, where the author reminds that: “la nature juridique de la zone contiguë est différente de celle de la zone économique exclusive et du plateau continental. Dans ces dernières zones, l’Etat côtier a des droits souverains et des droits de juridiction (...), tandis que les pouvoirs reconnus sans discussion dans la zone contiguë ne sont que des pouvoirs de police”. See also I.A. Shearer, “The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime”, in M.N. Schmitt/ L.C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium*, 1998, 429 et seq. (434).

⁸¹ This border can be affected by the factual elements of migrants arrival (as remarked above, see under III.) and consequently shift to the place where the coastal state effectively exercises its jurisdiction, following the factual elements of the migrants arrival, as remarked above, see under II.

tion and redirection is not clearly provided for by the wording of the article⁸², but it is not forbidden either.

The key word to identify the limit of the possible actions of the coastal state in the contiguous zone is “necessary”. The interception and redirection may be considered lawful when necessary for the protection of interests. Indeed, the protection of a minor interest, as preventing a violation of its migration law, does not justify any kind of intervention. This has already been affirmed in 1935 in the *I’m Alone* case⁸³ concerning goods smuggling. Consequently, once the coastal state exercises its jurisdictional powers intercepting and redirecting the vessel, it must consider whether its action may put the passengers of the concerned vessel at risk of persecution, torture or other inhuman treatments. The need of proportionality emerges in relation to the operations accomplished by states authorities on the high seas for contrasting unlawful migration.

V. The Principle of *Non-Refoulement* put to the Test in Naval Operations on the High Seas

1. The Freedom of the High Seas and the Safety of Life at Sea

High seas are defined negatively by article 86 UNCLOS as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State”. High seas are characterized by the prohibition of appropriation (article 89 UNCLOS) and the freedom of the high seas does not imply the absence of rules but rather indicates that

⁸² “[T]he special jurisdictional rights which a State can exercise in the adjacent area of the contiguous zone do not clearly include the interception of vessels believed to be carrying asylum seekers”, Goodwin-Gill/ Adam, see note 6, 276.

⁸³ A Canadian vessel sunk after the hot pursuit of two US navy ships because it was suspected of liquor smuggling during the prohibition period. Canada v. United States, 5 January 1935, *RIAA* Vol. III, 1609 et seq.; W.C. Dennis, “The Sinking of the *I’m Alone*”, *AJIL* 23 (1929), 351 et seq.; C.C. Hyde, “The Adjustment of the *I’m Alone*”, *AJIL* 29 (1935), 296 et seq.; G.G. Fitzmaurice, “The Case of the *I’m Alone*”, *BYIL* 17 (1936), 82 et seq.

freedoms are granted equally to all states. Article 87 UNCLOS gives a non-exhaustive list⁸⁴ of freedoms:

“1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area”.

The freedom of navigation encompasses two principles: the vessel sailing under the flag of any state has the right to navigate⁸⁵; the navigation of a vessel sailing under the flag of one state should not be hampered by other states. A vessel may sail under the flag of only one state which exercises its exclusive jurisdiction (article 92(1))⁸⁶, except in the

⁸⁴ “There are high-seas activities alleged by some States to constitute freedoms, but denied this status by other States. The principle on which such disputes should be resolved is that any use compatible with the status of the high seas (...) should be admitted as a freedom unless it is excluded by some specific rule of law”, Churchill/ Lowe, see note 62, 206.

⁸⁵ Article 90 UNCLOS, *Right of Navigation*: “Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas”; this implies the equal access to high seas for any state. D. Momtaz, “The High Seas”, in: R.J. Dupuy/ D. Vignes (eds), *A Handbook on the Law of the Sea*, Vol. 1, 1991, 396 et seq.

⁸⁶ The vessel sailing under the flag of more than one state is considered a vessel without nationality (article 92(2)), and consequently does not enjoy the protection of any state and the freedom of navigation.

cases explicitly provided by the Convention⁸⁷ or in accordance with another agreement stating expressly the exception⁸⁸.

Article 98 UNCLOS provides the duty to render assistance in the following terms:

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

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

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

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call”. (emphasis added)

Even if this article is located in the UNCLOS section concerning the high seas, the duty to render assistance must be considered as applicable in all maritime zones⁸⁹. This rule is closely connected with the principle of safety of life at sea which is the only real limit to the enjoyment of navigation freedom⁹⁰. Consequently, and because of its

⁸⁷ Article 100 (repression of piracy); article 110 (Right of visit); article 111 (right to hot pursuit).

⁸⁸ Article 110 states: “Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (...)”.

⁸⁹ During the negotiation of UNCLOS, there was a debate on the wording of this article (J.K. Jr. Gamble, *Law of the Sea: Neglected Issues*, 1979, 261) but pursuant to its literal interpretation (“any person found at sea” and not “any person found on the high seas”) in the light of the object and the context, as requested by article 31 of the 1969 Vienna Convention (see note 55), it was noticed that this duty could not disappear just because of the crossing of a maritime frontier. M.H. Nordquist (ed.), *UNCLOS 1982 A Commentary*, Vol. III, 1993, 170 et seq.

⁹⁰ “[D]ans la plupart des cas, l’élément décisif qui détermine les priorités entre les activités en mer (...) est la sauvegarde de la vie humaine”; Treves, see note 49, 717. Also Pallis (see note 26, 335) affirmed: “Explicit links have

repetition in treaty and domestic law and of states practice, the duty to render assistance is generally recognized as a principle of customary law.

During the Indochinese crisis, however, the duty to rescue was still considered as a treaty obligation and thus binding only states parties. In particular, two instruments applicable only in the territorial waters were invoked: the 1910 Brussels *Convention internationale pour l'unification de certaines règles en matière d'assistance et de sauvetage maritimes et protocole de signature* and the 1974 Convention for the Safety of Life at Sea (SOLAS)⁹¹. Subsequent to non-rescue at sea incidents, the problem of identifying who was under an obligation to undertake rescue operations emerged. Whereupon the *International Convention on Maritime Search and Rescue* (SAR Convention) was adopted in 1979⁹².

The SAR Convention aims at creating an international system coordinating rescue operations guaranteeing their efficiency and safety. States parties are thus invited to conclude SAR agreements with neighboring states for regulating and coordinating the operations and the services of rescuing in the maritime zone delimited in the agreement. The Secretary General of the International Maritime Organization (IMO), as depositary of the SAR Convention, must be notified of any modification of these agreements. The 1989 *International Convention on Salvage*⁹³ was elaborated in the framework of the IMO and has substituted the 1910 Brussels Convention mentioned above. The 1989 Convention affirms in article 10 the duty to render assistance:

- “1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1”.

This duty was then reaffirmed by the IMO Maritime Safety Council (MSC) in 2001 in a circular relating to unsafe practices concerning the transport of migrants at sea⁹⁴. Paragraph 2.3 of the circular defines un-

been drawn between the concept of distress and the preservation of human life”.

⁹¹ UNTS Vol. 1184 No. 1861.

⁹² UNTS Vol. 1405 No. 23489.

⁹³ UNTS Vol. 1953 No. 33479.

⁹⁴ *Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea*, MCS.1/Circ.896/Rev.1, 19 June

safe practices as any action contrary to the safety of navigation and any action constituting a danger to life or health of persons. Moreover the circular obliges states, and thus vessels sailing under their flag, to render assistance. The undertaking of rescue operations does not exhaust the duty to render assistance which is only fully met after the disembarkation of the rescued people in a place of safety. The disembarkation in a place of safety corresponds to the need to find a place of refuge for the asylum-seekers rescued at sea – again, in compliance with the principle of *non-refoulement*.

2. The Respect of the Principle of *Non-Refoulement* in the Course of Search and Rescue Operations

During the general revision of the IMO SAR system⁹⁵, the MSC faced in particular the question of the place where rescued people disembark, without distinction based on their status, nationality or place of finding. The MSC adopted two resolutions amending both SOLAS Convention⁹⁶ and SAR Convention⁹⁷, which entered into force on 1 July 2006, and aimed at guaranteeing assistance to rescued people and to minimize negative consequences for the rescuing ship. Consequently, article 4.1-1 SOLAS Convention has been amended as follows:

“Contracting Governments 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 the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue

2001, available at: <www.imo.org>. As to how and why this circular was adopted, A. Kirchner/ L. Schiano di Pepe, “International Attempts to Conclude a Convention to Combat Illegal Migration”, *International Journal of Refugee Law* 10 (1998), 662 et seq. MSC acts have no binding value, but just recommendatory. The content of this circular has been integrated almost entirely in the Protocol against the Smuggling of Migrants by Land, Sea and Air to the UN Convention against Transnational Organized Crime (A/RES/55/25 of 15 November 2000) and thus binds the States parties.

⁹⁵ *Maritime Safety Council – 78th session: 12-21 May 2004, Opening address by the Secretary-General.*

⁹⁶ Resolution MSC.153 (78) of 20 May 2004.

⁹⁷ Resolution MSC.155 (78) of 20 May 2004.

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 Contracting Governments shall arrange for such disembarkation to be effective as soon as reasonably practicable*". (emphasis added)

Similarly, article 3.1.9 SAR Convention now reads:

"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 the 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 effective as soon as reasonably practicable*" (emphasis added).

According to the MSC Guidelines⁹⁸, a "place of safety" means a location where the rescue operations can be considered completed. Pursuant to principle 6.14 of the Guidelines, even the rescue unit can be the place of safety, but only provisionally. In fact the text insists on the role that the flag state and the coastal state should play stepping in for the master of the rescuing vessel⁹⁹. Principle 6.13 provides:

"An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. (...) Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of

⁹⁸ *Guidelines on the Treatment of Persons Rescued at Sea*, Resolution MSC.167 (78) of 20 May 2004.

⁹⁹ Stressing the need for co-operation between the flag and the coastal state, the IMO aims at avoiding the repetition of a case such as the Tampa in which "Norway did not want to recognize any flag state responsibility over asylum-seekers. In turn, Australia did not want to assume the entire burden as a coastal state", Baillet, see note 61, 759.

safety, it should be relieved of this responsibility as soon as alternative arrangements can be made”.

Moreover the state, in whose SAR zone the operation took place, has the duty to provide or, at least, to secure a place of safety for the rescued people (principle 2.5). In a case such as *Tampa*, the rescuing vessel could have been considered a provisional place of safety. But the rescue operation could not have been considered completed because of the excessive number of passengers and their sanitary conditions. However, assuming these provisions had been in force at the time of the *Tampa* case, principles 6.13 and 2.5 could be interpreted as supporting the behavior of Australian authorities which stepped in for the master as soon as they reached an agreement with New Zealand and Nauru. Consequently, they acted in compliance with the duty to render assistance, even if they did not authorize the access into the port.

The MSC Guidelines state:

“The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea” (principle 6.17).

The coastal state shall respect the principle of *non-refoulement* of asylum-seekers and refugees while performing its duty to save life at sea. The principle of *non-refoulement* does not apply only in consideration of the access to territorial waters or ports, but also in the choice of the place of safety, i.e. not only concerning the rejection at the maritime frontier, but also concerning redirection operations, either as the consequence of a rescue operation or of interdiction program.

Recently the IMO elaborated a document entitled “Rescue at Sea, A Guide to principles and practice as applied to migrants and refugees”¹⁰⁰ in co-operation with the UNHCR, in which shipmasters are invited – for cases in which people rescued at sea claim asylum – to “alert the closest RCC (Rescue Co-ordination Centre); contact the UNHCR; [to] not ask for disembarkation in the country of origin or from which the individuals fled; [to] not share personal information regarding the asylum-seekers with the authorities of that country, or with others who might convey this information to those authorities” (page 10). It is regrettable that similar invitations are not repeated in the document con-

¹⁰⁰ Document available on the websites of both organizations <www.imo.org> <www.unhcr.org>.

cerning actions that have to be taken by governments and RCCs (page 11).

3. The Naval Interdiction Programs and the Problem of Diverting Vessels

Bearing in mind that a definition of interception does not exist in international law and that it can be identified on the basis of state practice, the UNHCR Executive Committee has defined interception “as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination”¹⁰¹. The practice of naval interdiction on the high seas consists of the action of one state or more, undertaken on the basis of an international agreement, aimed at exercising the right of visit in relation to criminal activities not listed in article 110 UNCLOS¹⁰², performed by ships without nationality or by vessels sailing the flag of a state or a group of states. In this latter case, the interested flag state usually participates in the conclusion of the agreement related thereto¹⁰³.

In the migratory field, several interdiction programs have been created to prevent and obstruct irregular flows. The most famous is doubtlessly the United States interdiction program with Haiti because it is the only one which has been brought before of the US Supreme Court con-

¹⁰¹ Executive Committee, *Interception of Asylum-seekers and refugees: The International Framework and Recommendation for a Comprehensive Approach*, EC/50/CRP.17 of 9 June 2000, para. 10.

¹⁰² The possibility to conclude such an agreement is provided by article 110(1): “Except where acts of interference derive from powers conferred by treaty (...)”. See Churchill/ Lowe, see note 62, 218; A.M. Syrigos, “Developments on the Interdiction of Vessels on the High Seas”, in: A. Strati/ M. Gavouneli/ N. Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea*, 2006, 166 et seq.

¹⁰³ Of course this does not happen when the interdiction programme aimed at sanctioning the flag state, as in an embargo situation. C.Q. Christol/ C.R. Davis, “Maritime Quarantine: The naval interdiction of offensive weapons and associated material to Cuba”, *Journal of Inter-American Studies* 4 (1962), 525 et seq.

cerning its legality in relation to the right of asylum, and in particular to the principle of *non-refoulement*¹⁰⁴.

On 23 September 1981, the United States concluded an agreement with Haiti, then ruled by President Duvalier, pursuant to which they established “a cooperative program of *selective interdiction and return* to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti” (emphasis added)¹⁰⁵. Six days after this agreement US President R. Reagan issued Executive Order No. 12.324¹⁰⁶ suspending the entry of irregular aliens coming from the high seas and ordering the Coast Guard to intercept vessels and to redirect them to their port of origin. Aliens were submitted to the screening process on board the naval unit and those found not eligible for refugee status were sent back to Haiti. Within ten years United States authorities exercised interdiction concerning about 25,000 Haitians¹⁰⁷.

After the coup against Haitian elected President B. Aristide, on 30 September 1991, arrivals from the island increased and the United States government suspended the interdiction program for a few weeks. On November 1991, interdictions at sea restarted and, because of the ever increasing number of migrants, the US military base of Guantanamo (Cuba) was opened and used as centre for the screening process. On 24 May 1992, US President, G. Bush, adopted Executive Order No.

¹⁰⁴ It does not mean that the other interdiction programmes did not or do not threaten refugees international protection, as the European “pre-border operations” carried on under the monitoring of the European Agency for the Management of the Operative Cooperation at the External Borders of the Member States of the European Union, the so called Frontex (Council Regulation (EC) 2007/2004 of 26 October 2004, OJEC No. L 349/1 of 25 November 2004). See also under: < www.frontex.europa.eu >. See S. Trevisanut, “L’Europa e l’immigrazione clandestine via mare: FRONTEX e diritto internazionale”, *Diritto dell’Unione Europea*, 2008, 367 et seq. (382 et seq.).

¹⁰⁵ *Agreement to Stop Clandestine Migration of Residents of Haiti to the United States*, *ILM* 20 (1981), 1198 et seq. See in this respect also the article of J. Leininger, “Democracy and UN Peace - Keeping-Conflict Resolution through State-Building and Democracy Promotion in Haiti”, *Max Planck UNYB* 10 (2006), 465 et seq.

¹⁰⁶ *AJIL* 76 (1982), 376 et seq.

¹⁰⁷ G.W. Palmer, “Guarding Coast: Alien Migrant Interdiction Operations at Sea”, in: M.N. Schmitt (ed.), *The Law of Military Operations, Liber Amicorum Professor Jack Grunawalt*, 1998, 157 et seq. (165).

12.807, known as the “Kennebunkport Order”¹⁰⁸, suspending the screening process and ordering the Coast Guard to redirect immediately intercepted Haitians. Executive Order No. 12.807 was the basis for the claim against the US administration brought before US jurisdictions by two non-profit organizations defending the interests of Haitian migrants. The proceedings came to an end with the US Supreme Court judgment of 21 June 1993¹⁰⁹ which did not find the actions of the Coast Guards illegal. The Court’s reasoning presents several interesting aspects in relation to the interpretation of the principle of *non-refoulement*¹¹⁰.

First, the US authorities forcibly diverted intercepted vessels to their port of origin, preventing them from the possibility of seeking refuge in other countries of the region, such as Cuba, Jamaica or the Bahamas. In this concern, Judge Blackmun, in his Dissenting Opinion, pointed out that:

“The refugees attempting to escape from Haiti do not claim a right of admission to this country [the United States]. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them to detention, abuse, and death”¹¹¹.

¹⁰⁸ The Kennebunkport Order was not modified by the successive US administration and thus it is still in force. Consequently, and unfortunately, the declaration of US President G.W. Bush, quoted at the beginning of this paper, is less surprising, see note 1.

¹⁰⁹ Supreme Court of United States, *Sale v. Haitian Centres Council, Inc.*, 21 June 1993, *ILM* 32 (1993), 1039 et seq.

¹¹⁰ “The judgement of the Supreme Court attempted to confer domestic ‘legality’ on the practice of returning individuals to their country of origin, irrespective of their claim to have a well-founded fear of persecution. That decision could not and did not alter the State’s international obligations”; Goodwin-Gill/ Adam, see note 6, 248. See also UNHCR, “Brief Amicus Curiae”, *International Journal of Refugee Law* 6 (1994), 85.

¹¹¹ “Dissenting Opinion of Judge Blackmun”, *ILM* 32 (1993), 1058 et seq.; G. S. Goodwin-Gill, “The Haitian *Refoulement* Case: A Comment”, *International Journal of Refugee Law* 6 (1994), 103 et seq.; T.D. Jones, “Aliens – interdiction of Haitians on high seas – definition of “return” under U.S. statute – extraterritorial effect of statute”, *AJIL* 88 (1994), 114 et seq. (122). See also L.D. Rosenberg, “The Courts and Interception: The United States’ Interdiction Experience and its Impact on Refugees and Asylum Seekers”, *Georgetown Immigration Law Journal* 17 (2002-2003), 199 et seq.

On its side, the Supreme Court excluded the application of article 33 of the 1951 Refugee Convention beyond the territory of the state, arguing in a somewhat original manner:

“If the first paragraph [of Article 33]¹¹² did apply on the high seas, no nation could invoke the second paragraph’s exception¹¹³ with respect to an alien there: an alien intercepted on the high seas is in no country at all. If Article 33.1 applied extraterritorially, therefore, Article 33.2 would create an absurd anomaly: dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not”¹¹⁴.

The Supreme Court reached this conclusion on the basis of a restrictive interpretation of the term “return” in article 33(1) invoking that the French word “*refouler*” encompasses terms as “repulse”, “repel”, “drive back” and “expel”. Thus “return” means “a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination” and, in the context of article 33(1), it “means to repulse rather than to ‘reinstate’”¹¹⁵. But the term “repulse” itself encompasses the term “reject” and “repel”, actions not needing necessarily the prior entry into the territory. Consequently to refuse to apply the principle of *non-refoulement* on the high seas seems to be unjustified¹¹⁶.

Commenting this case, the UNHCR expressed its point of view in relation to the geographical scope of the principle and affirmed:

“The obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders. UNHCR bases its position on the language and structure of the treaties’ overriding humanitarian purpose, which is to protect

¹¹² Article 33(1): “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

¹¹³ Article 33(2): “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.

¹¹⁴ *ILM* 32 (1993), 1053.

¹¹⁵ *ILM* 32 (1993), 1054.

¹¹⁶ I. Castrogiovanni, “Sul *refoulement* dei profughi haitiani intercettati in acque internazionali”, *Riv. Dir. Int.* 77 (1994), 474 et seq. (478).

especially vulnerable individuals from persecution. UNHCR's position is also based on the broader human right of refugees to seek asylum from persecution as set out in the Universal Declaration of Human Rights¹¹⁷.

The fact that the principle of *non-refoulement* applies on the high seas does not mean that the interdicting state has to host the intercepted migrants; it has solely not to preclude them from seeking asylum elsewhere and, thus, not to force them back to their country of origin. Consequently to return intercepted refugees vessels to the high seas does not necessarily imply a violation of the principle of *non-refoulement*.

Interception practice has become "an ever-expanding array of *non-entrée* policies which rely on law to deny entry to refugees"¹¹⁸ and this trend is quite explicitly admitted by the US authorities which affirm "[i]nterdicting migrants at sea means they can be quickly returned to their countries of origin without the costly processes required if they successfully enter the United States"¹¹⁹.

European countries are less explicit even if the joint patrols carried out in the Mediterranean sea in the framework of the EU agency Frontex¹²⁰ have a *modus operandi* similar to interdiction programs, but they are called "pre-border operations". According to the Annual Report of the Frontex¹²¹, it appears that in operations HERA II and HERA III¹²² the joint patrols had the task to interdict irregular migrant ships coming from Mauritania and Senegal and then to divert them to their port of origin or, when necessary, to the Canary Islands. European units even

¹¹⁷ *ILM* 32 (1993), 1215.

¹¹⁸ Hathaway, see note 6, 299-301.

¹¹⁹ "Alien Migrant Interdiction" page of the website of the US Coast Guard, available at: <<http://www.uscg.mil/hq/g-o/g-opl/AMIO/AMIO.htm>>.

¹²⁰ See note 104. Joint patrols are organized pursuant to article 3 of EC Regulation 2007/2004.

¹²¹ *Frontex Annual Report 2006, Coordination of Intelligence Driven Operational Cooperation at EU Level to Strengthen Security at External Borders*, 12, see also:<www.frontex.europa.eu>.

¹²² Operation HERA started in July 2006 on request of Spain because of the increasing number of arrivals of migrants by sea to the Canary Islands. Finland, Italy and Portugal participated at this operation with some naval units and aircrafts. Information concerning HERA and the other joint patrol programmes carried on since 2006 under the supervision of the Frontex are available on the Agency website.

had the right to pursue their mission in the territorial waters of these states, thus impeding migrant vessels to leave Mauritanian and Senegalese seas¹²³. Moreover, the report affirmed that “[d]uring the operational phase HERA II, 3887 illegal immigrants on 57 *Cayucos* (small fishing boats) were intercepted close to [the] African coast and diverted”. But the same document does not indicate whether the intercepted people were submitted to a screening process by the patrols or in the countries where they were redirected. Moreover, pursuant to the few available data, the migrants were diverted to their port of origin, but it is not possible to find out which port this was.

VI. Concluding Remarks

Several authors were taken aback by the United States practice of interception and redirection at sea in the Caribbean seas, and by the Australian excision of territories, but very little attention has been pointed to the pre-border operations of the EU Member States carried out under the cover of Frontex. But, as demonstrated above, the operational dynamics and the final consequences for the asylum-seekers are precariously similar. The attention of the media and of the interested governments is instead focused on avoiding the arrivals. What is most disappointing is the remaining lack of information and transparency regarding joint patrol operations within the framework of Frontex.

What is known for sure is that migrants screened-in on the EU territory can enjoy fully procedural rights guaranteed by European law; while the unlucky migrants interdicted in the territorial waters of the third state, participating in the program or on high seas, must submit to the domestic law of that state, considered safe by the European institutions.

As in the *Tampa* case, the practice of forced redirection of asylum-seekers violates the right to seek asylum guaranteed by article 14 UDHR and protected by the “temporary refuge” regime and the principle of *non-refoulement*, whose application in the different maritime

¹²³ At the moment of operation, it appears that Frontex did not have official relations with these two third states. According to the known information, the patrols in their territorial sea were carried on pursuant to two agreements concluded by Spain with Mauritania and Senegal. This raises some questions about the legality of the operations because of the participation of non Spanish units; Trevisanut, see note 104, 381.

zones, even the high seas, could not be challenged once states decide to exercise their sovereign powers, their effective jurisdiction¹²⁴.

However, as noted above, refugee protection and states' interests pursuant to the law of the sea are not completely incompatible. In fact, the principle of safety of life at sea permits guaranteeing to boat people minimum protection standards, which are completed by the non rejection at the frontier dimension of the *non-refoulement* principle for asylum-seekers. Moreover, "when properly and duly applied, the legal, policy and operational instruments of the institution of asylum and international refugee protection can yield strong dividends for national safety and security"¹²⁵. In this way refugee law can even be a tool for states to encourage border controls to be positively perceived by public opinion and to thereby improve the management of irregular immigration¹²⁶.

¹²⁴ Hathaway, see note 6, 335; UNCHR, see note 38, para. 43.

¹²⁵ UNHCR, *Background Paper (...)* see note 45, para. 13.

¹²⁶ Hathaway, see note 10, 99-100.