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## Overview

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### **Maritime rescue in the Mediterranean**

Rights and obligations of vessels under the SAR Convention and manifestations of the principle of *non-refoulement* on the high seas

## 1. Introduction

In the summer of 2017, the Libyan Government of National Unity<sup>1</sup> announced that it would meet its obligations arising from the Convention on Maritime Search and Rescue (SAR Convention)<sup>2</sup> of 1979 and that it had notified the International Maritime Organization (IMO) of the creation of a search and rescue region and a national Maritime Rescue Coordination Centre (MRCC).<sup>3</sup> According to media reports, however, it withdrew this notification to the IMO in December 2017.<sup>4</sup>

A new notification is said to have been submitted shortly afterwards in cooperation with the Italian authorities, although the Libyan MRCC in Tripoli will not be operational immediately and is to take up its duties by 2020.<sup>5</sup>

In the meantime, the year 2017 saw more incidents in connection with the rescue of migrants and refugees. An Italian warship, for example, reportedly blocked the passage of a boat carrying migrants and refugees for several hours without taking its passengers on board. The warship is said to have waited for the arrival of the Libyan coastguard, which ultimately picked up the migrants and refugees and returned them to Libya.<sup>6</sup>

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- 1 The Tripoli-based Libyan Government of National Unity, which is recognised by the UN Security Council, controls only part of the maritime borders in the Tripoli area through units of the Libyan coastguard that are under its authority (Bundestag printed paper 18/9262, p. 2). Since it is unclear to what extent the coastguard is also under the influence of militia, we shall refer in this overview to the ‘so-called Libyan coastguard’ to reflect the dubiety regarding its legitimacy.
  - 2 Convention on Maritime Search and Rescue, signed on 27 April 1975, entered into force on 22 June 1985. United Nations Treaty Series, Vol. 1405, p. 118.
  - 3 Point 2.1.2.2 of the Annex to the SAR Convention. See also the article entitled ‘Wo sind sie’ in the *Süddeutsche Zeitung* of 16 August 2017, p. 2.
  - 4 Reuters, ‘Exclusive: Italy plans big handover of sea rescues to Libya coastguard’ (15 December 2017), accessible at <https://www.reuters.com/article/us-europe-migrants-libya-exclusive/exclusive-italy-plans-big-handover-of-sea-rescues-to-libya-coastguard-idUSKBN1E91SG>; Monroy, M., ‘Libyen widerruft Seenotrettungsgrenze’, in *Telepolis*, 25 December 2017, accessible at <https://www.heise.de/tp/features/Libyen-widerruft-Seenotrettungszone-3927846.html>. A country search for Libya in <https://sarcontacts.info/> yielded no results (all sites last accessed on 5 February 2018).
  - 5 Sea-Eye, ‘Libyen stoppt widerrechtliche Ausweitung des Seegebietes’ (13 December 2017), available (in German only) at <https://www.sea-eye.org/en/entwarnung-fuer-die-seenotretter>; Monroy, M., *ibid.* (footnote 4); (both sites last accessed on 13 February 2018).
  - 6 Border Criminologies, ‘Italy Strikes Back Again: A Push-back’s Firsthand Account’ (15 December 2017), accessible at <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/12/italy-strikes>; Biondi, P., ‘The Case for Italy’s Complicity in Libya Push-Backs’ (4 November 2017), accessible at <https://www.newsdeeply.com/refugees/community/2017/11/24/the-case-for-italys-complicity-in-libya-push-backs> (both sites last accessed on 7 February 2018).

Against this backdrop, the present overview examines two issues relating to international maritime rescue, namely the substance and scope of the provisions of the SAR Convention concerning coordination of rescue missions on the high seas (section 2) and the applicability of the principle of *non-refoulement* to specific cases (section 3).

## 2. Applicable provisions of the SAR Convention when two or more ships are present at the rescue scene

The starting point for this examination is Article 98 of the UN Convention on the Law of the Sea (UNCLOS),<sup>7</sup> which lays down **an obligation for the master of every ship to rescue persons in distress anywhere at sea.**

In cases in which this rescue obligation applies simultaneously to **two or more ships**, the provisions of Article 98 of UNCLOS are fleshed out by the SAR Convention.<sup>8</sup> Under the latter instrument, the competent national MRCC assigns responsibility for carrying out the rescue to a designated vessel, while releasing any other ship from its obligation to proceed to the rescue of those in distress.<sup>9</sup> Such other ships are thus released from their rescue obligation if and in so far as effective rescue of the persons in distress is ensured by the designated vessel.

### 2.1. Coordination of rescue operations on the high seas in the absence of an officially notified SAR region.

In cases where states – such as Libya at the present time – have not given notice of the creation of

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7 United Nations Convention on the Law of the Sea, signed on 10 December 1982, entered into force on 16 November 1994, Federal Law Gazette 1994, Part II, p. 1799, accessible at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm) (last accessed on 8 February 2018).

8 The SAR Convention essentially lays down operational rules relating to planning, organisation, training, information exchange and coordination for the purpose of controlling and optimising maritime rescue missions. See the Bundestag Research Services overview of 25 August 2017 entitled '*Rechtsfragen bei Seenotrettungseinsätzen innerhalb einer libyschen SAR-Zone im Mittelmeer*', WD 2 - 3000 - 075/17, p. 7.

9 In particular, this presupposes that the national rescue coordination centre possesses information regarding the available capacity, the willingness of all parties to cooperate, etc., which reflects the actual situation at the rescue scene.

a search and rescue region, their powers to give instructions and to coordinate operations in maritime rescue missions are confined to coastal waters and a strictly limited adjacent area.<sup>10</sup> The reason for this is that ships sailing under a foreign flag in a country's coastal waters may be subject to certain restrictions arising from the territorial sovereignty of the coastal state.<sup>11</sup>

**Outside coastal waters**, ships may invoke the **principle of freedom of the high seas** (UNCLOS, Articles 58(1), 87(1)(a) and 90).<sup>12</sup> From this principle stems the **right to freedom of navigation**. The so-called Libyan coastguard therefore has no power to issue coordinating or other instructions to foreign vessels outside its coastal waters; in particular, it has no right to prevent the participation of other vessels in a maritime rescue.

## 2.2. Coordination of rescue operations on the high seas in an officially notified SAR region

The legal position is different if instructions to foreign maritime rescue vessels are issued by an officially notified national rescue coordination centre, as will be the case once Libya gives notice of its creation of an MRCC.

Under point 5.7.2 of the Annex to the SAR Convention, in the event of a search and rescue mission, the national rescue coordination centre is to **coordinate the rescue forces at the scene of the rescue operation**. The obligation to proceed to the rescue of persons in distress is assigned to an on-scene commander, either the master of a vessel designated by the rescue coordination centre or the master of the first vessel to arrive on the scene (the 'first come, first serve' principle), the purpose of this assignment being to ensure a successful rescue.

The reasoning behind the provisions of Article 98 of UNCLOS is to make the rescue of persons in distress an obligation for both private and state-owned vessels, and compliance therefore involves at least a temporary deviation from their chartered course. In practice, the maritime rescue obligation and the designation of the ship's master as on-scene commander impose an additional logistical and potentially financial burden on privately owned ships. Consequently, the master of the designated vessel must be enabled to resume the voyage on its original course as quickly as possible. The original purpose of this article of the SAR Convention, in other words, was to cater

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10 On the scope of police powers in the adjacent area, see the Bundestag Research Services overview of 19 June 2017 entitled '*Die völkerrechtliche Pflicht zur Seenotrettung: Verpflichtungen eines Küstenstaates nach dem Übereinkommen über Seenotrettung, das Refoulement-Verbot und die Strafverfolgung am Beispiel jüngster Vorfälle im Mittelmeer*', WD 2 - 3000 - 053/17, pp. 6-7.

11 See pages 5 *et seq.* of the Bundestag Research Services overview referred to in footnote 8.

12 *Ibid.*, pp. 7 *et seq.*

for situations in which masters of vessels wanted to be free to weigh anchor again as soon as possible.

By contrast, the situation in the Mediterranean is currently developing in such a way that private rescuers are finding themselves in competition with the Libyan coastguard in the realm of maritime rescue. The SAR Convention, however, does not cover situations in which two or more rival operators are vying for a 'prerogative' to carry out maritime rescues. The functioning of the SAR system ultimately depends on cooperation between the participating players; the Convention is not designed to defuse confrontational situations that may even involve the use of force.

Nevertheless, the SAR Convention does give rise to **cooperation obligations**. Foreign ships, for example, are bound as a matter of principle by the instructions of the competent MRCC.<sup>13</sup> For ships flying the German flag, this obligation is explicitly set out in the second sentence of section 2(1) of the Safety of Navigation Order:<sup>14</sup>

“Orders issued by the authorities that identify themselves to the master of the ship or to another person responsible for safety as the organisations charged pursuant to Chapter 2 of the Annex to the International Convention on Maritime Search and Rescue of 6 November 1979 (Federal Law Gazette 1982, Part II, p. 485) with the coordination of search and rescue operations in the event of distress calls shall be obeyed.”

Problems arise in situations in which two vessels, A and B, arrive on the scene simultaneously and the MRCC designates the master of ship A as on-scene commander, but the master of ship B considers this designation to be inadequate or in conflict with the aim of an effective maritime rescue, perhaps because ship A, the one designated by the MRCC, is operating with too little rescue equipment or does not have enough space to accommodate the number of persons in distress. In such cases, Article 98 of UNCLOS comes into play again, for if the master of ship B, who was not designated as the on-scene commander, cannot be certain that all of the persons in distress will be rescued with all possible speed, he remains duty-bound to engage in rescue efforts by virtue of Article 98 of UNCLOS. He must therefore render assistance.

Nothing in the SAR Convention can be interpreted as authorising the on-scene commander, that is to say the master of ship A, to use force to prevent the provision of assistance. Since any hostilities between rescue ships will always endanger the lives of those awaiting rescue, the on-scene commander's armed enforcement of MRCC orders is a breach of his obligations under Article 98 of UNCLOS.

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13 *Ibid.*, p. 8.

14 Safety of Navigation Order (*Verordnung über die Sicherung der Seefahrt*) of 27 July 1993, Federal Law Gazette 1993, Part I, p. 1417, as amended by the Order of 31 August 2017, Federal Law Gazette 2015, Part I, p. 1474.

### 3. The principle of *non-refoulement* in international law

The incident cited in the introduction raises the question whether ships infringe the principle of *non-refoulement* if they deliberately do not take migrants and refugees on board on the high seas and these persons consequently end up in a country with living standards which would preclude their expulsion or return to that country of deportation because of the principle of *non-refoulement*.<sup>15</sup>

#### 3.1. Substance of the *non-refoulement* principle

Under Article 33 of the Geneva Refugee Convention,<sup>16</sup> “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”. This is known as the principle of *non-refoulement*.<sup>17</sup> Besides Article 33 of the Geneva Refugee Convention, *non-refoulement* is explicitly guaranteed in Article 3 of the UN Convention against Torture (CAT) and in Article 19(2) of the EU Charter of Fundamental Rights. It is also implicit in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and in Article 3 of the European Convention on Human Rights (ECHR).<sup>18</sup>

It is the settled case law of the European Court of Human Rights (ECtHR) that the principle of *non-refoulement* prohibits expulsion or extradition to another state if there are sound reasons to assume that the alien would be exposed there – or in another state as a result of a further deportation or chain of deportations – to a serious risk of being subjected to **torture, inhuman treatment or punishment** or being **killed**.<sup>19</sup>

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15 See also Border Criminologies, ‘Italy Strikes Back Again: A Push-back’s Firsthand Account’ (15 December 2017), accessible at <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/12/italy-strikes> (last accessed on 6 February 2018).

16 Convention relating to the Status of Refugees, signed on 28 July 1951, entered into force on 22 April 1954, Federal Law Gazette 1953, Part II, p. 560.

17 See pages 10-11 of the Bundestag Research Services’ overview referred to in footnote 10.

18 Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, entered into force on 3 September 1953. Federal Law Gazette 1952, Part II, p. 1685.

19 Bundestag Research Services overview entitled ‘*Völkerrechtliche Aspekte der Rückführung von Flüchtlingen in die Türkei durch die Deutsche Marine im Rahmen der NATO-Seeraumüberwachungsoperation in der Ägäis*’ (15 March 2016), WD 2 - 3000 - 040/16, p. 5 with references.

The *non-refoulement* principle also applies to those areas where a **state of civil war** poses a specific risk to life and limb for the refugee.<sup>20</sup> In 2011, moreover, the ECtHR ruled that the return of refugees to Greece under the Dublin II Regulation was in breach of Article 3 ECHR **in so far as degrading conditions of detention and living conditions were found to obtain in the detention centres** there.<sup>21</sup>

In substance, however, the principle of *non-refoulement* **does not create any positive right to international protection**. In essence, it merely provides refugees with a right of continued abode, provided on the one hand that there are good reasons for assuming that one of the aforementioned risks exists in the country of repatriation and on the other hand that they cannot be expelled to a third country in which the danger of a chain *refoulement* to the country of repatriation exists.<sup>22</sup>

### 3.2. Applicability of the *non-refoulement* principle on the high seas

In general international law, the **extraterritorial application** of the *non-refoulement* principle remains controversial to some extent.<sup>23</sup> This applies especially to those cases in which migrants and refugees are hindered from entering the territory of a state so as to prevent the application of the *non-refoulement* principle.

In the early 1990s, the United States, for example, stopped Haitian ‘boat people’ on the high seas and sent them back to Haiti – an action known as a ‘push-back’. The U.S. Supreme Court did not regard this conduct as a breach of the *non-refoulement* principle, because the prohibition of *refoulement* applied only on U.S. territory and not on the high seas.<sup>24</sup> This view was challenged, *expressis verbis*, by the Inter-American Commission on Human Rights, which regarded the conduct as a violation of Article XXVII of the American Declaration on the Rights and Duties of

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20 ECtHR (Grand Chamber), *Ahmed v. Austria*, judgment of 17 December 1996, Application No 25964/94; Karpenstein, U., and Mayer, C. (eds), commentary on Article 3 ECHR in *EMRK-Kommentar* (2<sup>nd</sup> edition, Beck, Munich, 2015), point 24 with references.

21 ECtHR (Grand Chamber), *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09.

22 See the Bundestag Research Services overview referred to in footnote 10.

23 Kugelmann, D., ‘Refugees’ (2010), in Wolfrum, R. (ed.), *Max Planck Encyclopedia of Public International Law*, accessible at <http://opil.ouplaw.com/home/EPIL> (last accessed on 6 February 2018), point 33.

24 U.S. Supreme Court, *Sale v Haitian Centers Council*, 21 June 1993, 509 U.S. 155.

Man,<sup>25</sup> because the push-back of the boat people took place without first giving them an individual hearing and procedures for resolution of their claims to refugee status.<sup>26</sup>

In a leading judgment delivered in 2012 in the case of *Hirsi Jamaa and Others v. Italy*, the European Court of Human Rights ruled that the Member States of the ECHR are bound by the principle of *non-refoulement*, regardless of where sovereignty is exercised.<sup>27</sup> States Parties must ensure that all persons **falling under their authority or effective control** enjoy the rights enshrined in the Convention, even if sovereignty is not exercised within their national territory but **on board ships abroad or on the high seas**.<sup>28</sup> In terms of legal dogma, the ECtHR founded the extraterritorial applicability of the ECHR on the principle that a state, by taking persons on board one of its ships, exercises *de facto* sovereign control over them. This meant that Italian vessels on the high seas which took migrants and refugees on board were also bound by the provisions of the Convention.<sup>29</sup>

### 3.3. Infringing the *non-refoulement* principle by omission

The ECtHR, moreover, has not yet expressed an opinion on cases in which a ship sailing under the flag of a European State Party, having located migrants and refugees on the high seas, **does not take them on board at all** and so initiates or simply condones their *refoulement* to an unsafe third country. To some extent, it is true, the principle of *non-refoulement* is understood as a comprehensive obligation to protect migrants and refugees which requires states to take active protective measures.<sup>30</sup> The ECtHR itself, however, has never interpreted this obligation as such a broad

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25 American Declaration of the Rights and Duties of Man, (Organization of American States [OAS]) OAS Res XXX (1948), OEA/Ser.L/V/II.23 doc.21 rev.6 at 5 (1979), OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)), accessible at <http://hrlibrary.umn.edu/oasinstr/zoas2dec.htm> (last accessed on 21 February 2018).

26 Inter-American Commission on Human Rights, *Haitian Interdiction*, 13 March 1997, Report No 51/96, Case 10.675, points 156-157, 163 and 188.

27 ECtHR, *Hirsi Jamaa and Others v. Italy*, judgment of 23 February 2012, Application No 27765/09.

28 See page 6 of the Bundestag Research Services overview referred to in footnote 19.

29 If refugees and migrants are picked up and returned without an examination of their individual cases, this also constitutes a breach of the prohibition of collective expulsions, according to the case law of the ECtHR. In the specific case of *Hirsi Jamaa and Others v. Italy* (judgment of 23 February 2012, Application No 27765/09), the Court ruled that the prohibition of collective expulsions enshrined in Article 4 of Protocol No 4 to the ECHR was designed to prevent states from expelling particular aliens without examining their personal circumstances and giving them the opportunity to put arguments against the planned measure. See also pages 10-11 of the Bundestag Research Services overview referred to in footnote 28.

30 Concurring opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa and Others v. Italy* (judgment of 23 February 2012, Application No 27765/09; Weber, A., 'Menschenrechtlicher Schutz von Bootsflüchtlingen: Bedeutung des Straßburger *Hirsi-Jamaa*-Urteils für den Flüchtlingschutz', in *Zeitschrift für Ausländerrecht und Ausländerpolitik*, No 8/2012, pp. 265-270, esp. p. 269.



duty of protection. On this point, however, the case law of the Court on Article 3 ECHR has scope to develop in all directions.

If we consider the Geneva Refugee Convention, it becomes apparent that its wording, spirit and purpose probably substantiate the case for the applicability on the *non-refoulement* in cases where migrants and refugees are not taken on board, for the wording of Article 33(1) of that Convention expressly leaves it open whether the prohibition applies to both active and passive expulsions and returns:

“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 [...].”

Under this provision, it is not a question of how the expulsion or return is effected but solely of its **consequences**. If a person has a warranted fear of persecution in the country of destination, a state may not undertake or condone an expulsion or return carried out “**in any manner whatsoever**”, in other words neither by deed nor by omission.

The preamble to the Refugee Convention likewise implies that its provisions are to be interpreted broadly in order to lend the greatest possible effect to its underlying humanitarian principles:

“Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured *to assure refugees the widest possible exercise of these fundamental rights and freedoms*, [...].”

Lastly, the preliminary work on the Geneva Convention confirm the idea that the principle of *non-refoulement* covers both the actions and the omissions of a state if they **result** in the migrant or refugee facing the threat of persecution in the state of destination.<sup>31</sup> What counts, in other words, are the **prospects for the migrant or refugee**, who must be protected from being driven back “into the hands of his persecutor”.

“ [...] turning a refugee back to the frontier of the country where his life or liberty is threatened [...] *would be tantamount to delivering* him into the hands of his persecutor.”<sup>32</sup>

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31 See also UNHCR, ‘Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’, in *European Human Rights Law Review*, Issue 12, 2007, pp. 483 *et seq.*, esp. pp. 498-499); Biondi, P. *ibid.* (footnote 6), end of article.

32 UN Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons, Memorandum by the Secretary-General of 3 January 1950, UN Doc. E/AC.32/2, Article 24(3). See also Ad Hoc Committee on Statelessness and Related Problems, 10 February 1950, UN Doc. E/AC.32/SR.20, Article 24(3), points 54-55: (U.S. representative Mr Henkin): “54. [...] Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. 55. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned

The applicability of the principle of *non-refoulement*, however, does not ultimately give rise to a positive right to international protection or, conversely, to an obligation to take migrants and refugees aboard a vessel.

Under Article 98 of UNCLOS, an obligation to take migrants and refugees on board exists only if they are **in distress**. In general, people are said to be in distress if there are reasonable grounds for presuming that a vessel and its occupants and crew cannot be brought to safety without external assistance and will be lost at sea.<sup>33</sup> This would be the case, for example, if the vessel could no longer be manoeuvred, if its safety were endangered by overloading or if there were insufficient food, drinking water and essential medication to supply its passengers.<sup>34</sup> As a rule, however, a vessel is not in distress if it is damaged in such a way that does not directly endanger the vessel itself or the life and health of its passengers, for example if a sailing yacht suffered a broken mast but could still reach a harbour autonomously in calm weather.<sup>35</sup>

When assessing the situation, the master of the ship rendering assistance enjoys a **degree of discretion**.<sup>36</sup> Indications as to whether the occupants of a vessel are in distress can be found in Article 9(2)(f) of EU Regulation No 656/2014,<sup>37</sup> which lays down rules for maritime rescues in the

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back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.”

- 33 Bundestag Research Services overview entitled ‘*Rechtliche Konsequenzen einer Behinderung von Seenotrettern*’ of 11 November 2016, ref. WD 2 - 3000 - 138/16, p. 7; Bundestag Research Services overview entitled ‘*Internationale Seenotrettungsabkommen*’ of 28 November 2014, ref. WD 2 - 3000 - 215/14, p. 4; Proelss, A., commentary on Article 98 in *United Nations Convention on the Law of the Sea: A Commentary* (Beck, Munich, 2017), point 9; Rah, S., *Asylsuchende und Migranten auf See*, 2007, p. 102; von Brevern, H., and Bopp, J.M., ‘Seenotrettung von Flüchtlingen’, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 62, 2002, pp. 841-852, esp. p. 845.
- 34 Bundestag Research Services overview entitled ‘*Seenotrettung durch deutsche Kriegsschiffe*’ of 23 February 2016, ref. WD 2 - 3000 - 034/16, pp. 5-6; Noyes, J.E., ‘Ships in Distress’ (2007), in Wolfrum, R. (ed.), *Max Planck Encyclopedia of Public International Law*, accessible at <http://opil.ouplaw.com/home/EPIL> (last accessed on 6 February 2018), point 1.
- 35 Bundestag Research Services overview entitled ‘*Seenotrettung durch deutsche Kriegsschiffe*’ of 23 February 2016, ref. WD 2 - 3000 - 034/16, p. 6.
- 36 Nandan, S.N., and Rosenne, S., *United Nations Convention on the Law of the Sea 1982: A Commentary*, 1995, Vol. III, pp. 170 *et seq.*, esp. p. 175.
- 37 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189, p. 93.

course of Frontex operations.<sup>38</sup> According to that provision, the participating units are to take account of factors such as:

- the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination,
- the number of persons on board in relation to the type and condition of the vessel,
- the availability of necessary supplies such as fuel, water and food to reach a shore,
- the presence of qualified crew and command of the vessel,
- the availability and capability of safety, navigation and communication equipment,
- the presence of persons on board in urgent need of medical assistance,
- the presence of deceased persons on board,
- the presence of pregnant women or of children on board, and
- the weather and sea conditions, including weather and marine forecasts.

Since migrants and refugees are generally carried on overloaded, unseaworthy boats without a professional crew, the Office of the UN High Commissioner for Refugees (UNHCR) advocates a “humanitarian and precautionary approach”.<sup>39</sup> Where any doubt subsists, according to UNHCR, the spirit and purpose of the provisions of international law on maritime rescue make it imperative to avoid any loss of human life at sea.

#### 3.4. Infringing the *non-refoulement* principle by actively obstructing a boat carrying refugees and migrants

Obstructing a boat carrying refugees and migrants – for example by anchoring across its bows or by preventing the continuation of its voyage by any other means – until its passengers can be picked up by a vessel from an unsafe third country must surely be a breach of the *non-refoulement* principle. Unlike a mere omission, which may be the case when the vessel in distress is far away, actively blocking a craft carrying refugees and migrants must be classed as a **deed**. It makes no material difference whether a ship flying a European flag picks up refugees and migrants itself and docks in an unsafe third country or whether it blocks their craft for as long as it

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38 According to Article 1 of Regulation (EU) No 656/2014, the Regulation applies only to border surveillance operations carried out by Member States at their external sea borders in the context of operational cooperation coordinated by Frontex. This means that it does not provide a legal definition of maritime distress that is binding outside the EU. Be that as it may, the listed factors are a reflection of practical experience. Accordingly, there are no grounds for objection to their being cited internationally.

39 UNHCR, ‘General Legal Considerations: Search-and-Rescue Operations Involving Refugees and Migrants at Sea’, November 17, accessible at <http://www.refworld.org/pdfid/5a2e9efd4.pdf> (last accessed on 12 February 2018), p. 4, point 10.

takes the coastguard of another state to bring them on board and return them to an unsafe third country, for the ultimate result is the same.

3.5. Infringing the *non-refoulement* principle on the part of a national rescue coordination centre by designating the master of a Libyan vessel as the on-scene commander

Finally, it is a moot point whether the designation of the master of a Libyan coastguard vessel as the on-scene commander by a national MRCC which is subject to the ECHR, such as the coordination centre in Rome, constitutes an infringement of the *non-refoulement* principle. Since this designation is, in principle, a binding instruction within the meaning of the SAR Convention, it could be defined as the exercise of sovereign authority or at least effective control over the occupants of the boat to which the case law of the ECtHR adverts in *Hirsi Jamaa and Others v. Italy*. This question, however, has not yet been discussed by legal scholars or addressed in any decision of a supreme court.

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