IRREGULAR MIGRATION BY SEA, CONTROL OF MARITIME BORDERS, AND THE CO-EXISTENCE OF DIFFERENT NON-DEDICATED INTERNATIONAL REGIMES: CRITICAL REMARKS ON RECENT STATE PRACTICE AND ON THE ROLE OF THE EUROPEAN UNION

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1. In the recent years migration flows by sea towards southern EU Member States increased significantly[2]. Contrast actions by coastal States, both unilateral or coordinated through the Frontex agency, and the relevance of international rules concerning various subjects – law of the sea, safeguard of life at sea, human rights, *non refoulement* of persons in need of international protection – raises a set of problematic issues (for instance, intervention techniques, choice of disembarkation place, effective access to the procedure for international protection, room for

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[2] See (with further references) X. HINRICHS, 'Measures against smuggling of migrants at sea: a law of the sea related perspective', in *Revue belge de droit international* (2003), 413 ff., at 413-414, 421, 446-447; T. SPIJKERBOER, *Trends in the different legislations of the Member States concerning asylum in the EU: the human costs of border control*, study prepared on behalf of the Commission 'Civil Liberties, Justice and Home Affairs' of the European Parliament, July 2006, doc. IPOL/C/LIBE/FWC/2005-23-SC1, PE 378.25, at 1-2; UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Organized Crime and Irregular Migration from Africa to Europe*, July 2006 (http://www.unodc.org/pdf/research/Migration_Africa.pdf); L. COSLOVI, *Brevi note sull'immigrazione via mare in Italia e Spagna*, January 2007 (http://www.cespi.it/PDF/mig-mare.pdf); H. DE HAAS, *The myth of invasion. Irregular migration from West Africa to the Maghreb and the European Union*, IMI research report, October 2007; R. WEINZIERL - U. LISSON, *Border Management and Human Rights. A study of EU Law and the Law of the Sea*, German Institute for Human Rights, December 2007 (www.institut-fuer-menschenrechte.de), at 18.

international cooperation, etc.), about which the European Commission itself admitted the need to carry out an in-depth legal and technical analysis[3].

Recently, the main international organisations dealt with irregular migration and the need to contrast it, underling alternatively the threat for security and advancing a juxtaposition with terrorism and organised crime[4], or the need to conciliate control of borders and migration policy choices with respect of aliens' human rights and other international provisions[5].

The purpose of this paper is to scrutinize the main international provisions relevant to the topic, in order to check whether the resulting framework is coherent, or whether the effect is a contradiction or a tension among different rules, or between their abstract content and the practical enforcement.

By doing so, it will be assumed that migratory phenomena cannot be dealt with only with reference to the terminal stage of international movement of persons (immigration proper, *id est* the contact with a foreign country), and that, first of all, migrants are persons, entitled to the respect of their fundamental rights, no matter if in an irregular position according to the destination country's immigration law.

2. Under international customary law, one State may adopt a strict legislation on aliens' entry into its territory and subsequent stay[6]: the same goes with a group of States which coordinates their own policies through a regional international organisation such as the European Union.

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[3] See the Communication "Reinforcing the management of the European Union's Southern Maritime Borders", COM (2006) 733 of 30.11.2006; the subsequent *Commission Staff Working Document 'Study on the international law instruments in relation to illegal immigration by sea'*, SEC (2007) 691 of 15.5.2007 (hereinafter, the Commission Working Document).

[4] See the Berlin Declaration, signed on 25.3.2007 by the Presidency of the Council, the President of the Commission, the President of the European Parliament, on conclusion of the informal meeting of the Heads of State or Government, held in Berlin on 24 and 25 March 2007: see point II, where the undersigned undertake to jointly fight against "terrorism, organized crime and illegal immigration".

[5] See the amendments to the SOLAS and SAR Conventions, approved in 2004 by the International Maritime Organization (hereinafter, IMO), about which see *infra*, section 5; the UN GA Resolution of 23.2.2007, doc. A/RES/61/165, entitled "Protection of Migrants", in particular para. 6-7. See also the leaflet, co-authored in 2006 by IMO and the UN High Commissioner for Refugees (hereinafter, UNHCR), entitled "Rescue at sea. A guide to principles and practice as applied to migrants and refugees"(http://www.unhcr.org/publ/PUBL/450037d34.pdf).

[6] In legal literature, *ex multis*, see A. M. CALAMIA, *Ammissione e allontanamento degli stranieri*, Milano, 1980, 19 ff.; DOEHRING, 'Aliens, Admission', in R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. 1, Amsterdam, 1992, 107 ff.; MARTIN, 'The Authority and Responsibility of States', in ALEINIKOFF - CHETAIL (eds.), *Migration and International Legal Norms*, Den Haag, 2003, 31 ff.

Such right entails the ancillary right to adopt and enforce control measures on entry at the land, sea and air borders and of expulsion of persons deprived of a valid document for entry or stay. It must be verified whether international law sets some limits to the activities of borders control. In this context, the analysis will be confined to the issues concerning aliens' admission.

Some limits of a general character can be singled out: firstly, under the rule on territorial sovereignty, a destination country cannot perform a coercive activity over another State's territory, even when the latter is used for the organisation of irregular migration directed to its territory.

Secondly, human rights provisions reduce the choice of control means and enforcement activities. The protection of borders from undesired incoming flows cannot be performed with tools which entails a serious breach of human rights and the coercion may be used only if strictly necessary and in a proportional manner[7]. It may be added that it is widely accepted that a customary rule on *non refoulement* consolidated, stemming from important international treaties (such as the 1951 UN Geneva Convention on Refugees, *sub* art. 33, or the 1984 UN Torture Convention, *sub* art. 3) or implicitly deduced by general human rights treaties[8]: one State cannot remove an individual towards a country where he encounters a serious risk to loose his life or to be subjected to torture or other ill treatment. Additionally, if the concerned State is party to the Geneva Convention, a genuine possibility to ask for international protection shall be awarded to the individual, though in irregular position.

3. Specific issues arise when irregular migration by sea is at stake. Recent experience shows a significant variety of techniques: hiding of stowaways in ferries or cargos in regular service[9]; arrivals on board of old ships, in bad conditions and overloaded; use of small boats, completely unsuited for long journeys and usually devoted to short-term fishing; employment of speed rubber dinghies, and quick unload of migrants, often before reaching the dry land and with brutal

[7] On this subject, see A. CALIGIURI, 'La lutte contre l'immigration clandestine par mer: problèmes liés a l'exercice de la juridiction par les États côtiers', in R. CASADO RAIGÓN (ed.), *L'Europe et la mer (pêche, navigation et environnement marin)*, Bruxelles, 2005, 419 ff., at 432-433.

[8] See *infra*, section 7.

[9] This issue will not be treated here, the attention being focused on journeys and boats entirely devoted to irregular migration: for a discussion of problems raised by stowaways, see among others G. BASTID-BURDEAU, 'Migrations clandestines et droit de la mer', in AA.VV., *La mer et son droit. Melanges offerts a Laurent Lucchini et Jean-Pierre Quénedec*, 2003, 57 ff., at 60-64.

modalities if necessary in order to avoid interception by the coast guard[10]; lastly, a medium or large sized boat carries out the major part of the journey and stops at the limit of territorial waters, then disembarking migrants with light launches which go back and forth between the coast and the 'mother' boat[11].

Practice highlights the dangerous nature of such movements and the occurrence of tragic outcomes, about which precise statistics are inherently unavailable[12]. In addition, such flows are very often mixed, in the meaning that persons engaged in an attempt of irregular entry may be, at the same time, both ordinary migrants and individuals in need of international protection, either from the departure state or their own state, when different[13].

The issue at stake proves difficult, because an *ad hoc* international regulation does not exist and destination countries may find themselves in the uncomfortable position to tolerate arrivals without being able to effectively contrast them, if a genuine adherence to human rights standards is to be kept (and smugglers know it perfectly). An overview of applicable international rules, of different origin, confirms such impression: provisions on jurisdiction over maritime zones and on related coercive powers; obligations on safeguard of life at sea and on search and rescue of persons in distress; rules on human rights, among which the ones concerning the right to leave a country and the protection of persons in need of international protection, including refugees.

4. An analysis of the legal regime of migration by sea must start with the recall of the general provisions governing State jurisdiction over the sea. Under the United Nations Convention on the Law of the Sea (hereinafter, UNCLOS)[14], deemed *in subiecta materia* an authoritative codification of customary law, warship or other ship operated by the coastal State and used on

[10] From Albania and Montenegro to Italy in the nineties.

[11] See the cases described in IMO Circular MSC/Circ.896, Rev. 1, lastly updated on 12.6.2001.

[12] See, for instance, the data reported in SPIJKERBOER, *op. cit.*, at 6-7; WEINZIERL - LISSON, *op. cit.*, at 18. Additionally, see three sources, very different in nature but converging in driving attention to the same problem: the UNHCR website section on mixed migration flows (http://www.unhcr.org/cgi-bin/texis/vtx/asylum); the biannual circulars issued by the IMO Maritime Safety Committee on 'Unsafe practices associated with the trafficking or transport of illegal migrants by sea' (http://www.imo.org); the data reported on the website Fortress Europea (http://fortresseurope.blogspot.com/2006/02/immigrants-dead-at-frontiers-of-europe_16.html).

[13] Among the various sources on this subject, reference can be made to the web page http://www.unhcr.org/cgi-bin/texis/vtx/asylum and to the special issue of the UNHCR review 'Refugee', entitled *Refugee or Migrant. Why It Matters*, 2007, issue 4, No. 148.

[14] Adopted at Montego Bay on 10.12.1982, entered into force on 12.2.1995.

government non-commercial service may exercise their coercive powers on private ships, without any limitation concerning nationality, only when they are placed in internal waters or in territorial waters (12 nautical miles from the base line). In that context, the coastal State may carry out visits, inspections, seizure of cargo and arrest of crew or other individuals violating national law, both on immigration or other subjects, exception made for facts purely internal to the ship[15].

It is clear, however, that when a ship carrying illegal migrants has entered territorial waters being directed towards internal waters or the coast, the State does not have many options: taking in custody such persons, in order to evaluate their position with a view of repatriation or affording some form of international protection; ordering a change of route, provided that the ship is properly manned or equipped for carrying passengers on international voyages. The second option is rarely realistic, because the ship is often devoid of skilled crew or is in bad conditions, so as the passengers may be in need of immediate humanitarian assistance: in such conditions, an immediate pushing back out of the territorial waters might arise an issue of respect of human rights provisions (see *infra*, sections 5 and 7).

More broadly, in practical terms the arrest of the professional crew, if any, and the seizure of the ships are not able to stop the phenomenon of irregular migration by sea. The right of hot pursuit beyond territorial waters does not change that much the terms of the problem.

It may be asked whether an intervention by the coastal State might be put in practice beyond the territorial waters, in order to prevent at the sources the migratory routes or to challenge them with more effectiveness.

Any State, under Article 33 UNCLOS, is entitled to establish a "contiguous zone", that is to expand up to a limit of nautical 24 miles, with respect of ship of any nationality, its powers of prevention and repression of violations of its immigrations laws. It must be added, however, that such solution does not fundamentally alter the framework already described for the territorial waters. Moreover, the main problem lies in the action beyond the contiguous zone, if any: the destination State cannot exert any coercive powers over ships located in another State's territorial waters, while in the high seas a control action can be carried out only towards ship showing its

[15] The right to innocent passage may not be claimed when the foreign ship is engaged in an activity aimed at disembarking migrants in violation of the coastal state immigration law, according to Article 19, para. 2 letter g UNCLOS: see, with further details, G. BASTID-BURDEAU, 'Migrations clandestines et droit de la mer', cit., at 62; A. CALIGIURI, 'La lutte', cit., at 421-422: N. RONZITTI, 'Coastal State Jurisdiction over Refugees and Migrants at Sea', in N. ANDO *et al*. (eds.), *Liber Amicorum Judge Shigeru Oda*, Den Haag, 2002, 1271 ff., at 1272-1273.

own flag. A limited right of visit in high sea on ships not flying national flag is allowed to warships in the cases spelled in Article 110 UNCLOS, among which here can be recalled the cases where the has reasonable grounds to suspect that a ship in engaged in slaves trafficking, is without nationality, or though flying a foreign flag or refusing to show its flag is, in reality, of the same nationality as the State concerned.

In the first case, the warship can free the slaves and host them on board, but cannot seize the ship or arrest the crew, unless the ship flies the national flag: it must be pointed out that it is not probable that the necessary conditions are met in order to qualify migrants smuggling as slavery.

In the other cases, where no flag is showed or the visit confirms the suspects that the vessel is of the same nationality of the warship, the latter may exercise its jurisdiction on the former. Often, ships employed in irregular migration belongs to the category of absence of nationality[16]. From a practical point of view, however, the warship could find difficult to demonstrate that such ship was really directed towards its coasts and would have breached its immigration laws. When such intention can be deemed evident, a coercive action may take the form of the seizure and escort in a port of the acting State, or of the order to change route, with the additional possibility of escorting the vessel. However, it should be noted that a need of immediate assistance for the individuals, often in critical conditions (see *infra*, section 5), could render impracticable this solution. Besides, monitoring and, if this is the case, escorting back boats used for purposes of irregular migration may exceed the capacities of the prospective destination state or impose on it an excessive financial burden.

Where the ship flies the flag of another State, the destination State need the flag State's consent in order to adopt coercive measures influencing the freedom of navigation, including techniques of forced diversion of the route: absent a dedicated treaty framework, the consent must be obtained each time, with evident operational difficulties. Alternatively, the warship may monitor the behaviour of the ship, being able to intervene more robustly only if it is entering its territorial waters or its contiguous zone (or in case of danger for the safety of the ship or of the passengers, see *infra*, section 5): however, this is a costly strategy too.

On this aspect, the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the Palermo Convention against Transnational Organized Crime (hereinafter, the

[16] As confirmed in the Commission Working Document, cit., at 19.

Palermo Protocol)[17], does not alter the picture, given that its Article 8, para 2, devoted to enforcement activities in high seas, confirms the need for the acting state to request and obtain the authorization of the flag state in order to take appropriate measures against the vessel concerned (boarding, searching, arrest of crew or seizure of the ship)[18].

An ideal solution to these problems is difficult to envisage: could a destination country expand in the space its control activity and deploy its warships out of the territorial waters of the departure States in order to discourage the use of some routes? It should be taken into account, in addition to the problems already described with regard to the exercise of jurisdiction and the evidentiary aspects, that a tension with the coastal State might arise absent a bilateral treaty regulating such actions. The departure State's cooperation is indispensable in order to give continuity to the preventive and repressive action and only an effective diplomatic action and the conclusion of dedicated and detailed agreements can ensure results[19]. Notwithstanding, negotiations in this context produces meaningful political and economic costs, given the scarce interest of sending or transit countries in a spontaneous collaboration with destination countries: moreover, even when an agreement is finalized, its practical enforcement is conditioned by wide political considerations and perspectives which have nothing to see with migrants' situation, especially when transit countries are involved[20]. Apart from these policy considerations, as

[17] Adopted in December 2000, entered into force on 28.1.2004.

[18] For further analysis, see RONZITTI, 'Coastal State Jurisdiction', cit., 1282-1284; HINRICHS, *op. cit.*, 429 ff.; L. SICO, 'Contrasto internazionale all'immigrazione clandestina', in U. LEANZA (ed.), *Le migrazioni. Una sfida per il diritto internazionale, comunitario e interno*, Napoli, 2005, 213 ff., at 220 ff.

The only relevant addition to applicable law may be seen in the obligation for the requested State, set forth in para. 4, to respond expeditiously. It cannot be shared, for this reason, the opinion expressed in the Commission's Working Document, at 24, where it is incidentally stated that the flag state is, as a matter of principle, under the duty to positively respond to the request for authorization.

[19] See, for instance, the agreements between Albania and Italy of 25.3.1997 and 2.4.1997, in G.U. 15.7.1997, No. 163, s.o. For a commentary, see F. CAFFIO, 'L'accordo tra Italia e Albania per il controllo ed il contenimento in mare degli espatri clandestini', in *Rivista marittima*, 1997, No. 6, 109 ff.; T. SCOVAZZI, 'Le norme di diritto internazionale sull'immigrazione illegale via mare con particolare riferimento ai rapporti tra Albania e Italia', in A. DE GUTTRY - F. PAGANI (eds.), *La crisi albanese del 1997*, Milano, 1999, 239 ff.

On 29.12.2007, Italy signed a Cooperation Protocol with Libya, providing for joint patrolling of the Libyan territorial waters and of the adjacent international waters through six vessels (temporarily put at the Libya's disposal by the Italian 'Guardia di Finanza') with mixed crew and under a unified command directed by a Libyan official, who is assisted by an Italian deputy director.

As for the agreements stipulated by Spain with Morocco and the subsequent practice, see M. ACOSTA SÁNCHEZ - A. DEL VALLE GÁLVEZ, 'La crisis de los cayucos. La Agencia europea de fronteras-Frontex y el control marítimo de la inmigración clandestina', in *Tiempo de paz*, 2006, No. 83, 19 ff.

[20] See P. CUTTITTA, 'I confini dell'Europa a Sud del Mediterraneo. Strumenti e incentivi per l'esternalizzazione dei controlli', in P. CUTTITTA - F. VASSALLO PALEOLOGO (eds.), *Migrazioni, frontiere, diritti*, Napoli, 2006, 13 ff., at 16 ff.

already highlighted in incidental way, the issue of jurisdiction must be accompanied by the verification of the impact of coercive measures on other values protected by international law (life at sea, human rights: see *infra*, sections 5 to 7).

All this being said, it must be remembered that, in any case where it is allowed by the law of the sea, use of coercion must be necessary in the light of the relevant circumstances and conform to the proportionality criterion, keeping in mind the need to safeguard human life and to respect elementary principles of humanity in the treatment of individuals[21]. In practical terms, the ship's situation, weather conditions and the conduct of who manes the ship may render extremely risky any operation of interception, boarding, or rescue[22].

5. Rules on exercise of jurisdiction in maritime areas are interlinked with provisions on rescue of persons in danger. The old custom to provide comfort and take on board shipwrecked and persons whose life is at risk found in the last decades wide recognition in positive international law. IMO devoted much attention to this issue, as witnessed by several treaties and related instruments.

The same UNCLOS treats this topic in a general character provision, stating that 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. In addition, every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding

[21] See, on this subject, International Tribunal for the Law of the Sea, judgement, *M/V «SAIGA» (No. 2), Saint Vincent and the Grenadines v. Guinea*, para. 155-156; E. CANNIZZARO, 'La tutela della sfera territoriale da intrusioni non autorizzate: in margine al caso *Sibilla*, in *Rivista dir. internazionale*, 1997, 421 ff.; RONZITTI, 'Coastal State Jurisdiction', cit., at 1279-1280.

[22] As confirmed by the unfortunate case of the collision between the Italian Navy unit 'Sibilla' and the Albanese ship 'Kater I Rades' (a former State ship, subsequently employed for irregular migration by private agents), which took place on 28.3.1997: see CANNIZZARO, *La tutela*, *loc. cit.*; CAFFIO, 'L'Italia di fronte', cit., at 7-9.

Other incidents are reported in WEINZIERL - LISSON, *op. cit.*, at 20.

safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose (see Article 98, para. 2).

A more detailed regulation of those issues can be found however in two older IMO's Conventions, adopted in the seventies and amended on various occasions. The International Convention for the safeguard of the life at sea, adopted in London on 1.11.1974 (hereinafter, SOLAS Convention)[23], provides that the master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so[24]; besides, the Convention requires each Contracting Government to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for rescue of persons in distress at sea around its coast. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers, and shall, so far as possible, provide adequate means of locating and rescuing such persons[25].

The International Convention on Search and Rescue at Sea, adopted in Hamburg on 27.4.1979 (hereinafter, SAR Convention)[26] reiterates the duty to set up SAR areas and the related rapid intervention services and adds that Parties shall ensure that assistance be provided to any person in distress at sea, doing it regardless of the nationality or status of such a person or the circumstances in which the person is found[27], and that an operation to retrieve persons in distress provide for their initial medical treatment or other needs, and deliver them to a place of safety[28].

Against this background, it arises that both the master of a vessel (no matter if official or private) and the states (especially the one territorially competent for the relevant SAR region) must comply with several obligations, occasionally of a certain degree of intensity. Hence, it comes out that a state acting in the high seas with a view to protect its maritime borders may be compelled to carry out an activity of first assistance and taking on board of irregular migrants, not

[23] Entered into force on 25.5.1980, 158 states parties as of 31.5.2007.

[24] See Chapter V, reg. 33, par. 1.

[25] See Chapter V, reg. 7.

[26] Entered into force on 22.6.1985, 91 states parties as of 31.5.2007.

[27] Chapter 2.1.10.

[28] Chapter 1.3.2.

being allowed to ignore their actual conditions and need of rescue[29]. It is worth noting that intervention in favour of a vessel in need of rescue is a duty and is not made conditional on its nationality.

The main gap of the above mentioned international rules lies in the lack of precise criteria for the indication of the State which must allow disembarkation of the rescued persons after the first emergency intervention. The problems is particularly serious for private ships, which may be subjected to economic losses and complications given that it is not always easy to prosecute the original route. Practice shows that an activity of rescue at sea by private vessels may be followed by the refusal coming from the nearest State or of the State territorially competent for the relevant SAR zone to accept the disembarkation of the migrants[30], or by the difficulty for the master to convince such authorities not to be involved in smuggling[31]. Sometimes, the mess is total, as the recent case concerning the Maltese fishing boat 'Budafel' shows[32].

In order to solve such problems and avoid the risk that commercial ships refrain from providing the due rescue or that warships have no other choice, due to diplomatic disagreement with the nearest States, than to conduct the migrants towards their own coasts, IMO adopted on 2004 some amendments to SOLAS and SAR, aimed at strengthening the search and rescue system and to minimize the inconveniences for the ships carrying out an intervention[33].

Article 4.1-1 SOLAS, as amended, states that «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'

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[29] Additionally, see the cases described by HINRICHS, *op. cit.*, at 445-447.

[30] See the famous case of the Norwegian boat "Tampa", occurred in 2001, on which see M.N. FORNARI, 'Soccorso in mare di profughi e diritto di asilo: questioni di diritto internazionale sollevate dalle vicende della nave Tampa', in *La Comunità Internazionale* (2002), 61 ff.; P. MATHEW, 'Australian Refugee Protection in the Wake of the *Tampa*', in *American Journal of Int. Law* (2002), 661 ff.; M. WHITE, 'M/V Tampa incident and shipping obligations of a coastal State', in *Indian Journal of Int. Law* (2003), 314 ff. More recently, similar cases took place in the waters between Malta and Libya, involving Spanish fishing boats ('Francisco Catilina' in July 2006; 'Monfalcó' in May 2007) not allowed to disembark neither in Malta nor in Libya migrants rescued in a situation of clear distress: some days later, migrants were accepted by Spain and other European countries (see UNHCR, *Press Briefing*, 1.6.2007; *El Pais*, 4.6.2007). For further details on other cases, see MILTNER, *op. cit.*, at 87-89.

[31] See the Cap Anamur case (2004) and the indictment of some Tunisian fishermen (2007), both concerning Italy.

[32] See the account given by various sources: UNHCR, *Press Briefing*, 1.6.2007; *La Repubblica*, 27.5.2007 e 29.5.2007; the report from the Italian NGO Consiglio italiano rifugiati, presented during an EP public hearing (http://www.europarl.europa.eu/hearings/20070703/libe/cir_report_en.pdf); the version from the Maltese government, included in a document presented in the same hearing (http://www.europarl.europa.eu/hearings/20070703/libe/caruana_en.pdf).

[33] See IMO Maritime Safety Committee Resolutions MSC.153 (78) e MSC.155 (78), adopted on 20.5.2004.

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 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». Article 3.1.9 SAR, as amended, is drafted in almost identical terms[34].

Such amendments entered into force on 1 July 2006, according to the simplified revision mechanism of the mentioned conventions. Problems are not disappeared, however: some States did not accept the amendments (Malta among them), thus not being bound by them; the full matching of the purpose of the amendments requires both the declaration of SAR areas and the correct management of them by States, both the conclusion of bilateral and regional agreements in areas where the immigration unsafe practices are more frequent or probable.

From this point of view, different situations may be detected. Focusing on the Mediterranean Basin, a provisional plan for was drafted by IMO in the Conference of Valencia held in 1997, as a starting point for the adoption on national measures and the drafting of more specific bilateral and regional agreements. In the Ionic and Adriatic zone, a treaty based regime, rather satisfactory, was defined by the interested States[35]. A problematic area – delimited by the coasts

[34] «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 cooperation 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».

The IMO Guidelines on the treatment of persons rescued at sea, adopted by Committee on Maritime Safety together with the mentioned amendments by Resolution MSC.167 (78), defines place a safety a location where rescue operations are considered to terminate and that an assisting ship could only temporarily considered a place of safety (see para. 6.12 to 6.14).

[35] See M. GESTRI, 'I rapporti di vicinato marittimo tra l'Italia e gli Stati nati dalla dissoluzione della Iugoslavia', in N. RONZITTI (ed.), *I rapporti di vicinato dell'Italia con Croazia, Serbia-Montenegro e Slovenia*, Roma, 2005, 177 ff., at 207-211; A. TASSI, 'Le zone di ricerca e soccorso in Mediterraneo', in *Rivista marittima* (2007), No. 4, 31 ff., at 33.

of Italy, Malta, and Libya – rises various problems. Both Malta[36] and Italy[37] established a SAR zone, partially overlapping. As far as Libya is concerned, it is not sure that a formal establishment of the SAR followed the provisional IMO plan[38], but in any case it is certain that it has been raised the issue of the unsatisfactory fulfilment of the activity of search and rescue and of the insufficient cooperation with other States involved in SAR operations in the waters included in the Libyan SAR region or otherwise proximate[39].

An additional remark is due: as a matter of law, a near coastal State is not obliged to accept the disembarkation of persons rescued out of its SAR zone[40], whilst the one competent for the relevant SAR zone bears an overall responsibility for coordinating interventions but is not under a strict duty to receive itself the rescued persons, notwithstanding the above mentioned amendments to SOLAS and SAR[41]: thus, such State – as a consequence of its inertia or limited will to fulfil its duty to handle the situation, due to internal difficulties or opportunity considerations – may discharge upon other States and the intervening ship the burden of the SAR

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[36] See the map and the information reported at http://www.sarmalta.gov.mt/sar_in_Malta.htm and in IMO Circular SAR.8/Circ.1/Corr.3 of 20-10-2005, *Global Sar Plan Containing Information on The Current Availability of Sar Services*, Annex 2 (http://www.imo.org/includes/blastDataOnly.asp/data_id%3D16608/1-Corr-3.pdf), at 25 .

[37] See the map annexed to Presidential Decree (D.P.R.) No. 660/1994 and in IMO Circular SAR.8/Circ.1/Corr.5 of 23.4.2007, *Global Sar Plan Containing Information on The Current Availability of Sar Services* (http://www.imo.org/includes/blastDataOnly.asp/data_id%3D18744/1-Corr-5.pdf), at 26.

[38] See the Commission Working Document, cit., at 5, note 4. Besides, the relevant IMO Circulars on '*Global Sar Plan Containing Information on The Current Availability of Sar Services*' do not report any information regarding Libya SAR zone and services, notwithstanding Libya's quality of contracting States of the SAR Convention.

It should be noted, however, that the Maltese Government often refers to the Libyan SAR area when deals with distress situations involving disembarkation issues of migrants rescued there (see the documents quoted *infra*, note 40).

[39] See the Commission Working Document, cit., at 5 and 33, where it is stated that 'the waters neighbouring Libya are not subject to SAR patrols' and that there are still some areas where SAR services are not provided at the moment by the State mainly responsible (for instance in the waters around Libya).

[40] This is the position of the Maltese Government with respect to the individuals rescued in the Libyan SAR region: see the letter of 8.6.2007 of the Malta Permanent Representative to the EU, addressed to the German Permanent Representative to the EU, in his capacity as Chairman of CoRePer (available at http://www.europarl.europa.eu/hearings/20070703/libe/caruana_en.pdf); the statement of the Maltese Minister for justice and home affairs, delivered at the JHA Council meeting of 12.6.2007 (available at http://www.doi.gov.mt/en/press_releases/2007/06/pr0870.asp).

[41] The language employed in the amendments would have been different if a strict duty to receive rescued persons were to be placed upon the said state. A different reading of the 2004 amendments is proposed by T. GAMMELTOFT-HANSEN, *The Refugee, The Sovereign and The Sea: EU Interdiction Policies in The Mediterranean***,** DIIS Working Paper no 2008/6, at 25-27: in his view, the amendments oblige the State responsible for the relevant SAR zone to allow disembarkation. A similar stand seems proposed in the House of Lords European Union Committee's Ninth Report on the European Union, devoted to Frontex, 2008 (hereinafter, House of Lords Ninth Report), para 109.

A more nuanced position is expressed by WEINZIERL - LISSON, *op. cit.*, at 40 (with further references).

activities[42]. Here we are faced with a mix of legal and political issues: an EU based regulation of such issue will certainly prove useful, even because it has rightly been pointed out that reluctance of Member states in providing patrol boats in the joint operations coordinated by Frontex would be due to the risk that the country providing the boats will remain responsible for migrants rescued or intercepted at sea[43].

It is worth noting that in the context of rescue operations the flag rule does not apply and that intervention is due with indifference regard the status of the vessel and of the persons in need of assistance. It is very common that such boats are with no nationality, but in the case they show a genuine flag, the intervening state vessel could gain the chance to take a proactive contact with the migrants without the need to obtain the consent of the flag state: this leads some commentators to underline the risk that rescue operations may hide interception measures, with the prospective risk that they are used to shift the relevant responsibility for disembarkation and protection to the State competent for the interested SAR region, according to the 2004 amendments to the SAR Convention[44]. However, such shift is in reality more evanescent than in appearance, as explained above. It seems to me that the problem is rather the contrary: any interception effort by warships or State vessels is very often turned into a SAR operation, given the conditions of the boat encountered and the tactics employed by smuggler and the migrants themselves, with the consequence for the intervening State to be compelled to take on board persons in distress. To put it differently, states are not so willing to declare a SAR event, given that the common consequence is that they will have to accept responsibility for the rescued persons, unless, once given a first aid to the boat, this is seaworthy and thus may be compelled to go back or to significantly change its route: thus, applying the SAR regime does not usually give particular advantages to States willing to reduce undesired migratory flows.

6. Article 12 of the UN Covenant of Civil and Political Rights (hereinafter, the Pact)[45] recognizes in para. 2 the individual right to leave any country, including one's own, while para. 3

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[42] A similar perplexity is expressed by MILTNER, *op. cit.*, at 109.

[43] See D. LUTTERBECK, *Coping with Europe's Boat People. Trends and Policy Dilemmas in Controlling the EU's Mediterranean Borders*, ISPI Policy Brief No. 76 (http://www.ispionline.it/it/documents/PB_76_2008.pdf), February 2008, at 5.

[44] See MILTNER, *op. cit.*, at 111-113; GAMMELTOFT-HANSEN, *op. cit.*, at 23-27.

[45] Adopted in New York on 16.12.1966, entered into force on 23.3.1976.

specifies that such rights may be subjected to restrictions which are provided in the law and necessary in order to safeguard national security, public order, public health and morals, others' rights and interests. A non absolute right is thus enshrined, whose limitation must be rooted in legal procedures and comply with requirements of strict interpretation (listed values; necessity and proportionality[46] of the restriction). An analogous rights is affirmed in other international instruments, such as Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 10 of the Convention on the Rights of the Child, Article 13 of the Universal Declaration of Human Rights, Article 2 of Protocol No. 4 to the European Convention on Human Rights[47], and Article 22 of the Inter-American Convention on Human Right[48].

Here, it may be raised the question whether controls by origin and destination States, aimed at preventing or reducing irregular migration towards other countries, should be construed as restrictions on such right[49]. Known cases examined in international practice concerned the refusal to issue or renew a passport (deemed as a *condicio sine qua non* for the exercise of the right), the imposition of an exit visa or other restrictions on political dissidents, on individuals under military service obligations or criminal proceedings, on persons involved in terrorist activities and holders of state secrets[50].

Focusing instead on the specific topic here investigated, it seems necessary to draw some distinctions.

As far as unilateral actions by the destination State are concerned, it may be remembered that the right to leave a country does not include the right to enter another State at the individual's discretion and that the destination State enjoys a wide discretion with regard to modalities and circumstance for entry into its territory: it may be thus excluded that a refusal to entry the

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[46] As for the proportionality criterion, see General Comment No. 27 of the Human Rights Committee, CCPR/C/21/Rev.1/Add.9, 2.11.1999, para. 14-15; the judgement 31.8.2004 of the Inter-American Court of Human Rights, *Ricardo Canese c. Paraguay*, para. 123 e 132-135.

[47] Adopted in Strasbourg on 16.9.1963, entered into force on 2.5.1968.

[48] Adopted in San José de Costa Rica on 22.11.1969, entered into force on 18.7.1978.

[49] The issue is mentioned, without any further deepening, in the Commission Working Document, cit., at 32, para 5.1.4.

[50] Cfr. H. HANNUM, *The Right to Leave and Return in International Law and Practice*, Dordrecht - Boston - Lancaster, 1987; M. NOWAK, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, Kehl - Strasbourg - Arlington, 1993, 204 ff.; S. JOSEPH *et al.*, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, Oxford, 2000, 248 ff.; C. HARVEY - R.P. BARNIDGE, *The right to leave one's own country under international law*, September 2005, available at http://www.gcim.org (and subsequently published with the title 'Human Rights, Free Movement, and the Right to Leave in International Law' in *International Journal of Refugee Law*, 2007, 1 ff.), 4-10.

territory or the territorial waters represents a *per se* breach of the individual's right to leave any country, be it his own or a transit one. Nevertheless, where an unilateral action is performed deeply in space, for instance carrying out interception and diversion in high seas, eventually at the limit of the origin State's territorial waters, the doubts may be raised whether a restriction on right to leave exists and whether it meets the necessary requirements. As for the first aspect, it is plain that an action directed at prevent the abandonment of the one State's territorial waters impinges on the practical exercise of the right to leave such country. As a consequence, the fulfilment of the conditions above described must be verified. The purpose to protect one of the listed national interests seems to find a correspondence if we think that the need to prevent violations of its own immigration law may be placed under the public order, while the necessity and proportionality requires a more careful consideration. Necessity should be tested against a reasonable nexus between the restrictive measures and the safeguard of the national interest at stake: it is not sure that the beginning of a route will produce in any case an attempt of irregular entry on the acting State. Only the relevant circumstances (geographical aspects; features of the ship or means employed for the route) may offer guidance. Under those conditions, the proportionality test could be met too.

A different approach must be followed when taking into consideration the country from which the individual plans to move. Notwithstanding a not full uniformity of views about the nature of the reasons which may be justify a restriction by the departure State[51], it seems sound to place an interference in the context of the public order, due to the undetermined content of such ground[52]. In particular, it might be affirmed that the public order of the departure State may include the need to ensure an ordered exit from the national territory (even to control if persons not allowed to leave the country are violating the ban imposed on them); the interest to prevent dangerous activities for the migrants' life and to combat the criminal organisations exploiting the migrants

[51] During the cold war it has been underlined that the physiological involvement of at least two states and the presence of considerable social and economic implications for the departure states, due to the exercise of the right to leave, lead many states to elaborate a restricted conception of such right, under which limitations are justified if introduced with the purpose to prevent brain drain or uncontrolled movements able to harm good relations with other states (to this view, exceptions listed in the Covenant would receive a wide interpretation): see A. CASSESE, 'International protection of the right to leave and return', in AA.VV., *Studi in onore di Manlio Udina*, t. I, Milano, 1975, 219 ff., at 221-222. More recently, other commentators, although taking note of the stand of few states invoking a wide reading of possible derogations, have underlined the need of a strict interpretation of grounds for exception, thus attaching great value to the monitoring and interpretative activity by the Human Rights Committee: see HANNUM, *op. cit.*, at 121-127; NOWAK, *op. cit.*, at 213-214; HARVEY - BARNIDGE, *op. cit.*, at 4-10.

[52] The reference to rights of other (i.e. another state) would not be pertinent, given that it is meant as referable only to individuals: see, for instance, NOWAK, *op. cit.*, at 216-217.

(often powerful and dangerous for the same state institutions); the will to prevent a subsequent and costly activity of readmission of nationals rejected at the border of the destination country, or the spread of tensions with neighbouring states which harms good international relations. Notwithstanding the doubts raised by a leading authority[53], I share the view of who argued from the conclusion of the UN Palermo Protocol on smuggling the opinion of states that the migrants may not leave their own states by any means of their choosing and it is lawful to adopt restrictive measures aimed at prevent irregular emigration, provided that the measures adopted must not impinge on the very essence of the right to leave[54].

It seems that exit controls on the borders, aimed at checking the holding of valid document for entry or stay in the destination country are lawful, so as control measures on land, sea and air spaces, carried out with the purpose to prevent irregular migration towards other states[55].

All this being said, it is time now to drive the attention to the conclusion of agreements between destination and origin or transit countries. Provided that the criteria above spelled are met and that the agreements are aimed at cooperating in the management of legitimate control activities[56], it seems possible to conclude such arrangements do not violate *per se* the individual's right to leave a country, his own included. To this respect, the Palermo Protocol acts a sort of framework treaty, while at the bilateral level states may undertake more specific and operational engagements. This is the context where it appears necessary a check of compatibility with the requirements above enumerated[57].

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[53] See NOWAK, *op. cit.*, at 214.

[54] See HARVEY - BARNIDGE, *op. cit.*, at 12. As of 30.6.2007, states parties to the Protocol are 107.

A different question is whether the departure state is under the duty to prevent smuggling directed towards other states: for an argument based upon several obligations of due diligence arising from the Palermo protocol and from the customary rule which prescribes to respect other states' territorial sovereignty, see G. PALMISANO, '*Smuggling* via mare e responsabilità internazionale degli Stati', in U. LEANZA (a cura di), *Le migrazioni. Una sfida per il diritto internazionale, comunitario e interno*, Napoli, 2005, 217 ff., at 220 ff.

[55] It is worth to remember, however, that Article 5 Palermo Protocol does not request states to introduce criminal liability for the smuggled migrant, given that is states that "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct" proscribed in the same Protocol: it follows that states acting against irregular migration are not requested by international law to impose criminal sanctions on migrants.

[56] The following contents are conceivable, among others: dispatching of liason officers; conducting joint patrol operations in international or in territorial waters; accelerated readmission procedures.

[57] See, for instance, the agreement quoted *supra*, note 19.

Nevertheless, unilateral actions and cooperation agreements, which are coherent with the right to leave, must be tested against other international rules protecting human rights too: time has come now to turn the attention to them.

7. Control over irregular migration by sea is frequently put into relation with the respect of refugee law and, more broadly, with the relevance of the *non refoulement* principle. In order to settle the question, it must be preliminarily pointed out that, according to the evolution of international law, a distinction may be drawn between the implications of the duty to respect the *non refoulement* principle and the enforcement of the 1951 Refugee Convention proper.

As for the former, it may be stated that a customary rule evolved according to which a state cannot send, in any way, an individual towards a territory of a state where he risks his life or to be subjected to torture or to a on inhuman or degrading treatment. Such principle was firstly enshrined in Article 33 of the Refugee Convention[58] and found a progressive consolidation thanks to the drafting of other international treaties (such as the 1984 UN Torture Convention, under Article 3) and to the established interpretation of protective rules couched in general terms (see the Covenant, under Articles 6 and 7; the ECHR, under Articles 2 and 3[59]): nowadays, we are faced with a guarantee of a general character, functional to the protection of core human rights (life, physical integrity, basic dignity), which protects from the actual deportation towards places where a serious risk of death or torture is present and which is provided to the benefit to any individual, even not matching the definition of refugee or asylum seeker[60]. Additionally, the rooting of the customary notion of *non refoulement* in the human rights treaties transforms it in a

[58] It must be remembered that, in such a context, the guarantee afforded presents some peculiar features: on one side, it concerns only individuals qualified as refugees; on the other, protects from the risk to be persecuted (for one of the reasons spelled in Article 1.F Refugee Convention), i.e. to suffer prejudices which could be other than the loss of life or the suffering of torture.

[59] See, for instance, European Court of Human Rights, judgement 20.3.1991, *Cruz Varas v. Sweden*; 15.11.1996, *Chalal v. United Kingdom*; 29.4.1997, *HLR c. France*. For a case concerning extradition and the risk of breach of Article 2, see the judgement 12.4.2005, *Chamaiev and others v. Georgia and Russia*.

In legal literature, see among others L. CAFLISCH, 'La Convention européenne des droits de l'homme et les étrangers', in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, vol. III, Napoli, 2005, 1857 ff., at 1859-1865; WEINZIERL - LISSON, *op. cit.*, at 46-48.

[60] See, among others, G.S. GOODWIN-GILL, *The Refugee in International Law*, Oxford, 1998, at 167-171; MILTNER, *op. cit.*, at 96-97; 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*, January 2007, at 7-8; WEINZIERL - LISSON, *op. cit.*, at 45. To the same view, see the Commission Working Document, cit., at 11-12.

For a less recent reasoning, based upon the prohibition of complicity in the commission of wrongful act by another state, see also CALAMIA, *op. cit.*, 36-39.

principle which does not admit exceptions on ground of public order or national security[61], originally permitted under Article 33 of the Refugee Convention.

The principle now recalled works on an immediate perspective; only afterwards, it must be verified if the individual has the right to enter the procedure for the determination of the refugee status or to enjoy a subsidiary protection, with the consequence to apply the relevant provisions.

In the context of the present enquiry, it is worth to underline that the *non refoulement* principle has been undisputedly enforced on the state territory: the duty to respect it at sea undergoes some discussion. According to a view, it implies that the individual has touched the dry land, or at least has entered the territorial waters[62]; under another reading, it is strictly associated with the exercise of jurisdiction by state organs[63] and thus is relevant any time a state enjoys an effective control over or coercive powers towards individuals, even in high seas[64] or another state's territorial waters according to a bilateral agreement[65]. The second option seems preferable: to say the contrary would mean to subject the respect of universal values protecting human beings to a mere spatial factor and to create "no law" zones which would be fully incompatible with the *ratio* of the mentioned provisions and the related duty of fulfilment in good faith: the same must be affirmed in cases where the control in foreign waters is carried out with on board an officer of the coastal State[66], given that the only consequences in such cases is that the responsibility for

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[61] See European Court of Human Rights, judgement *Chalal*, cit., para 80.

[62] See for instance, the US Supreme Court decision in the case *Sale v. Haitian Central Council*, 1993.

[63] See E. LAUTERPACHT - D. BETHLEHEM, 'The scope and content of the principle of *non-refoulement*: Opinion', in E. Feller *et al.* (eds.), *Refugee protection in international law : UNHCR's global consultations on international protection*, Cambridge, 2003, 87 ff., at 110. In general terms, about the extraterritorial effects of human rights law, see International Court of Justice, advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 111; Human Rights Committee, *Lopez Burgos v. Uruguay*, 29.7.1981; European Court of Human Rights, judgements of 18.12.1996, *Loizidou v. Turkey*; 19.12.2001, *Bankovic and others v. Belgium and other 16 States Parties*, No. 5207/99; 12.3.2003, *Ocalan v. Turkey*, No. 46221/99. See also European Court of Human Rights, decision of admissibility 11.1.2001, *Xhavara and fifteen v. Italy and Albania*, No. 39473/98.

[64] To this view, with regard to Article 33 of the Refugee Convention, but with arguments relevant in a broader perspective, see GOODWIN-GILL, *op. cit.*, at 166-167; RONZITTI, 'Coastal State Jurisdiction', at 1285-1286.

[65] With respect to high seas and other states' territorial waters, see (with further bibliographical and case-law references) J.C. HATHAWAY, *The Rights of Refugees under International Law*, Cambridge, 2005, 336-342; UNHCR, *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations*, cit., at 11-19; M. FOSTER, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State', in 28 *Michigan Journal of International Law* (2007), 223 ff., at 250-261; ECRE (European Council on Refugees and Exiles), *Defending Refugees' Access to Protection in Europe* (hereinafter, the ECRE paper), (http://www.ecre.org/files/Refugees%20Access%20to%20Protection%20in%20Europe%20FULL.pdf), December 2007, at 20-21; WEINZIERL - LISSON, *op. cit.*, at 57-66.

[66] As reported by GAMMELTOFT-HANSEN, *The Refugee, The Sovereign and The Sea*, cit., at 19, in the framework of the HERA II mission, leaded by Frontex in 2007, bilateral arrangements were made that allowed the Spanish,

breaching the *non refoulement* principle or the underlying basic human rights could be shared with the coastal state – according to the concept of complicity enshrined in Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts[67] – but not exclusively transferred to it[68].

Such interpretation, however, does not imply that any activity of control, interdiction or diversion in high seas or in another state's territorial waters, or of any refusal of entry into the territorial waters amounts *per se* to an infringement of the *non refoulement* principle: it must be taken into account if the restrictive measure is accompanied by an actual sending of the persons to a territory where the described risks are sure or highly probable[69], it being understood that the duties on safeguard of life at sea keep unchanged.

According to the prevailing view, the respect of the *non refoulement* principle implies the verification on the possibility that the state where individuals are sent is not going to put in practice a *refoulement* towards an unsafe place[70]: such a risk is not easy to assess, not being enough that the state concerned is not a champion in respecting human rights. Rather, an appreciation is to be conducted on objective elements, not being sufficient the presence of formal assurances of the competent authorities or the mere ratification of international treaties on the subject matter.

It seems clear from the analysis herein carried out that the respect of the *non refoulement* principles calls for a basic screening of the situations of the individuals with whom state authorities enters in contact[71] and a proper evaluation of the position of the place where to conduct them with regard to an effective protection of human rights. By not doing so, a state

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Finnish, Italian and Portuguese ships and airplanes to patrol and intercept vessels bound for the Canary Islands, not just on the high seas but also inside Cape Verde, Senegalese and Mauritanian territorial sea, contiguous zone or air space. Cooperation with the Senegalese authorities further extended to bringing Senegalese immigration officers on board European ships, and Frontex argued that these officers were formally in charge of rejecting migrants' passage to international waters.

[67] Adopted in 2001 by the International Law Commission and annexed to the GA Resolution 56/83 of 12.12.2001.

[68] The view of a shifting of responsibility is advanced in such circumstances by GAMMELTOFT-HANSEN, *The Refugee, The Sovereign and The Sea*, cit, at 22.

[69] See the authors quoted *supra* note 64.; *adde*, the Commission's Working Document, cit., at 12; I. CASTROGIOVANNI, 'Sul *refoulement* dei profughi haitiani intercettati in acque internazionali', in *Rivista dir. internazionale*, 1994, 474 ff., in part. 476-479 (with a convincing criticism of the U.S. position).

[70] See among others HATHAWAY, *op. cit.*, at 301; WEINZIERL - LISSON, *op. cit.*, at 47-48.

[71] The need of a screening is underlined by RONZITTI, 'Coastal State Jurisdiction', cit., at 1285-1286; MILTNER, *op. cit.*, at 77 and 106. See also the profiling method envisaged in UNHCR, *Refugee Protection and Mixed Migration: A 10 Point Plan of Action*, January 2007; for a cautious approach to profiling, see ECRE Paper, at 43.

acting for protecting its sea borders could breach its obligations under human rights law, either directly or in complicity with the origin or transit country.

To this view, the conclusion of cooperation agreements with sending or transit countries in the context of irregular flows or the request to authorize the disembarkation should be made conditional upon the verification, on charge of the destination countries, of the actual respect of the essential provisions on human rights and of the effective access to procedure of determination of refugee status under the Refugee Convention or to another protection scheme. Even when such evaluation is carried out in general terms, it should be remembered that, in individual cases, the specific situation of an irregular migrant might raise a need of protection towards the origin or transit state. Thus, the enforcement of a cooperation agreement and the drafting of operational procedures and rules of engagement should be coupled with measures apt to carry out a preliminary verification of the risk that specific individuals might encounter in the territory of the contracting state.

What advocated here does not imply that the warship or the official ship should be vested with the responsibility to decide upon a request of determination of the refugee status, or the flag state is obliged to grant asylum to any person in need of international protection. An automatic responsibility for processing the asylum claim may be affirmed solely when migrants are intercepted in or transported into the territory of a state, which would include the territorial waters, under the 2005 Asylum Procedures Directive, *sub* Article 3[72], unless it can be proved that the persons entered before another Member state's territory according to the Dublin II Regulation. When persons are intercepted in the high seas or in another country territorial waters, different solutions may be envisaged, such as sending them to a third (authentically) safe country willing to accept them[73], or the later start of the procedure in a safe place under the jurisdiction of the flag state, obviously other than the ship itself. A third option might consist in organising in the departure or transit state, with its consent, a process of status determination of migrants, with a direct involvement of destination country specialised agents and of UNHCR and

[72] The said Directive makes reference to the territory and thus is deemed applicable at the border and within the territorial waters of Member States. For its application event to the contiguous zone, see WEINZIERL - LISSON, *op. cit.*, at 56.

[73] Some indications may be drawn by the outcome of Tampa case, although with the caution imposed by the controversial nature of some facts surrounding it: on the subject, see the remarks by FORNARI, *op. loc. cit.*; WHITE, *op. loc. cit*. Additionally, see GOODWIN-GILL, *op. cit.*, at 157-160; the Commission Working Document, cit., at 12.

other impartial entities, such as authoritative NGOs and the International Organisation for Migration[74].

It is evident how complicated is to ensure the respect of the mentioned rules: it should be firmly rejected, notwithstanding all this, the alternative solution to declare that warships or other official vessels, when carrying out enforcement activities in high seas or in another state's territorial waters, are not under the duty to respect the *non refoulement* principle and to take care of the destiny of deported persons in a certain state. Shifting migration controls far beyond the border should carry within the need to respect basic human rights and the associated possibility of judicial review[75].

In order not to render devoid of any meaning the relevance of the rules on human rights, it is necessary that the operational procedures and the bilateral agreements concluded by destination countries or by an agency common to them (such as Frontex[76], or the EU itself) with an origin or transit countries are published and thus scrutinised[77].

More broadly, in the EU context, should not be possible to enter into arrangements with third states under the described conditions, the state whose warship or official ship has rescued migrants at sea could ask another Member state to accept disembarkation in order to provide

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[74] See the case of the Marine I (reported in the ECRE Report, at 39), which led Spain and Mauritania to agree the disembarkation of the persons intercepted and their screening. The treatment of such persons raised doubts of respect of dignity and of pressure upon them in order to accept 'voluntary' repatriation: notwithstanding, if managed properly and with the intervention of impartial third parties, as explained above in the text, a balanced result could be obtained.

[75] On this subject, see J.J. RIJPMA - M. CREMONA, *The Extra-Territorialisation of EU Migration Policies and the Rule of Law*, EUI Working Paper LAW, No. 2007/01, at 20-24.

[76] Cooperation with third countries is not a direct task of Frontex, but more modestly it facilitates the operational cooperation between Member States and third countries and concludes, to that end, working arrangements with the authorities of those countries (under Article 14 of the Regulation No. 2007/2005, setting up Frontex). So far, an agreement between a Member State and third countries worked as the legal basis for Frontex activities in third country territorial waters: see the agreement concluded by Spain with Senegal and Mauritania which allowed operations coordinated by Frontex in their territorial waters. Working arrangements were stipulated by Frontex with the border guard authorities of some countries (Russia, Ukraine, and Switzerland) while others are under negotiations (Croatia, Morocco, Mauritania, Senegal, and Libya).

[77] Publicity of such agreements and procedure is far from satisfactory. Arrangements stipulated by Frontex with African countries are secret, as the recent Italy-Libya Cooperation Protocol, referred to *supra*, note 19. It is worth noting that the Italian Parliament authorised the expenditure for the deployment of public officials to Libya under such Protocol (for a period running until 30.9.2008 and an amount of more than 6 millions euro), which notwithstanding keeps secret: see Law 13.3.2008, No. 45, converting into law an urgency Decree-Law of 31.1.2008, No. 8, concerning development cooperation and missions abroad (in *Gazzetta Ufficiale* 28.3.2008, No. 74; see also http://www.parlamento.it/leggi/08045l.htm), under Article 3, para. 20.

The problem is often raised among commentators: se for instance J.-P. CASSARINO**,** 'Informalising Readmission Agreements in the EU Neighbourhood', in 42 *The International Spectator* (2007), No. 2, p. 179 ff.; MILTNER, *op. cit.*, at 76; ECRE paper, *op. cit.*, at 12 and 15; WEINZIERL - LISSON, *op. cit.*, at 22.

humanitarian assistance. According to the Dublin II Regulation[78], however, by entering such state's territory, asylum seeker should be entitled to lodge a request for refugee status determination, thus obliging such state to accept the relevant burden and to process the claim. This possibility may lead to refuse disembarkation by the coastal Member state or to refuse to hold responsibility for status determination and for processing asylum claims under the Dublin II Regulation[79]: this is a matter of possible reform of the Dublin II system, which is currently risking to impose a disproportionate burden on the State accepting disembarkation (the responsible for SAR region or the one accepting to take care of migrants for humanitarian reasons). By not drafting more tailored rules at the EU level, this risk may arise that coastal states refuse disembarkation invoking a restrictive reading of the SAR convention and that the official ship of other states may be reluctant to participate to joint operations absent a clear identification of a solidarity system for the processing of potential asylum claims and reception of asylum seekers.

8. It seems legitimate to conclude that prevention and repression of irregular migration by sea is not adequately regulated by current international law and that, so far, the intervention of the EU is not contributing to improve the quality of the legal framework: on the contrary, some provisions and activities on the ground may create additional deadlocks. In the immediate future, the auspice may be formulated that some issues are addressed in a satisfactory manner[80], not devoting every effort to a control-based approach.

More broadly, however, the nature of the values and principles at stake reveal that an uprising of multilateral and bilateral cooperation is not able to completely eliminate the legal questions above mentioned. Democratic states, and a democratic oriented EU, committed to the sincere respect of international obligations stemming from human rights provisions and from the law of the sea, cannot go beyond certain limits when conducting preventive and repressive activities

[78] Regulation No. 343/2003 of 18.2.2003, determining the State responsible for examining applications for asylum lodged in one of the Member States by a third country national.

[79] For instance, Malta purports the view that it should not necessarily be the State of disembarkation which would have exclusive jurisdiction to determine any subsequent asylum claim, particularly where interception of migrants occurred outside that State's SAR region: see House of Lords, Ninth Report, para. 117.

[80] Common rules for engagement of migrants' boat, screening procedures, disembarkation procedures, status determination and asylum claims processing; a policy of transparency of international engagements and operational procedures, and more care for treatment of migrants in third countries.

with regard to irregular migration by sea, or when pleading for third states' cooperation on the matter. Lastly, even though legal parameters are complied with, a final (and embarrassing) question may be raised whether, in the long term, the outcome may be qualified as successful[81].

[81] It has been widely documented that the foreclosure of some routes or the enhancing of controls in some areas lead to the opening of new routes or the recourse to techniques which are more dangerous for migrants' safety, absent a substantial and stable decreasing of irregular flows (especially when placed in an European-wide perspective): see, among others, SPIJKERBOER, *op. cit.*, at 2-7; ACOSTA SÁNCHEZ - DEL VALLE GÁLVEZ, *op.cit.*, at 21; COSLOVI, *op. cit.*, at 4 ff.