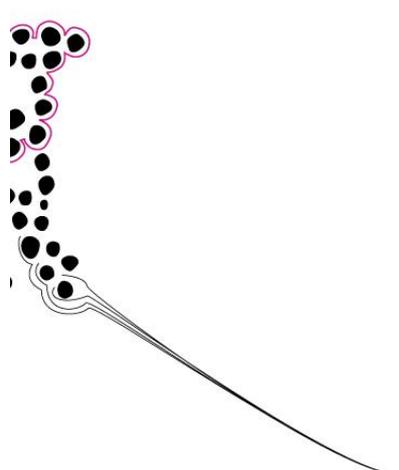
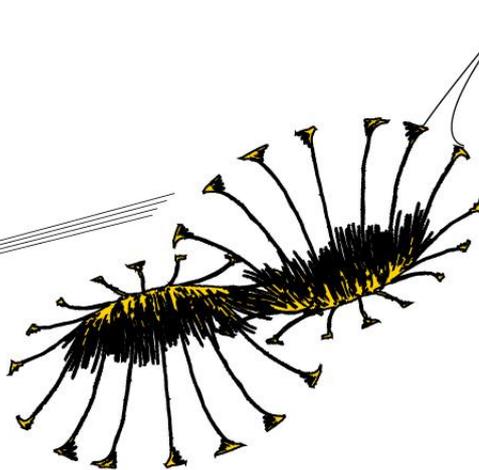


Bachelor thesis



The extraterritorial application of the principle of non-refoulement in the context of sea borders



School of Management and Governance

Author: Carola Salau (s1127292)

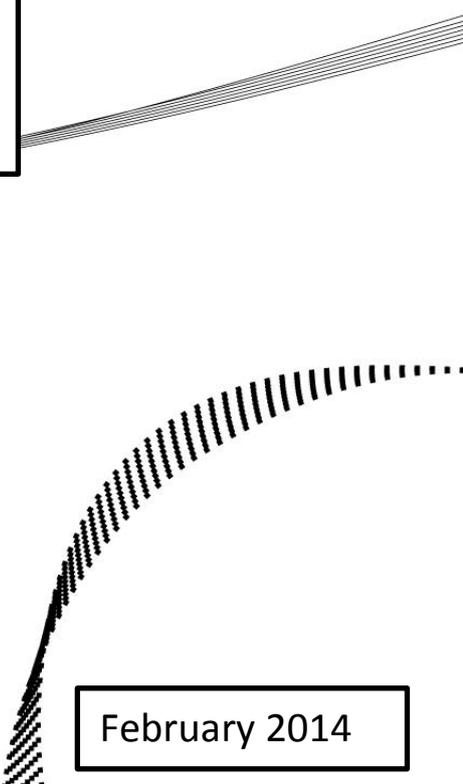
University of Twente

European Studies

Examination Committee:

Dr. Luisa Marin

Prof. Dr. Ramses Wessel



UNIVERSITY OF TWENTE.

February 2014

Abstract

People have been undertaking dangerous sea journeys to Europe, America or Australia for decades, in search of either economic stability or in search of international protection from war and persecution. The phenomenon of people dying by trying to cross sea borders or due to shipwrecks is a social and humanitarian problem which has to be combated. Numerous vessels lack navigation aids, under-powered outboard engines and steering. However, this issue is considerably ignored by humanitarian organizations, governments as well as international agencies. Within the corresponding sea zones, state authorities have a different degree of control. This is why it is difficult to determine legal rights for the people in need as well as legal obligations of the states to help them. In this context the principle of non-refoulement is crucial. It prohibits states to send individuals back to their country of origin or any other country where they would be exposed to torture or persecution

The purpose of this thesis is to analyze the extraterritorial application of the principle of non-refoulement in the context of sea borders. It will be argued that the principle of non-refoulement, as laid down in the United Nations Convention Relating to the Status of Refugees and other international treaties dealing with refugee and immigration law, does indeed apply beyond the territory of the signatory states.

List of Abbreviations

Advisory Opinion	Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRSR	Convention relating to the Status of Refugees
ExCom	Executive Committee of the High Commissioner's Programme
Human Rights Watch	HRW
Refugee Protocol	Protocol Relating to the Status of Refugees
SOLAS	International Convention for the Safety of Life at Sea
SAR	Search and Rescue
UDHR	Universal Declaration of Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	Office of the United Nations High Commissioner for Refugees

Table of contents

- 1. Introduction 1
- 2. Problem statement 2
 - 2.1 Problem Definition 2
 - 2.2 Pre-border proceedings by states 3
- 3. The principle of non-refoulement 4
- 4. Personal scope of application 6
- 5. Territorial scope of application 8
 - 5.1 CRSR on the territorial application of non-refoulement 8
 - 5.2 UNHCR on the territorial application of non-refoulement 9
- 6. State jurisdiction in the different sea zones 10
 - 6.1 Internal Waters 12
 - 6.2 Territorial Sea 13
 - 6.2.1 Definition of presence in the country in the context of territorial waters 15
 - 6.2.2 The Right of innocent passage 15
 - 6.2.3 Persons in distress 17
 - 6.2.4 The Tampa case 18
 - 6.3 Contiguous zone 20
 - 6.4 High sea 21
 - 6.4.1 Freedom of navigation 24
 - 6.4.2 Flaglessness 24
- 7. Conclusion 25
 - 7.1 Introduction 25
 - 7.2 Main findings 26
 - 7.3 Final remarks 27
- References 28

1. Introduction

The application of the principle of non-refoulement in an extraterritorial context has been highly debated (Moreno-Lax, 2011; Noll, 2005; Pugh, 2004). In its original sense, non-refoulement means that the states should not eject a refugee from its land territory and send that person back to his or her country of origin or otherwise where he would be exposed to torture or persecution legally stipulated in Article 33 of the Convention Relating to the Status of Refugees¹ (hereinafter CRSR) (Duffy, 2008). Often it has been argued that the non-refoulement principle is primarily territorial, in the sense that it only applies to refugees who have already reached the territory of the state of refuge.

The main concept of my Bachelor thesis is therefore the principle of non-refoulement referring to refugee law and the law of the sea. These areas in law are used to determine in what situations people on vessels are granted access to territory at sea. The question addressed in this analysis is *“Does the principle of non-refoulement entail an indirect right for potential refugee transporting vessels to breach sea borders and have access to the territorial waters of a country?”*

I want to identify the scope of the legal question. Thus, specific sub-questions have been formulated in order to identify the relevant legislation and jurisdiction.

1. *“What is the personal scope of the principle of non-refoulement and to whom does it apply?”*
2. *“How is the principle of non-refoulement defined in international law with regard to its territorial scope and, secondly, extraterritorial application?”*
3. *“When and where does the protection against refoulement take effect in the different sea zones?”*

This thesis illustrates how the allocation of sovereign powers in the sea zones, in particular on the high seas and in the territorial sea, leads to diverging views on the application of the principle of non-refoulement and on the protection of migrants and potential refugees at sea. For instance, it is not clear under what conditions states can refuse the permission of entry into their territorial sea. (Trevisanut, 2008, pp. 206-207)

The analysis primarily focuses on the rights of vessels under the United Nations Convention on the Law of the Sea² (hereinafter UNCLOS) and other maritime agreements. The law of the sea in respect of refuge, rescue of persons in distress and admittance to territory is highly unsatisfactory because a number of key rights are poorly defined and inadequately implemented. (Barnes, 2004, p. 47) It seems clear that insufficient weight is given to potential refugees in the special situation on sea.

This thesis will be structured in the following way. First, the social problem will be discussed, and then the definition of non-refoulement to be used throughout this thesis is given followed

¹ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

² UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

by an analysis of the personal and territorial scope of the principle of non-refoulement. Defining border lines and the corresponding jurisdiction in the different sea zones is very much important in order to find out when and where the protection against refoulement takes effect. Finally the conclusion will answer the main research question of the thesis as well as provide final remarks on the depicted topic. In the next part, the social problem and the states perspective will be explained focusing especially on the concept of interception at sea, which is one of the practices carried out by immigration states in order to fight irregular migration.

2. Problem statement

In the following, I will outline what the social problem is which this Bachelor project is aiming to elaborate on. Firstly, I will discuss the conditions of the vessels on which people are trying to cross the sea. I will also explain the issue from the states perspective and their argumentation on their course of action towards people trying to cross sea borders. In 2.2 I will then elaborate precisely what kind of measures states take to tackle the problem of migration.

2.1 Problem Definition

The issue of refugees trying to cross sea borders or shipwrecks due to people in distress who are not rescued is a phenomenon which is considerably ignored by humanitarian organizations, governments as well as international agencies. In 2011, more than 1,500 drowned or went missing trying to cross the Mediterranean.³ On October 3, 2013, over 360 men, women, and children died when their boat caught fire and sank off the coast of Lampedusa, a small Italian island in the Mediterranean. Just over a week later, on October 11, at least 36 bodies were recovered and some 200 people rescued after another boat carrying migrants capsized in the Sicilian Channel. Over 500 people are estimated to have died trying to cross the Mediterranean to Europe so far in 2013. Unfortunately, calculations of deaths at sea are inherently unreliable, as many bodies are never recovered. Various sources estimate that between 20,000 and 25,000 people may have died in the Mediterranean over the past 20 years.⁴

High numbers of individuals migrate through sea borders, in dangerous situation in which they risk their lives. Numerous vessels lack navigation aids, under-powered outboard engines and steering. (Pugh, 2004, p. 53) Many times these are small wooden fishing vessels or pleasure crafts which are ill-equipped for long ocean voyages or use at any distance from the shore. There are also instances where those vessels do not have any crew member or ship master. Consequently, the passengers have to face serious difficulties while crossing the different sea zones. Oftentimes they are missing registration, documentation or any other kind of certificate of origin. In these cases the common types of application of rules in this field are difficult to be implemented in practice, especially because these rules have been established for vessels that comply with sea order requirements by holding up a formal link with any flag State. (Barnes, 2010, p. 115)

³ See UNHCR “More than 1,500 drown or go missing trying to cross the Mediterranean in 2011”, 31 January 2012, available at <http://www.unhcr.org/4f2803949.html>

⁴ See the Human rights Watch (HRW) Report “EU: Improve Migrant Rescue, Offer Refuge” 23 October 2013, available at <http://www.hrw.org/news/2013/10/23/eu-improve-migrant-rescue-offer-refuge>

Unsafe vessels and an unclear legal framework with regard to Search and Rescue duties make the transportation risky and dangerous for the migrants. Nowadays fear of irregular movements of people, smuggling and trafficking pushes the right of freedom of movement and the right of everyone to leave any country, including their own, to the background. It is quite contradictory that state leaders still defend the general respect for human rights while ordering interception programmes at sea⁵, interdiction and disembarkation of people in need to countries where general human rights as we know them are not guaranteed. (Goodwin-Gill, 2011, p. 443) The governments of coastal states worry about the arrival of people via boats and therefore have been especially consistent in refusing entry. They base their argumentation on possible threats to their national security (Pugh, 2004, p. 50) due to illegal immigration, more and more mass migrations of people, and the costs of asylum (Barnes, 2004, p. 47). Thus, it usually takes some time until states agree to disembark refugees without the assurance of financial or readmission guarantees. Negotiations on the request for financial compensation may take several days or even weeks so that refugees in need of rescue are forced to wait for a certain period of time until they receive help. Due to poor admission and process systems of refugees, the passengers find themselves in a disastrous situation. (Coppens & Somers, 2010)

2.2 Pre-border proceedings by states

Destination states in Europe, Australia and America have all depicted refugees arriving by boats as a threat. They have developed complex procedures in order to work against this issue. It is important to elaborate on these pre-border procedures since they are the reasons for the social problem described above. Without these procedures, it would be much easier for refugees to cross sea borders and enter the territorial waters of the destination country.

Pre-border operations by states, particularly those carried out on the high seas or in the territorial waters of other States, do not always include sufficient protection safeguards to ensure that the principle of non-refoulement is upheld. This raises concerns that refugees and other people in need of international protection may be returned to situations where they are at risk of persecution or other serious harm.⁶ States have adopted the method of intercepting people who travel without the required documents primarily in order to combat irregular migration such as smuggling of persons or trafficking in human beings (THB) in territorial waters and on the high seas. Interception at sea is the measure that states implement to stop or prevent the arrival of vessels carrying undocumented people who may be refugees through maritime interception operations.⁷ It may happen that interception prevents refugees from

⁵ Interception is defined as “encompassing all measures applied by a state, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination” see Article 10 of UNHCR, Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach, 9 June 2000, EC/50/SC/CRP.17, available at: <http://www.refworld.org/docid/49997afa1a.html>.

⁶ See Preamble of UN High Commissioner for Refugees (UNHCR), Rescue at Sea, Stowaways and Maritime Interception: Selected Reference Materials, December 2011, 2nd Edition, available at: <http://www.refworld.org/docid/4ee087492.html>

⁷ See Preamble of UN High Commissioner for Refugees (UNHCR), Rescue at Sea, Stowaways and Maritime Interception: Selected Reference Materials, December 2011, 2nd Edition, available at: <http://www.refworld.org/docid/4ee087492.html>

benefitting from international protection. Sometimes states intercept boats as far away as possible from their territorial waters. After being intercepted the people on the boat are disembarked on a third state territory which allows their entering or they are directly returned to their country of origin or rather their country of departure.⁸

States practices such as disembarkation may put potential refugees in jeopardy.⁹ States cannot consider the interception of potential refugee transporting vessels as an appropriate method to reduce loss of life. Neither international agreements nor the concept of extraterritoriality can be used as a reasonable justification to not act according to the principle of non-refoulement. Thus, simply intercepting a refugee ship and towing it somewhere is not permitted under the Law of the Sea, further elaborated on in the following chapters. A vessel carrying potential refugees on the high seas cannot simply be ordered to change course and cannot be boarded, except with the permission of the flag state. (Pallis, 2002, p. 353) However, often these boats are flagless and therefore have a different status. This special situation will be further explained in chapter 6.4.2. Immigration control methods such as interception can very much compromise the possibility of persons in fear of persecution to gain access to safety measures¹⁰

In the next chapter I will give a precise definition of the principle of non-refoulement in order to provide the reader with legal background information to understand the issue described above. This will help to link non-refoulement with the following chapters on the personal and territorial scope.

3. The principle of non-refoulement

In this part of the thesis, I will discuss the main concept relevant to the topic of the extraterritorial protection of refugees on sea. Taking into consideration the existing research and reports, this study is an investigation of one particular principle, namely the principle of non-refoulement.

The principle of non-refoulement is solidly grounded in international refugee and human rights law, in treaty, in doctrine, and in customary international law (Goodwin-Gill, 2011, p. 444). Most lately custom and treaty law dealing with the law of the sea have been also taking the principle of non-refoulement into account (Wallace, 1992, p. 128). In some factual circumstances, non refoulement might entail a prohibition to send or push refugees back to the country of origin. (Sinha, 1971, p. 110).

The principle of non-refoulement was officially enshrined in the CRSR in 1951.¹¹ The CRSR provides the basis for the treatment of refugees. The right to be protected against refoulement is often used as the foundation of refugee protection arguments (Kaunert, 2011).

⁸ UN High Commissioner for Refugees (UNHCR), *Rescue at Sea, Stowaways and Maritime Interception: Selected Reference Materials*, December 2011, 2nd Edition, available at: <http://www.refworld.org/docid/4ee087492.html>.

⁹ International Maritime Organization (IMO), Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued At Sea*, 20 May 2004, available at: <http://www.refworld.org/docid/432acb464.html>, para. 6.17.

¹⁰ Executive Committee of the High Commissioner's programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000, available at <http://www.unhcr.org/excom/EXCOM/3ae68d144.pdf>.

¹¹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, available at: <http://www.refworld.org/docid/3be01b964.html>.

The most important article of the CRSR is Article 33(1) that defines it as follows:

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

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

Non-refoulement is a very indispensable right which is free of any territorial or other material limitation but belongs to a “category of entitlements broadly addressed to all refugees with the exception of the type of refugee laid out in Article 33(2)” (Moreno-Lax, 2011, p. 205). Consequently, every refugee who is under the jurisdiction of a Signatory Party of the CRSR, whether territorially or extraterritorially may enjoy the protection of the prohibition of non-refoulement inscribed. As discussed in more detail in the following sections, the obligation under Article 33(1) of the CRSR not to send a refugee to a country where he or she may be at risk of persecution is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction.

The obligation of non-refoulement is a very essential principle of refugee protection (Lauterpacht & Bethlehem, 2003, p. 87) since it is the only guarantee that refugees are not exposed to the persecution which made them leave their country of origin. The prohibition of non-refoulement applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the CRSR, or from where he or she risks being sent to such a risk.¹² (Weis, 1995, p. 341) This is evident from the wording of Article 33(1) of the CRSR Convention, which refers to expulsion or return (refoulement) “in any manner whatsoever”. This convention has been amended and supplemented in other human rights laws and protection regimes.¹³

The principle of non-refoulement actually describes a rule not to do something, which is sending persons on vessels back to their country under certain conditions. What does this mean for state interception and disembarkation measures? Are state authorities infringing non-refoulement because they actively force these people to leave their territory? If these actions mean that they have to go back to their country of origin, does it mean that they are under no circumstances forbidden? In order to get an in depth analysis of this problem, I will scrutinize the personal as well as the territorial scope of application of non-refoulement

¹² See para. 4 of UNHCR, Note on Non-Refoulement (Submitted by the High Commissioner), 23 August 1977, EC/SCP/2, available at: <http://www.refworld.org/docid/3ae68ccd10.html>

¹³ See for example Article 3, para. 1. UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html>: ‘No contracting Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture’

followed by a precise discussion of the determination of non-refoulement in the different sea zones.

4. Personal scope of application

The personal scope of application is important to be taken into account since the type of people who are on these vessels on sea differ immensely with regard to their nationality, country of origin and most importantly their reasons to flee the country.

International law does not only considers the place where the situation takes place, it also takes the actor to which the law is attributable into account. (Goodwin-Gill, 2011, p. 452). Therefore, this chapter considers more precisely the actors who may claim a right of protection of refoulement when trying to cross sea border.

A recent example is the situation of refugees fleeing from Syria who most likely are trying to seek shelter in EU countries. Border-enforcement measures and the lack of a common approach to refugees from Syria mean that many people fleeing the conflict take dangerous sea journeys to enter the EU irregularly. According to Human Rights Watch (hereinafter HRW) more than 9,800 Syrians and Palestinians from Syria reached Italy in the first nine months of 2013. With the Greece-Turkey land border virtually sealed due to increased patrols and the construction of a 12.5-kilometer fence, more and more refugees and migrants of all nationalities are setting off from the Turkish coast to reach Greek islands by sea. HRW, Amnesty International, and UNHCR have heard direct accounts of life-threatening manoeuvres by the Greek Coast Guard to force boats back toward Turkey.¹⁴ In the Syrian case it is clear that the people on these vessels are refugees who are in danger of torture or persecution in their home country. The problem is that national authorities are often not aware or do not want to be aware of the crucial differentiation between refugees in need of international protection, and other migrants who are indeed able to receive national protection from their home country.

One has to distinguish between different types of migrants which is difficult to do since migrants often travel in “mixed flows”. This means that economic migrants who seek better living standards in developed countries and migrants in need of protection travel together to reach a safe shore. (Moore & Shellman, 2007, p. 811) The latter frequently seek help from smugglers in order to flee from persecution in their country of origin. Of course, states have justifiable incentives to control irregular migration. However, current control methods for example visa requirements, the imposition of carrier sanctions and interception measures repeatedly do not distinguish true refugees from economic migrants.

The application of article 33 CRSR depends on the person concerned meeting the qualification criteria in article 1 CRSR, which includes being outside the country of his nationality or former habitual residence.¹⁵ The protection against refoulement applies to any person who meets the requirements of the refugee definition contained in Article 1(A)(2) of

¹⁴ See the Human rights Watch (HRW) Report “EU: Improve Migrant Rescue, Offer Refuge” 23 October 2013, available at <http://www.hrw.org/news/2013/10/23/eu-improve-migrant-rescue-offer-refuge>

¹⁵ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, available at: <http://www.refworld.org/docid/3be01b964.html>

the CRSR¹⁶ and does not come within the scope of one of its exclusion provisions. Given that a person is a refugee within the meaning of the CRSR as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee.¹⁷ It follows that the principle of non-refoulement applies not only to recognized refugees, but also to those who have not had their status formally declared¹⁸, thus also to potential refugees.

Exceptions to the principle of non-refoulement under the CRSR are permitted only in the circumstances expressly provided for in Article 33(2) (see section 3.1). The application of this provision requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under Article 33(2) of CRSR. (Lauterpacht & Bethlehem, 2003, pp. 145-152)

Since the obligation of non-refoulement only applies to a certain people, namely only to people which are indeed in fear of torture or persecution in their country of origin, states have to take the status of such persons into account. When the status has been determined, the state has to comply with more obligations under the CRSR. Obviously, it is quite difficult to identify the true status of many persons seeking refuge, given that many movements are a combination of economic migrants and true refugees. This is further complicated by more complex treatment of refugees and restrictive asylum practices of destination States. (Barnes, 2004, p. 74)

State agents working on behalf of coastal states are mostly not able to identify which persons on the vessels are refugees in fear of persecution and which are not. The question becomes more complex in the case of a mixed crew of refugees and other persons who would not benefit from the exclusion from penalties for illegal entry provided for in article 31 CRSR, or where the master of the ship is carrying the migrants for profit. In such cases, state practice has offered multiple examples of passage being considered non-innocent further elaborated on in chapter 6.2.2.¹⁹ (Mathew, 2002) Thus, an important distinction needs to be drawn between vessels deliberately engaged in irregular migration activities, and vessels that find themselves carrying migrants due to circumstance, for example by responding to a distress call. Although

¹⁶ Article 1(A)(2) of UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>: "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

¹⁷ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, January 1992, HCR/IP/4/Eng/REV.1, available at: <http://www.refworld.org/docid/3ae6b3314.html>, para. 28.

¹⁸ This has been reaffirmed by the UNHCR, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, December 2009, 1975-2009 (Conclusion No. 1-109), available at: <http://www.refworld.org/docid/4b28bf1f2.html> e.g., in its Conclusion No. 6 (XXVIII) "Non-refoulement" (1977), para. (c) (reaffirming "the fundamental importance of the principle of non-refoulement ... of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.").

¹⁹ Minister for Immigration and Multicultural Affairs & Others v. Vadarlis ("Tampa Appeal"), [2001] FCA 1329, Australia: Federal Court, 17 September 2001, available at: <http://www.refworld.org/docid/3bb1cfdc6.html>

it is clear that ships engaged in illegal migration activities cannot avail themselves of the right of innocent passage and of access to territory, the position of other vessels carrying potential refugees is less clear. In practice, the position is hampered by the difficulty of identifying the nature of the activity, and the precise scope of innocent passage. (Barnes, 2010, p. 122) The coastal State could try to distinguish between illegal immigrants and genuine refugees, but the distinction is difficult to make in practice and more importantly would involve prejudging refuge and asylum claims on their merits and without due consideration.

In this thesis and in the research question mentioned above I used the term *potential refugees* as the subject to be discussed. I do this because non-refoulement applies to this type of people and that is why they are the main focus of my analysis. Of course, economic migrants or asylum seekers are also often sailing on these vessels. However, when I refer to legal documents and provisions I am always looking at refugees. This is why I will solely use the term refugees in the following chapters since these are the persons the principle of non-refoulement applies to.

Having discussed the dimension of the personal application of non-refoulement, I am now taking a look at the territorial scope of application of the principle. The next section therefore deals with territorial and extraterritorial state jurisdiction and obligations with regard to non-refoulement.

5. Territorial scope of application

The common way of view is that competences of state jurisdiction are generally territorial considering public international law. However, international law also grants some derogation from this rule. As will be explained below, in some specific situations, customary international law and treaty provisions have recognized the extra-territorial exercise of jurisdiction by the relevant State'.²⁰ (Noll, 2005, p. 566)

5.1 CRSR on the territorial application of non-refoulement

The crucial issue is the point of application of the principle of non-refoulement. It is only sensible to assume that compliance with the CRSR depends upon the presence of persons within administrative competence of the State. It would be nonsensical to require vessels to either process refuge claims onboard, or return to the territory of the flag-State to process claims. Likewise, coastal States should not be able to discriminate against refugees from the simple fact of their presence in the territorial sea upon the vessel of another State. Yet it is not entirely clear whether the CRSR is limited to land territory. Conventional obligations appear to be defined in terms of territory, the term being used repeatedly, for example in Art 14-19, 23-8, 31, and 32 CRSR. The obligation set out in Article 33(1) of the CRSR is subject to a geographic restriction only with regard to the country a refugee may not be sent to and not regarding the place he or she is sent from. However, the extraterritorial applicability of the non-refoulement obligation under Article 33(1) is indirectly clear from the text of the provision itself, which states a simple prohibition: "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened...". Apart from the obligation not to return a refuge

²⁰ See Council of Europe: European Court of Human Rights, Extra-territorial Jurisdiction of ECHR States, July 2011, available at: <http://www.refworld.org/docid/4e31312d0.html> [accessed 7 February 2014]

to the frontiers of the State responsible for the persecution, (an obligation that is unlikely to be breached), CRSR is silent on the point and place at which it arises.

If a state does not allow persons on vessels to enter, or simply turns them away, it can be argued that this would breach international law. However, in its comments in 1950 on the draft CRSR, the Ad hoc committee observed another opinion:

... the obligation not to return a refugee to a country where he was persecuted did not imply an obligation to admit him to the country where he seeks refuge. The return of a refugee ship, for example, to the high seas could not be construed as a violation of this obligation.²¹ This is one source and lately also other sources have been added, namely SOLAS and Search and Rescue (hereinafter: SAR) conventions. They also affect state duties in this respect but will not be further discussed in this thesis because it is outside of its scope.

With regard to CRSR the question is unresolved as to whether non-refoulement applies also to refugees on vessels on sea. This is why it is necessary to also refer to other legal documents dealing with this topic.

5.2 UNHCR on the territorial application of non-refoulement

The Office of the United Nations High Commissioner for Refugees (hereinafter UNHCR) also expressed its point of view in relation to the geographical scope of the principle and affirmed: “The obligation not to return refugees to persecution arises irrespective whether governments are acting within or outside their borders.”²² In UNHCR’s understanding, the resulting obligations extend to all government agents acting in an official capacity, within or outside national territory. Given the practice of States to intercept persons at great distance from their own territory, the international refugee protection regime would be rendered ineffective if States’ agents abroad were free to act at variance with obligations under international refugee law and human rights law.²³

In the advisory Opinion on the Extraterritorial Application of non-refoulement obligations, the UNHCR also addresses the question of the extraterritorial application of the principle of non-refoulement. According to the Advisory Opinion “the prohibition of refoulement to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or “renditions”, and non-admission at the border in the circumstances described below.”²⁴ The advisory Opinion on the Extraterritorial Application of non-refoulement obligations states that the prohibition

²¹ Article 28 (expulsion to country of persecution) of UN Ad Hoc Committee on Refugees and Stateless Persons, Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950, 25 August 1950, E/AC.32/8;E/1850, available at: <http://www.refworld.org/docid/3ae68c248.html>

²² See UN High Commissioner for Refugees responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, 32 ILM 1215 (1993) available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/intlm32&div=133&id=&page=>

²³ UN High Commissioner for Refugees (UNHCR), *Rescue at Sea, Stowaways and Maritime Interception: Selected Reference Materials*, December 2011, 2nd Edition, available at: <http://www.refworld.org/docid/4ee087492.html>.

²⁴ Article 7 of UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.refworld.org/docid/45f17a1a4.html>

on refoulement is applicable also when a State has de jure or de facto jurisdiction extraterritorially. Legal prove is also provided by Article 9 of UNHCR Advisory Opinion stating that "...the obligation under Article 33(1) of the CRSR not to send a refugee to a country where he or she may be at risk of persecution is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction."²⁵

EXCOM has repeatedly referred to situations in which non-refoulement exists independent of the presence of the persons concerned in the territory of the contracting state; thus it has assessed the turning back at the border. The decisive factor cannot be the place where the person concerned and the acting state official are located as this would imply immunity from international law for states acting extraterritorially. Rather, the main criterion to define whether the person concerned is under the control of state institutions or is affected by their actions (Francis, 2008, p. 277).

Legal support for extraterritorial application of the principle of non-refoulement in the territorial sea and on the high seas is provided by the Protocol Relating to the Status of Refugees (hereinafter Refugee Protocol)²⁶ that removes the time and geographical limits of the CRSR. Therefore, it also applies wherever a State has jurisdiction, including on the high seas. Article 1(3) of the 1967 Protocol suits best to support an extraterritorial applicability of article 33 CRSR since it states that the Protocol 'shall be applied by States Parties hereto without any geographic limitation' (Noll, 2005, p. 553).

According to all these legal documents, the principle of non-refoulement has no territorial limitations at all. The question has to be posed if this is really applicable for all sea zones when taking into account their specific legal grounds. In order to answer the third sub-question, *When and where does the protection against refoulement take effect in the different sea zones?*, I will precisely scrutinize the different sea zones with regard to the territorial application of non-refoulement. The next chapter therefore deals with the jurisdiction, rights and obligations of states and refugees in the internal waters, the territorial sea, the contiguous zone and the high seas.

6. State jurisdiction in the different sea zones

The law of the sea must be scrutinized since it is a body of international law that concerns the principles and rules by which public entities, especially states, interact in maritime matters, (Harrison, 2011, p. 1) including navigational rights and coastal waters jurisdiction. The legal provisions and regulations on the sea are crucial to this analysis. The most important convention in this field is UNCLOS which is a quasi-constitution for the oceans, containing detailed provisions on a wide range of matters relating to conduct at sea.²⁷

²⁵ Article 9 of UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, available at: <http://www.refworld.org/docid/45f17a1a4.html>

²⁶ UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>

²⁷ UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

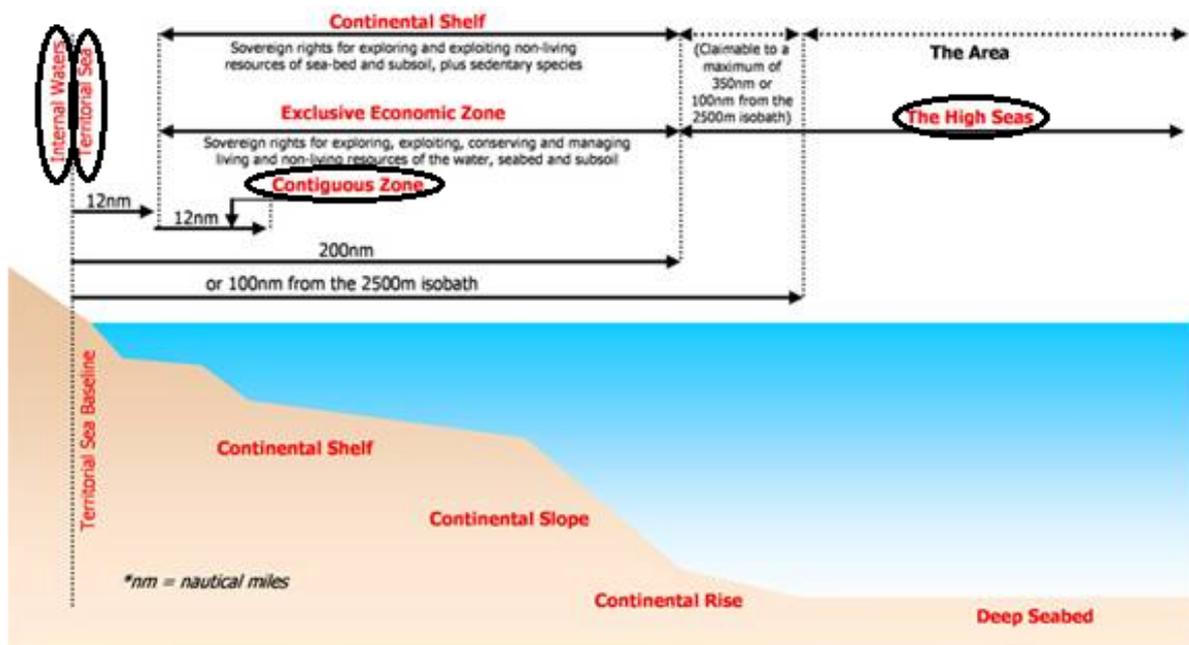
In the different sea zone, we find states operating, normally in the management of states' external borders, but actually in a physical domain where borders, as we commonly understand them, simply do not exist – on the high seas, or even in the contiguous zone or territorial waters of other states, in fact, at notional or virtual borders reconstituted on the basis of national and regional interest. (Goodwin-Gill, 2011, p. 447) This is why the following chapter takes a more precise approach to the territorial scope of application of the principle of non-refoulement on sea and which obligations it entails.

The sea zones are regulated in a structured regime that emphasizes freedom of navigation and lays out the responsibility of flag states while allowing coastal states to exercise a number of powers. The rule of non-interference with navigation²⁸ and the right of visit²⁹ constitute the claim of persons on board vessels to breach sea borders while on the other hand states defend their right of search and control of certain vessels in their territory and on the high seas. (Goodwin-Gill, 2011, p. 448)

This is the context for the following four-step analysis examining how far the relevant conventions are legally binding:

- First, vis-à-vis the internal waters
- Secondly, vis-à-vis the territorial sea
- Thirdly, vis-à-vis territory beyond the 12 mile zone, that is, in the contiguous zone
- and lastly, on the high seas

This graph³⁰ illustrates the different sea zones showing the distance from the baseline.



²⁸ See Article 78 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>: "The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention."

²⁹ See Article 110 (Right of visit) of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

³⁰ Available at <http://www.dfo-mpo.gc.ca/science/hydrography-hydrographie/sovereignty-eng.html>

The Exclusive Economic Zone EEZ is not considered in this analysis because it deals with marine resources. Moreover, the contiguous zone, which is included in the following analysis, is part of the EEC and therefore will indirectly be discussed. All in all, it is much more interesting to contrast the territorial sea and the high seas since these two differentiate the most with regard to the principle of non-refoulement and rights to cross sea borders or the entry to sea zones.

Taking into consideration the logic of how the maritime zones are organized, the analysis will start with rights and measures occurring in the internal waters, then the territorial sea, then will continue with the contiguous zone and end with the analysis concerning the high seas.

6.1 Internal Waters

Internal waters lie within the baseline that is used to delimit the territorial sea from other maritime zones. The normal baseline is drawn along the low-water line along the coast, but also includes features such as reefs, ports and low-tide elevations. In general, port facilities comprise part of the coast and hence the territory of a State Internal waters and port areas are subject to the full sovereignty of the coastal State³¹, which may regulate all matters pertaining to irregular migration for all vessels in port regardless of their flag status. (Barnes, 2010, p. 117) Thus, coastal states have certain jurisdiction over a vessel present within certain regulatory zones adjacent their coasts.

There is no general right of entry for vessels into the ports of third states. Even when states do establish rights of entry under bilateral treaties, coastal states usually retain the right to deny entry when vital interests are threatened. Innocent passage, further explained below, does not include a concomitant right of entry into port. Even if states allow merchant ships to enter their internal waters to reach their ports, this does not imply to a right to cross the border (Lowe, 1977, p. 597). Entry remains a privilege until a right of entry is provided by an agreement or treaty. Neither UNCLOS nor any other international treaty determines a right of entry into foreign ports. The exception to this rule is given by the situation of vessels in distress (discussed in 6.2.3) in which the right of passage is naturally extended. (Barnes, 2004, p. 58) The principal difficulty remains the fact that the coastal State enjoys wide discretion to determine the extent of search and rescue operations (Barnes, 2004, p. 54). However, there is a limit to this discretion in the sense that discretion cannot prejudice rescuing.

What does this mean for refugees on vessels in internal waters in the context of the principle of non-refoulement? They are not allowed to just dock at the port of their destination state. The only exception to this is vessels in distress. In general, states have the right to search vessels in this area. Taking into account the principle of non-refoulement, one can conclude that states are not allowed to send these vessels back to their country of origin if there are

³¹ In the Nicaragua case, the ICJ confirmed that internal waters are subject to the sovereignty of the State and that it is 'by virtue of its sovereignty that the coastal State may regulate access to its ports', Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, available at: <http://www.refworld.org/docid/4023a44d2.html> at paras 212-13.

refugees on board who will be tortured or persecuted. However, from this one cannot conclude that states have to allow entry into their internal waters or ports. According to UNCLOS, the coastal nation is free to set laws and regulate their application while foreign vessels have no right of passage within internal waters³². This lack of right of innocent passage is the key difference between internal waters and territorial waters which will be elaborated on in the next chapter.

6.2 Territorial Sea

Within the territorial sea zone, the coastal State exercises sovereignty³³, subject to the requirements of innocent passage. Under Article 3 UNCLOS, every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles.³⁴ It is important to mention that I am only referring to the territorial sea of the country of destination. Procedures in territorial waters of the country of departure will not be discussed in this section. In addition, state action such as interception or rescue performed in the territorial waters of third countries/country of embarkation with which for example the EU Member States and Frontex collaborate (Moreno-Lax, 2011) will also not be the focus because this would exceed the scope of the thesis. This means for the following chapter, that topics such as push-back operations or joint cooperation actions in the territorial waters of third states will not be included in the analysis while the actions undertaken to hinder vessels to enter the territorial sea of a state or to redirect vessels which are already in this area will be indeed be discussed.

Coastal States are entitled to regulate migration activities within their territorial sea and this clearly extends to measures intended to prevent the infringement of immigration laws. This is provided for by Article 21(1)(h) of the UNCLOS, which explicitly provides for the power to enact laws relating to passage to prevent the infringement of customs, fiscal, immigration or sanitary laws and regulations of the coastal State. But only the control which is needed in order to prevent immigration rules from being breached is permitted. This requires proportionality in each particular situation (Moreno-Lax, 2011, p. 190). Thus, such laws must be in conformity with other provisions of the convention and other rules of international law. Therefore the authority of coastal state to regulate the passage of vessels carrying migrants is limited by customary international law and any other treaty commitments that the coastal State has assumed. (Barnes, 2010, p. 120)

A difficulty is whether or not the entry of people onboard ships into the territorial sea amounts to entry within the territory of the State, thereby triggering the application of the rules of international law and non-refoulement. More specifically, do refugees who present themselves at the edge of the territorial sea or cross into such waters satisfy the requirements of Articles 31 to 33 CRSR including the non-refoulement principle? The Executive Committee of the UNHCR (hereinafter ExCom) has indicated that the State in whose

³² UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

³³ Art 2(1) of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

³⁴ Arts 2 and 3 UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

territorial waters an interception takes place has primary responsibility for addressing the protection needs of intercepted persons.³⁵ Certainly, contrary to internal waters or ports, there may be a number of reasons for treating entry into the territorial sea as not triggering the full operation of the above provisions. Firstly, in practice it may be difficult to ascertain precisely when entry into territorial waters occurs. Entry into port or internal waters is much easier to ascertain and thereby provides a more transparent means of identifying the point in time when certain rights and responsibilities crystalize. States have a legitimate interest in patrolling and maintaining the integrity of their borders to prevent illegal migration. To extend the application of the CRSR including the Non-refoulement principle to the outer limits of the territorial sea, or indeed any further, may render it practically impossible for coastal States to control illegal migration. (Barnes, 2010, p. 121)

It is very important to distinguish the kinds of operations carried out by the authorities of the coastal state in the territorial waters. If the states authorities' intention is targeted at the *expulsion* of the vessel, the coastal state uses its sovereign powers to expel the refugees on these vessels because it thinks that these persons have unlawfully entered its territorial sea. In this situation the state recognizes indirectly that the vessel entered its territory and thus the vessel becomes subject to its jurisdiction. Accordingly, the persons on the vessel can enjoy the rights stipulated by the international obligations (including the prohibition of refoulement) binding the state in respect to the persons submitted to its jurisdiction. Thus, article 31(1) CRSR³⁶ applies in this situation "guaranteeing immunity from penalties to refugees who entered unlawfully into the destination state." (Trevisanut, 2008, p. 220)

On the contrary, if the intervention of the coastal state authorities is only aimed at *refusing the entry*, this implies the movement of the frontier to the area where the operation takes place. Then persons on the vessel are not yet under state jurisdiction and the authorities are only limited by the principle of non-refoulement in its meaning of non-rejection at the frontier. (Trevisanut, 2008, p. 220) Thus, States still can refuse to agree to a claim of refuge without breaching the rules on non-refoulement. Any contrary assertion remains highly controversial for it is clear that most States would be unwilling to assume full responsibility for the protection of all human rights in their territorial waters (Barnes, 2004). However, this does not mean that states are not under other legal obligations such as SAR operations.

In a nutshell, the principle of non-refoulement is not triggered when the vessel is still at the border of the territorial sea whereas it is triggered when the vessel has illegally managed to cross (breach) the border since then the persons on the vessel are under the jurisdiction of the coastal state. The next chapter explains, from a more detailed perspective, how states adapt their perception of territoriality in order to evade the principle of non-refoulement.

³⁵ See Executive Committee of the High Commissioner's programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000 available at <http://www.unhcr.org/excom/EXCOM/3ae68d144.pdf>.

³⁶ See Article 31(1) of UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, available at: <http://www.refworld.org/docid/3be01b964.htm>

6.2.1 Definition of presence in the country in the context of territorial waters

It is important to consider the concept of territory in the context of the territorial waters in order to determine whether the territorial sea belongs to the state territory. (D. O'Connell, 1973, p. 303). Since most States extend their legislative competence to the territorial sea, the application of the principle of non-refoulement in this sea zone is widely recognized. (Barnes, 2004, p. 69).

In case of a shipwreck, coastal states are obliged to assure immediate disembarkation. But states have found ways to interpret and take advantage of the concept 'presence in the country'. The right of non-refoulement becomes legally effective as soon as the refugee is present in a country irrespective whether he entered lawfully or not. However, states differ between physical presence and legal presence in order to determine entrant status. A refugee may "be denied the right to seek protection by being declared a non-entrant in a legal sense, even though physically present" (Pugash, 1977, pp. 591-599). Thus, a claimant on a vessel in territorial waters may be lawfully and physically present and subject to the state's jurisdiction, but is deemed not to have entered the country. A common method used by states then is to deny the right to seek refuge on specified parts of sovereign territory. One example of state that uses this tool are the United States. For asylum purposes, US sovereign territory excludes ground below the high water mark and outside the mainland, such as government vessels and foreign bases including Guantanamo Bay in Cuba (Pugh, 2004, p. 60). Similarly, under the Migration Amendment Act³⁷, Australia's offshore territories, such as Christmas Island and Ashmore reef, were removed from its 'asylum zone' (Pugh, 2004, p. 60). If governments in destination states make arbitrary decisions about the limits of the sovereign territory which are obviously intended to evade the CRSR's non-refoulement provisions, this can be held to be contrary to international treaty obligations (Fonteyne, 2001, p. 251).

Although the territorial sea is 'territory', given the seas' special juridical status, international law has unquestioned primacy in the zone, trumping not only the coastal state's domestic law but its sovereignty also: '(t)he sovereignty over the territorial sea is subject to this convention and to other rules of international law.'³⁸ This further indicates that the obligation of non-refoulement applies in the territorial sea just as in land territory. If the refugees have already illegally entered the territorial sea and are therefore present in the territory of the coastal state, Article 31(1) of CRSR is relevant with full application. It is submitted that a 'necessary step' would be to establish whether or not the people on the vessels meet the refugee definition. (Pallis, 2002, p. 357)

6.2.2 The Right of innocent passage

The right of innocent passage states that a vessel may navigate the territorial sea without entering internal waters, and includes the right to proceed to and from port facilities and

³⁷ Migration Amendment (Excision from Migration Zone) Act No. 127 of 2001: "An Act to excise certain Australian territory from the migration zone under the Migration Act 1958 for purposes related to unauthorised arrivals, and for related purposes"

³⁸ Article 2(3) of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

roadsteads.³⁹ Thus, the right of innocent passage limits the exclusive powers of the coastal state in its territorial sea.⁴⁰ But does this also mean that non-refoulement is triggered in the territorial sea?

Coastal States enjoy a wide measure of discretion to determine the innocence of passage, and to take action against vessels engaged in irregular migration activities, intentionally or otherwise. (Barnes, 2010, p. 123) The coastal state shall not hamper the innocent passage of foreign ships through the territorial sea⁴¹ but it can regulate the conditions of the passage in the fields listed in article 21(1) UNCLOS, for example the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulation of the coastal State.⁴² In this situation the coastal state has no jurisdiction on passing vessel unless it considers the presence of unlawful passengers, the refugees, as a breach of the conditions for enjoying the right of innocent passage. Consequently, the state could refuse the entry of the vessel into its territorial waters. Such refusal can have consequences for individuals' enjoyment of the right of non-refoulement. (Trevisanut, 2008, p. 220)

Furthermore, Article 19(1) UNCLOS specifies that passage is not innocent when it is prejudicial to the peace, good order, or security of the coastal state. Central to the present discussion is also Article 19(2)(g) of the UNCLOS which provides that the passage of a vessel is rendered non-innocent if the vessel engages in the "loading, unloading of any commodity, currency to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State". Assuming that persons on vessels at sea can be viewed as a commodity, Goodwin-Gill refers to the 19(2)(g) UNCLOS provision to argue that '(t)he fact that a vessel may be carrying refugees who intend to request the protection of the coastal state arguably removes that vessel from the category of innocent passage...'.(Goodwin-Gill & McAdam, 1996, p. 164)

Pallis has questioned Goodwin-Gills approach, arguing that seeking refuge actually 'accords with international law' for which reason the passage of refugee' boats should not be deemed contrary to article 19(1) UNCLOS (Pallis, 2002, p. 357). In addition, 'passage' does not really correspond to the 'loading' or 'unloading' of persons in breach of the immigration regulations of the coastal state, which arguably removes refugee boats transiting the territorial sea from the scope of application of article 19(1) UNCLOS altogether.

According to Article 25(3)⁴³ UNCLOS, the coastal State can also prevent a passage which it considers not innocent and suspend the related right in specific areas of its territorial sea when

³⁹ Article 18 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁴⁰ See Article 17 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>: "Subjects to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea".

⁴¹ Article 24 UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁴² See 21(1)(h) UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁴³ Article 25(3) of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>: "The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of

this “is essential for the protection of its security”. The knee-jerk response would be to claim that this gives states an automatic right to remove any vessel in non-innocent passage from the territorial sea. This is not the case because states are only empowered to do what is necessary to prevent non-innocent passage. (Pallis, 2002, p. 357) But the coastal state shall not exercise its criminal jurisdiction on foreign vessels crossing its territorial sea except into its territory or if the offence is of a kind to disturb the peace or the security or the good order of the territorial sea.⁴⁴

Generally speaking, the concept of innocent passage and the concept of persons in distress both allow refugees on vessels to cross the sea border towards the territorial waters of the destination state. The question whether non-refoulement is triggered in the territorial sea in the context of persons in distress depends on whether one argues that the people on these vessels are a threat to the security of the destination country. This is what the next chapter is dealing with.

6.2.3 Persons in distress

The situation of persons in distress constitutes an exception to the exclusive rights of coastal states in their territorial sea, extending a right to dock and to seek refuge in ports to vessels in distress. The laws of the sea impose clear obligations to provide assistance to vessels in distress, but this duty is often interpreted as being triggered only when there are clear signals or requests for help, allowing ships to ignore dangerously overcrowded and ill-equipped migrant boats.⁴⁵

Although UNCLOS does not directly codify it, the existence of this right in customary law is supported by commentary (Chircop & Lindén, 2006, pp. 163-229) and consistent jurisprudence. The necessity of entering port ‘must be urgent and proceed from such a state of things as may be supposed to produce, on the mind of a skillful mariner, a well-grounded apprehension of the loss of the vessel or of the lives of the crew and the passengers’⁴⁶ and the passengers. The Irish High court of Admiralty has lately supported ‘the right of a foreign vessel in serious distress to benefit of a safe haven in waters of an adjacent coastal state’. (Moreno-Lax, 2011, p. 192)

Passage must be ‘continuous and expeditious’ except for stopping or anchoring ‘incidental to ordinary navigation or rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to person, ships or aircraft in danger or distress’.⁴⁷ The fundamental importance of this right is reflected in Article 24(1) which provides that: “The coastal State

foreign ships is such suspension is essential for the protection of its security, including weapons exercise. Such suspension shall take effect only after having been duly published.”

⁴⁴ See article 27(1)(a)-(b) UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁴⁵ See the Human rights Watch (HRW) Report “EU: Improve Migrant Rescue, Offer Refuge” 23 October 2013, available at <http://www.hrw.org/news/2013/10/23/eu-improve-migrant-rescue-offer-refuge>

⁴⁶ See Case *Kate A. Hoff v. The United Mexican States*, *The American Journal of International Law*, Vol. 23, No. 4 (Oct., 1929), pp. 860-865, available at <http://www.jstor.org/stable/2189760>.

⁴⁷ Article 18 UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>: provides that vessels may stop and anchor within the territorial sea ‘for the purpose of rendering assistance to persons, ships or aircraft in danger or distress’ and that such acts would not remove the vessel from innocent passage.

shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:

- (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
- (b) discriminate in any form or in fact against the ships of any State or against ships carrying cargoes to or from or on behalf of any State.⁴⁸

Since 1977 the ExCom has brought forward the argument restating it in relation to migration by sea in 1979, as follows: It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant at least temporary refuge, to persons on board who may wish to seek asylum in the end.⁴⁹

It may be possible to distinguish between vessels commencing a voyage with the specific purpose of transporting illegal immigrants and vessels stopping to assist those in distress. Certainly the former should be the subject of legal proceedings, whereas the latter are entitled to the fullest cooperation of all the parties involved. Yet such a distinction can be difficult to make in practice and should not be encouraged for the same reason. It should be avoided because it could lead to a derogation of refugee rights. (Barnes, 2004, p. 56)

In order to gain a deeper understanding of state jurisdiction in the situation of people in distress in territorial waters, I will take a closer look at a case dealing with the territorial sea of Australia in the next chapter.

6.2.4 The Tampa case

The Tampa case deals with actions of the Australian Government that prevented people aboard the Norwegian cargo vessel MV Tampa from entering Australia. In August 2001, the MV Tampa rescued 433 people, most of them of Afghani origin. They were trying to reach Australia with their wooden fishing boat but then the boat was sinking in international waters about 140 kilometers north of Christmas Island which is part of Australian territory. Since some of the people on the boat required medical help, the *Tampa* proceeded to the nearest port, at Christmas Island. In order to do so the *Tampa* stopped at the boundary of Australia's territorial sea to request permission to enter Australian waters and unload the refugees, but permission was refused. However, the *Tampa* declared a state of emergency and entered Australian waters anyway. About four nautical miles offshore, the ship was stopped and boarded by a special elite operations force of the Australian Army, who took control of the ship and anchored it.⁵⁰

In the *Tampa* case, Australia claimed that a vessel had entered Australian waters in violation of Australian immigration laws. This is a vague assertion and may also be accounted to be an abuse of rights. In order to ensure that the Tampa did not proceed, the Australian government

⁴⁸ Minister for Immigration and Multicultural Affairs & Others v. Vadarlis ("Tampa Appeal"), [2001] FCA 1329, Australia: Federal Court, 17 September 2001, available at: <http://www.refworld.org/docid/3bb1cfdc6.html>

⁴⁹ UN High Commissioner for Refugees (UNHCR), Conclusions Adopted by the Executive Committee on the International Protection of Refugees, December 2009, 1975-2009 (Conclusion No. 1-109), available at: <http://www.refworld.org/docid/4b28bf1f2.html>, Conclusion No. 15 2979, para. (c).

⁵⁰ Minister for Immigration and Multicultural Affairs & Others v. Vadarlis ("Tampa Appeal"), [2001] FCA 1329, Australia: Federal Court, 17 September 2001, available at: <http://www.refworld.org/docid/3bb1cfdc6.html>

sanctioned the use of armed troops. In the absence of an armed attack, the use of force against potential refugees cannot be justified on the grounds of self-defense. Although the State enjoys a margin of discretion in deciding what constitutes a threat to it, the measures taken in response will still be subject to requirements of necessity and proportionality (Goodwin-Gill & McAdam, 1996, p. 162).

A reasonable argumentation for Australian action would have been to argue that it acted in order to prevent passage that had threatened Australian security.⁵¹ Although the exercise of this power in this way might be morally questionable, it is not necessarily against the law and therefore difficult to argue against. In the territorial sea the coastal State exercises sovereignty, subject to some limitations as explained above. If there are no limitations to the sovereignty of the state, then the presumption must be that the coastal State has authority to act. Thus, “international law permits freedom of action for states, unless there is a rule constraining this.” (Barnes, 2004, p. 57)

It goes without saying that the coastal State must announce any new national laws and regulations that may affect passage in their territorial sea.⁵² The reason for this is obvious – vessels must be informed about any local laws that could have the effect of rendering passage non-innocent. In the *Tampa* case there was no such law in force that would have rendered the passage of the *Tampa* non-innocent. The only exception to this is that Australia would have been able to prove that the persons on the *Tampa* were unlawful immigrants. But this would mean to prejudge the status of those persons without the right legal process which would jeopardize the provisions of the CRSR.⁵³

The requirements for the suspension of innocent passage are clear: they must be non-discriminatory and duly published. In the *Tampa* case it appears that a course of action aimed at a specific vessel, the *Tampa*, was discriminatory and hence unlawful (Barnes, 2004, p. 57). Article 19(2) UNCLOS is not exhaustive and, in any case, the coastal State retains the authority to determine threats to its security. Of course this power must be exercised in accordance with the letter and spirit of the convention. This can be proven by finding out whether the destination country, in the *Tampa* case Australia, can legitimately claim that suspension is necessary for the security of the coastal State. It would seem very unreasonable that Australia can claim that that refugees or asylum-seeking in general threatens its peace or security. (Mason, 2002)

Of course Australia has obligations under international law by virtue of treaties to which it is a party, including the Refugee Convention of 1951 and the 1967 Protocol. The primary obligation which Australia has to refugees to whom the Convention applies is the obligation

⁵¹ Article 25(3) of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>: “The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercise. Such suspension shall take effect only after having been duly published.”

⁵² Art 21(3) UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁵³ Art 32(2) UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

under Article 33 not to expel or return them to the frontiers of territories where their lives or freedoms would be threatened on account of their race, religion, nationality, or membership of a particular social group or their political opinions. The question whether any of the rescues had been refugees has not been determined.

In the end, all of the people on the MV Tampa had been transferred to Nauru or New Zealand because National authorities did not want them to enter Australian land territory. This is a clear infringement of the principle of non-refoulement since the Tampa was already in territorial waters and therefore under Australian jurisdiction which obliges Australian state agents to help people in distress as explained in the chapter above. The people on the Tampa were people who were rescued from an emergency situation. This case shows that conduct of some states which deal with refugees in their territorial sea can be extreme. With regard to non-refoulement, this case indicates that states do not only use measures to disembark or redirect boats but also may try to directly attack them in order to prevent refugees to go ashore.

I will scrutinize the contiguous zone and the obligations of states and rights of refugees within this part of the sea in the following chapter.

6.3 Contiguous zone

The contiguous zone is a band of waters running from the outer limits of the territorial sea to 24 nautical miles.⁵⁴ In the contiguous zone the coastal state enjoys ‘a limited right of police’ (D. P. O’Connell & Shearer, 1984, p. 1058). This area does not fall within the exclusive sovereignty of the coastal state and preserves the navigational freedoms associated with the high sea. (Moreno-Lax, 2011, p. 190) However, pursuant to article 33(1) UNCLOS, in the “contiguous zone”, the coastal state may exercise the control necessary to: “(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea” (Lowe, 1981). The contiguous zone is the only maritime zone not fully under the coastal state’s jurisdiction for which UNCLOS provides some explicit powers in the migratory field (Trevisanut, 2008, p. 231).

Controls in refugee issues highlight the contrast between two legal regimes applicable in the maritime zone. On the one hand, the coastal state has the sovereign prerogative to exercise its powers of prevention and repression in relation to violations of its domestic immigration law. On the other hand, the same state must comply with international obligations deriving from the customary principle of non-refoulement and from the right to seek asylum guaranteed by article 14 of the Universal Declaration of Human Rights (hereinafter UDHR).⁵⁵ (Trevisanut, 2008, p. 232)

⁵⁴ Article 33(2) of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁵⁵ Article 14 of UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>: “(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution and (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”

In the contiguous zone the practice of interception and redirection of vessels transporting unlawful migrants, among whom there may well be some refugees, is encompassed in the prevention powers pursuant to article 33(1)(a) CRSR. In fact, unlawful migration may only be committed upon crossing a national border. At sea this general corresponds to the external limits of the territorial sea. This border can be affected by the factual elements of migrant's arrival and consequently shifts to the place where the coastal state effectively exercises its jurisdiction, following the factual elements of the migrants arrival. Any intervention of the authorities in the contiguous zone in such a situation cannot be justified by the attribute repressive powers. With regard to non-refoulement this basically means that states are not allowed to disembark refugee on vessels since there are not in their territory and therefore not yet under their jurisdiction. However, in reality, the practice of the interception and redirection is not clearly provided for by the wording of the article, but it is not forbidden either. The special jurisdictional rights which a State can exercise in the adjacent area of the contiguous zone do not clearly include the interception of vessels believed to be carrying refugees (Goodwin-Gill & McAdam, 1996, p. 276).

The contiguous zone has an exclusively functional nature, as supported by the wording of article 33(1) and the use of "necessary" to qualify the controls that the coastal state may exercise in the listed fields. The key word to identify the limit of the possible actions of the coastal state in the contiguous zone is "necessary". The interception and redirection may be considered lawful when necessary for the protection of interests. Indeed, the protection of a minor interest, as preventing a violation of its migration law, does not justify any kind of intervention. This has already been affirmed in 1935 in the *I'm Alone* case⁵⁶ concerning goods smuggling. (Dennis, 1929, p. 351; Fitzmaurice, 1936, p. 82; Hyde, 1935, p. 296) in which the defended argued that the intentional sinking of the vessel went beyond the exercise of necessary and reasonable force for the purpose of her apprehension. Consequently, once the coastal state exercises its jurisdictional powers intercepting and redirecting the vessel, it must consider whether its action may put the passengers of the concerned vessel at risk of persecution, torture or other inhuman treatments. The need of proportionality emerges in relation to the operations accomplished by states authorities on the high seas for contrasting unlawful migration. (Trevisanut, 2008, p. 233)

Contextualizing the points discussed in the contiguous zone with the principle of non-refoulement one can conclude that the states are allowed to use actions against refugee transporting vessels if this is necessary to protect certain laws and regulations in their territory. However, the definition of necessity is difficult to be made and therefore the possibility of taking advantage of this rule is very likely.

6.4 High sea

Compared to the other sea zones discussed above, the zone of the high seas is beyond national jurisdiction the most disputed and discussed area since vessels of all nations are allowed to use the high seas freely. (Malanczuk, 1997, p. 184) High Seas are defined negatively by Article 86 UNCLOS as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of

⁵⁶ Canada v. United States (1935) 3 R.I.A.A. 1609.

an archipelagic State”.⁵⁷ The high seas zone is an area of ocean space beyond the exclusive control of any State.⁵⁸ What does this mean for state compliance with the principle of non refoulement?

High seas are characterized by the prohibition of appropriation⁵⁹ and the freedom of the high seas does not imply the absence of rule but rather indicates that freedoms are granted equally to all states. Article 87 UNCLOS gives a non-exhaustive list of freedoms: (Trevisanut, 2008, p. 236)

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

- (a) Freedom of navigation;
- (b) Freedom of overflight;
- (c) ...

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area”.⁶⁰

Article 2 and article 89 of UNCLOS also state that no state is allowed to claim sovereignty over the high seas⁶¹. Article 8 of UNCLOS⁶² supports this by saying that the high seas are open to the usage of all states. However, the freedoms of the high seas have to be exercised with consideration of the conventions and the rules and principles of international law (Shaw, 2003, p. 543). Thus, the freedom of the high seas does not mean that a state can simply take any action it pleases against other vessels. The central part of the freedom is that ships are subject to the exclusive jurisdiction of the flag state.⁶³ Therefore, government vessels generally may not board foreign vessels in international waters without flag state consent.⁶⁴ Since national law cannot be applied in this area, a ship on the high seas is subject only to international law and to the laws of the flag state which is the state whose nationality the ship

⁵⁷ See Article 86 of PART VII HIGH SEAS SECTION 1. GENERAL PROVISIONS UN of General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁵⁸ Article 86 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁵⁹ Article 89 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁶⁰ Article 87 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁶¹ Article 2 and 89 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁶² Article 8 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁶³ Art. 92 UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html> Article 6 of PART VII HIGH SEAS SECTION 1. GENERAL PROVISIONS UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁶⁴ S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) and Article 92(1) of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

possesses. (Malanczuk, 1997, p. 185) As a consequence, the flag state enforces the rules and regulations of its own law but also of international law when present on the high seas.

States have increasingly taken advantage of the ambiguity in the law concerning the interdiction of vessels on the high seas to take extraterritorial actions to stem the flows of migration by sea. However, the general rule is that flag States enjoy exclusive authority to regulate vessels flying their flag.⁶⁵ This extends to both legislative and enforcement jurisdiction. This indicates a primary responsibility of the flag state to ensure that vessels do not engage in illegal trafficking and smuggling of people or the facilitation of breaches of coastal State immigration laws. Of course the practical control of such activities presents many difficulties given the frequent lack of knowledge, capacity and enforcement capacity of many flag States, even for strong maritime powers, across vast ocean spaces. In order to meet public order needs, there are some important exceptions to exclusive flag State jurisdiction in respect of stateless vessels and vessels engaged in piracy, slave-trading, unauthorised broadcasting and illicit trade in narcotics.⁶⁶ In such exceptional cases, or where an act of interference is derived from a specific treaty provision, then, and only then, may foreign flagged vessels be visited and boarded.⁶⁷

According to the UNHCR the non-refoulement obligation is binding regardless of whether the State first encounters the refugee inside or outside its own territory. This particular comment arose as a result of the *Sale* case in which the Supreme Court of the United States ruled on whether the non-refoulement provisions of the Refugee Act 1980⁶⁸ (which enacted Article 33 of the CRSR) applied to Haitians who had been interdicted on the high seas and returned home. The majority expressed the view that ‘no... protection (was offered) to any alien who was beyond the territorial waters of the United States’.⁶⁹ Evidently, this indicates that the CRSR, including Article 33, applies within the territorial waters of the US, and that it also applies to refugees who are on the threshold of entry to the territorial sea.⁷⁰

HRW supports this argument and points out that the court has ruled that the right to protection against return to a country where an individual faces the risk of torture or persecution – the non-refoulement principle – applies on the high seas. Yet it is still allowed to return people intercepted on the high seas to third countries where a cursory assessment of protection needs

⁶⁵ Article 92 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁶⁶ Article 99-109 UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁶⁷ Article 110 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁶⁸ The Refugee Act of 1980, Public Law 96-212, approved March 17, 1980

⁶⁹ *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.*, United States Supreme Court, 21 June 1993, available at: <http://www.refworld.org/docid/3ae6b7178.html>

⁷⁰ *Shaughnessy v. Mezei*, 345 U.S. 206 (1953), United States Supreme Court, 23 September 1953, available at: <http://www.refworld.org/docid/4152e10024.html>; suggest that the term ‘return (,refouler)’ refers to the exclusion of aliens who are merely „on the threshold of initial entry“

and the situation in the country to which they would be returned is done. This raises the risk of refoulement following snap decisions on the high seas.⁷¹

In the following two sub-sections, I will firstly discuss the general rule of freedom of navigation and secondly take a closer look at the special situation of flagless vessels sailing on the high seas.

6.4.1 Freedom of navigation

Arrivals by sea of refugees challenge not only the interpretation and application of the right of non-refoulement, and in particular the principle of non-refoulement, but also the existing rules related to the freedom of the high seas (Trevisanut, 2008, p. 206). One of the freedoms of the high seas is the freedom of navigation.⁷²

The freedom of navigation encompasses two principles: the vessel sailing under the flag of any state has the right to navigate⁷³ (Momtaz, 1991, p. 396) and the navigation of a vessel sailing under the flag of one state should not be hampered by other states. A vessel may sail under the flag of only one state which exercises its exclusive jurisdiction⁷⁴, except in the safe practices as any action contrary to the safety of navigation and any action constituting a danger to life or health of persons. Moreover, the circular obliges states, and thus vessels sailing under their flag, to render assistance.

6.4.2 Flaglessness

For the purpose of controlling maritime migration, the position of stateless vessels is particularly important given the distinct possibility that vessels engaged in irregular migration activities will lack a flag. (Pallis, 2002, pp. 350-353)

Generally, only the flag state is allowed to exercise jurisdiction over a ship on the high seas in terms of the power to arrest or similar acts in need of physical interference (Malanczuk, 1997, p. 186). However, if the flag state cannot be ascertained or the ship does not have a flag at all, new issues arise which makes the possibility to apply laws even more difficult. Other states may exercise jurisdiction in the high seas in very limited instances only⁷⁵, covering the only instances in which non-flag states may exercise jurisdiction: slave trading, piracy, unauthorized broadcasting, flaglessness, hot pursuit, and constructive presence. (Moreno-Lax, 2011, p. 186) Other than to permit warships to verify the flag of a ship, the UNCLOS does

⁷¹ See the Human rights Watch (HRW) Report “EU: Improve Migrant Rescue, Offer Refuge” 23 October 2013, available at <http://www.hrw.org/news/2013/10/23/eu-improve-migrant-rescue-offer-refuge>

⁷² Article 2 (1)(a) PART VII, HIGH SEAS SECTION, 1. GENERAL PROVISIONS of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

⁷³ Article 90 UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>: Right of Navigation: “Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas”; this implies the equal access to high seas for any state

⁷⁴ Article 92(1) UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>: “The vessel sailing under the flag of more than one state is considered a vessel without nationality”, and consequently does not enjoy the protection of any state and the freedom of navigation

⁷⁵ Articles 99,100, 109,110 and 111 of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

not detail how States are to treat stateless vessels. Article 110 UNCLOS is silent on the consequence of statelessness. A ship without a flag would not be able to draw on privileges and rights provided by the laws of the high seas. Even though no ship is forced to sail with a flag, this might lead to considerably lack of diplomatic protection in case of any international wrong. (Wallace, 1992, p. 143).

Action such as seizing a ship and apprehending the persons on board, ordering the ship to modify its course towards a destination outside the territorial waters or the contiguous zone to the high seas, escorting the vessel or steaming nearby until the ship is heading on such course, conducting the ship or the persons on board to a third country or handing them over to the authorities of a third state are not allowed according to any applicable treaty. The fact that the boats used for the transport of migrants do not fly the flag of any state does not seem to allow for unlimited enforcement jurisdiction in their regard. (Moreno-Lax, 2011, p. 188)

Taking into account the non-refoulement principle, the high seas is not an area where any kind of method that is aiming at sending refugees back to their country is allowed. There is only the exception of piracy, unauthorised broadcasting and illicit trade of narcotics in which states are allowed to enter the specific vessel. In general, the flag state has the responsibility of the vessel and its passengers.

After having discussed the legal basis of non-refoulement in the different sea zones, a few concluding remarks will be made in the last section.

7. Conclusion

This study was carried out in order to reply to the following research question: “Does the principle of non-refoulement entail an indirect right for potential refugee transporting vessels to breach sea borders and have access to the territorial waters of a country?” The analysis conducted in relation to the principle of non-refoulement in the context of sea borders reveals that the procedures on sea carried out by states are not fully in accordance with the international legal principle.

7.1 Introduction

Extraterritorial determination of a case where the person is not on state territory implies several issues such as time pressure and minimized control over the situation itself. One of the main issues is the difficulty to determine the moment of entry into the territory for refugees at sea. With the regard to non-refoulement, allowing migrants to enter territory might be the most reasonable consequence of not sending them back to their country of origin if they would be tortured or persecuted there.

The CRSR is the legal basis to confer effective protection against human rights abuses in the country of origin. In the context of sea borders, jurisprudence and doctrine have clearly detached certain rights from territory. (Goodwin-Gill, 2011, p. 453) Any territorial restriction frustrates its aim.⁷⁶ Considerably weight can be attached to this argument for several reasons.

⁷⁶ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, available at:

First, a refugee's need of protection can be measured solely in terms of the danger of persecution in the state of origin. The emphasis on the victim's perspective has prevailed as the element determining interpretation whenever questions regarding refugee status have been disputed in recent years. (Mathew, Hathaway, & Foster, 2003) Secondly, extraterritorial application is increasingly gaining recognition in other human rights treaties and refugee provisions.⁷⁷ (Lauterpacht & Bethlehem, 2003, p. 279)

If there were reasonable and probable grounds to believe that a vessel's intended purpose is to enter the territorial sea in breach of the immigration law, then the coastal State may have the right to stop and board the vessel; action taken under these powers include inspection and redirection. (Goodwin-Gill & McAdam, 1996, pp. 165-166) This is a general view, and is not expressed with specific regard to vessels containing refugees. In that connection, it must be recalled that redirection could amount to de facto refoulement. It is arguably 'unnecessary' to redirect a refugee transporting vessel. It is submitted that necessary control should be to provide the refugees with a hearing to establish whether they meet the refugee definition. An obvious argument is that certain refugees may indeed possess the requisite documentation and would not infringe immigration law and therefore a state lacks legal basis to exercise control over them.

7.2 Main findings

The main result of this analysis is that the principle of non-refoulement generally applies independently of any formal recognition of refugee status or entitlement of other form of protection, and it applies to the actions of states, wherever undertaken, whether at the land border, or in maritime zones. Its essential characteristics are acts attributable to the state or other international actor, which have the foreseeable effect of exposing the individual to a serious risk of irreversible harm. According to the Refugee Protocol the obligation not to send a refugee to a country where he or she may be at risk of persecution is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction. Thus, the decisive criterion is not whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State. The UNHCR makes clear: "non-refoulement is not so much about admission to a State, as about not returning refugees to where their lives or freedom are endangered." This does not state from where the refugees would be returned.

Since the determination of jurisdiction is the most crucial point to be taken into account with regard to non-refoulement, the following section is pointing out the main findings on state jurisdiction in the different sea zones.

Internal waters and thus also port areas are subject to the full sovereignty of the coastal State. Even the right to innocent passage does not include a concomitant right of entry into port. Neither UNCLOS nor any other international treaty determines a right of entry into foreign

<http://www.refworld.org/docid/45f17a1a4.html> para. 29 and Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al., 509 U.S. 155; 113 S. Ct. 2549; 125 L.Ed. 2d 128; 61 U.S.L.W. 4684; 93 Cal. Daily Op. Service 4576; 93 Daily Journal DAR 7794; 7 Fla. Law W. Fed. S 481, United States Supreme Court, 21 June 1993, available at: <http://www.refworld.org/docid/3ae6b7178.html>

⁷⁷ The Haitian Centre for Human Rights et al. v. United States, Case 10.675, 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 1997, available at: <http://www.refworld.org/docid/3ae6b71b8.html>, § 167.

ports. The exception to this rule is given by the situation of vessels in distress. Coastal States are entitled to regulate migration activities within their territorial sea. Border control and Interdiction powers should be exercised with due regard to the UNCLOS and 'other rules of international law'.⁷⁸ Ultimately, a positive obligation to preserve human life such as in situations of persons in distress may require that permission to enter port is accorded. The fact that these vessels may not fly the flag of any state does not allow for unlimited enforcement jurisdiction in their regard.

In respect of the contiguous zone, there is a general lack of coherent and uniform practice by States. It is suggested that the threshold for control is not limited to extreme cases that threaten the preservation of the State, but extends to any situation where there is a reasonable risk of any domestic law being breached.

The high seas are allowed to be used freely by vessels of all nations because they have a right to navigate and no state is allowed to claim sovereignty over the high seas. The central part of the freedom is that ships are subject to the exclusive jurisdiction of the flag state in this area. The fact that the principle of non-refoulement applies on the high seas does not mean that the interdicting state has to host the intercepted people; it has solely not to preclude them from seeking refuge elsewhere and, thus, not to force them back to their country of origin.

However, the practical consequences of the state's act must be examined: if the return to the high seas would leave the refugees with no alternative but to return home, this can be said to be de facto refoulement. If return to the high seas leaves the refugees with no alternative but to go to a third country which would send them back, this can be said to be chain refoulement. As a result, refugees who are sent back to another country which then sends them back to their home country are said to suffer indirect or chain refoulement, which similarly contravenes the protection provided for under Article 33. If the operation of state agents entails expulsion of the vessel when vessels have unlawfully entered its territory, the state recognizes implicitly that the vessel entered its territory and therefore becomes subject to its jurisdiction. Thus, the passengers of the vessel enjoy the right of prohibition of the principle of non-refoulement. If the intervention of the coastal state authorities is only aimed at refusing the entry and the individuals concerned are not yet under its jurisdiction, states still can refuse to let the refugees enter their territory without breaching the rules on non-refoulement.

7.3 Final remarks

States are often preoccupied with preventing departure and barring entry refugees. This corresponds to longstanding disputes about responsibilities for rescue operations and for determining where those rescued may land. However, the general aim to save lives at sea needs to be the main focus as well as the respect for fundamental human rights, such as the right to protection against torture and ill-treatment according to the principle of non-refoulement. Measures which can support this aim are for example to broaden the circumstances in which a boat is considered to be in distress and its passengers in need of rescue. To adopt binding rules and to avoid disputes about disembarkation points is also crucial because this would ensure that refugees are taken to a safe place in the shortest possible amount of time.

⁷⁸ Articles 2(3) and 87(1) of UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>

References

- Barnes, R. (2004). Refugee Law at Sea. *International and Comparative Law Quarterly*, 53(1), 47-77.
- Barnes, R. (2010). The international law of the sea and migration control. *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers, 103-150.
- Chircop, A. E., & Lindén, O. (2006). *Places of refuge for ships: emerging environmental concerns of a maritime custom* (Vol. 51): Martinus Nijhoff Publishers.
- Coppens, J., & Somers, E. (2010). Towards new rules on disembarkation of persons rescued at sea? *The International Journal of Marine and Coastal Law*, 25(3), 377-403.
- Dennis, W. C. (1929). The Sinking of the I'm Alone. *The American Journal of International Law*, 23(2), 351-362.
- Fitzmaurice, G. G. (1936). Case of the I'm Alone, The. *Brit. YB Int'l L.*, 17, 82.
- Fonteyne, J.-P. L. (2001). All Adrift in a Sea of Illegitimacy: An International Law Perspective on the Tampa Affair', (2001). *Public Law Review*, 12, 249-253.
- Goodwin-Gill, G. S. (2011). The right to seek asylum: Interception at sea and the principle of non-refoulement. *International Journal of Refugee Law*, 23(3), 443-457.
- Goodwin-Gill, G. S., & McAdam, J. (1996). *The refugee in international law*: Clarendon Press Oxford.
- Hyde, C. C. (1935). The Adjustment of the I'm Alone Case. *The American Journal of International Law*, 29(2), 296-301.
- Lauterpacht, E., & Bethlehem, D. (2003). The scope and content of the principle of non-refoulement. *Refugee protection in international law: UNHCR's global consultations on international protection*, 78-177.
- Lowe, A. (1977). The Right of Entry into Maritime Ports in International Law' (1977). *San Diego Law Review*, 14, 597, 621.
- Lowe, A. (1981). The Development of the Concept of the Contiguous Zone'. *BYIL*, 52, 109-169.
- Malanczuk, P. (1997). *Akehurst's Modern Introduction To International Law.*: London: Routledge.
- Mason, J. (2002). Paying the price: Australia, Indonesia join forces to stop "irregular migration" of asylum seekers. *Refugee Reports*, 22(8), 5.
- Mathew, P. (2002). Australian refugee protection in the wake of the Tampa. *The American Journal of International Law*, 96(3), 661-676.
- Mathew, P., Hathaway, J. C., & Foster, M. (2003). Role of State Protection in Refugee Analysis, The. *Int'l J. Refugee L.*, 15, 444.

- Momtaz, D. (1991). The high seas. *A handbook on the new law of the sea*, 1, 383-423.
- Moreno-Lax, V. (2011). Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea. *International Journal of Refugee Law*, 23(2), 174-220.
- Noll, G. (2005). Seeking Asylum at Embassies: A Right to Entry under International Law? *International Journal of Refugee Law*, 17(3), 542-573.
- O'Connell, D. (1973). The Juridical Nature of the Territorial Sea"(1971). *BYBIL*, 45, 303.
- O'Connell, D. P., & Shearer, I. A. (1984). *The international law of the sea*: Oxford University Press, USA.
- Pallis, M. (2002). Obligations of states towards asylum seekers at sea: interactions and conflicts between legal regimes. *International Journal of Refugee Law*, 14(2 and 3), 329-364.
- Pugash, J. Z. (1977). Dilemma of the Sea Refugee: Rescue without Refuge, The. *Harv. Int'l. LJ*, 18, 577.
- Pugh, M. (2004). Drowning not waving: boat people and humanitarianism at sea. *Journal of Refugee Studies*, 17(1), 50-69.
- Shaw, M. N. (2003). *International Law* (Vol. 5): CAMBRIDGE University Press.
- Sinha, S. P. (1971). *Asylum and international law*: Martinus Nijhoff.
- Trevisanut, S. (2008). The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection. *Max Planck Yearbook of United Nations Law*, 12, 205-246.
- Wallace, R. M. M. (1992). *International Law* (Vol. 2). London: Sweet & Maxwell.
- Weis, P. (1995). The Refugee Convention, 1951: The Travaux Préparatoires Analysed, with a Commentary by Dr Paul Weis. *The Research Centre for International Law, University of Cambridge*.