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The Legality of Regional Disembarkation Arrangements under International Law

A case study on arrangements between the European Union and North African
Countries

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List of Abbreviations

AU	African Union
BRA	Bureau des réfugiés et apatrides
CAT	Covenant against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EEAS	European External Action Service
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMO	International Maritime Organisation
IMO Guidelines	Guidelines on the treatment of persons rescued at sea
ICJ	International Court of Justice
IOM	International Organization for Migration
NGOs	Non-Governmental Organizations
OHCHR	Office of the United Nations High Commissioner for Human Rights
SAR	Search and Rescue
SAR Convention	1979 International Convention on Maritime Search and Rescue
SOLAS Convention	1974 International Convention for the Safety of Life at Sea
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	Office of the United Nations High Commissioner for Refugees

1. Introduction

In June 2018, the European Council introduced the concept of regional disembarkation platforms in an effort to find a common European Union (EU) solution to irregular migration.¹ In its conclusions it stated that in order to break the business models of human traffickers, it would be necessary to end the incentive to attempt to reach EU territory by embarking on perilous journeys. This in turn would require a new approach of the Member States to the disembarkation of people saved in search and rescue (SAR) operations. The European Council therefore called upon other EU institutions to explore the concept of regional disembarkation platforms.

In response to these conclusions the EU Commission has stated that disembarkation in a third country is possible if this SAR operation is carried out in the territorial sea of the third country by its coast guard or by other third country vessels. It is also possible in case the operation occurs in international waters and involves an EU State's flag vessel, provided that the principle of non-refoulement is respected.² In November 2018 the European Parliament's legal service confirmed this in a confidential report on the legality of disembarkation platforms. According to the report, the platforms "could lawfully be established outside of the EU, in order to receive migrants rescued outside the territory of the Union's member states."³ Moreover, it says that "EU law does not apply to migrants rescued at high sea, even with a boat flying an EU-member state flag... EU law is also not applied if the migrant is rescued in the territorial waters of an African coastal state".⁴ This however does not explain whether this would also be in accordance with international law and more importantly, seems to contradict a previous ruling of the European Court of Human Rights (ECtHR), in which it was held that the European Convention on Human Rights (ECHR) applies to vessels of an EU coast guard sailing on the high seas when actively exercising power.⁵

This thesis will explore under what circumstances the envisaged regional disembarkation platforms or arrangements would be in accordance with international law. The need for such a

¹ European Council, 'Conclusions, 28 June 2018' (Press Release) (2018) <<https://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/>> accessed 7 January 2019.

² European Commission 'Managing migration: Commission expands on disembarkation and controlled centre concepts' (Press Release) COM (2018).

³ Niels Frenzen 'Week in Review – 09 December 2018' (*Migrants at Sea*, 31 December 2018) <<https://migrantsatsea.org/2018/12/>> accessed 7 January 2019; Nikolaj Nielsen 'EP Lawyers back EU plans for migrant centres in Africa' (*EUObserver*, 27 November 2018) <<https://euobserver.com/migration/143513>> accessed 7 January 2019.

⁴ *Ibid.*

⁵ *Hirsi Jamaa and Others v Italy*, App No. 27765/09 (ECHR, 23 February 2012).

study derives from the lack of clarity in these policy documents on the exact meaning of regional disembarkation arrangements. Furthermore, the position of the African Union (AU) is that such platforms are de facto detention centres and therefore violate international law.⁶ A senior official of the European External Action Service (EEAS), has also stated that the discussions on the arrangements are continuing within the EU Council, regardless “of the willingness of third countries to participate”.⁷ This adds further to the relevance of a discussion on the legality of the envisaged arrangements under international law.

This thesis will explore the obligations that such regional disembarkation arrangements will have to fulfil in order not to violate international law of the sea and international refugee and human rights law. More specifically it will focus on arrangements concerning SAR operations conducted by EU coast guard vessels in international waters and in the territorial waters of third States. The research will take a desk-based approach. The main research question this thesis aims to answer is: what are the international obligations that regional disembarkation arrangements have to meet for the return of migrants rescued by EU coast guard vessels to North African countries to be legal? It will focus on the obligations of EU Member States when migrants are intercepted by EU coast guard vessels on the high seas and in the SAR zone of the respective North African country. A country’s SAR zone is a delimited search and rescue region for which a particular country is responsible.⁸ To answer the main question, this thesis will first discuss the definition of regional disembarkation arrangements, i.e. what are regional disembarkation arrangements, how did the concept come into existence and what format would they have? Thereafter the research will turn to the obligations that the EU has under international law to determine the requirements that the arrangements would have to meet for the EU not to be in breach of its international obligations. After having examined the requirements posed by the international law of the sea and international refugee and human rights law, the next chapter will apply these requirements to the concepts of regional disembarkation platforms or arrangements and thereby determine what format these arrangements should have for them to be in compliance with these international obligations. It

⁶ Daniel Boffey ‘African Union seeks to kill EU plan to process migrants in Africa’ *The Guardian* (Sharm el-Sheikh 24 February 2019) <https://www.theguardian.com/world/2019/feb/24/african-union-seeks-to-kill-eu-plan-to-process-migrants-in-africa?CMP=share_btn_tw&utm_source=ECRE+Newsletters&utm_campaign=511cc7177d-EMAIL_CAMPAIGN_2019_02_25_02_54&utm_medium=email&utm_term=0_3ec9497afd-511cc7177d-422327773%20accessed%2016%20March%202019> accessed 27 April 2019.

⁷ Frenzen (n 3).

⁸ For more information on SAR zones, see <<http://www.imo.org/en/ourwork/safety/radiocommunicationsandsearchandrescue/searchandrescue/pages/sarconvention.aspx>>.

will also provide some general remarks on whether agreements with specific North African countries could meet the requirements. The research will thereafter focus on a particular disembarkation agreement recently concluded between Spain and Morocco. Although a similar, arguably more questionable agreement has been concluded between Italy and Libya, the number of migrants that currently enters the EU via Morocco and Spain is significantly higher than the number of migrants that enters the EU through Libya and Italy.⁹ It is for this reason that the agreement concluded between Morocco and Spain, which allows Spain to return rescued migrants to Morocco,¹⁰ will be examined more thoroughly in this research. The research will look at the obligations of these countries under international law. The focus will be on the obligations Spain has when its coast guard conducts SAR operations in Morocco's SAR zone and thereby returns migrants to Morocco. This thesis will not take into account the obligations Spain has when migrants are rescued in the EU's territorial waters as EU law would be applicable in such instances and the current proposal does not seem to include this option. For Morocco, the focus will be on post-disembarkation responsibilities. Finally, the conclusion will provide some concluding remarks and recommendations.

⁹ Human Rights Watch 'No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya' 21 January 2019 <<https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>> accessed 19 June 2019; Council of Europe Commissioner for Human Rights 'Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean' (2019) pp 20-21, 28-29, 43-44; 'Frontex Migratory Map (2019) <<https://frontex.europa.eu/along-eu-borders/migratory-map/>> accessed 19 June 2019.

¹⁰ Lucía Abellán & María Martín 'Spain and Morocco reach deal to curb irregular migration flows' *El País* (Madrid 21 February 2019) <https://elpais.com/elpais/2019/02/21/inenglish/1550736538_089908.html?id_externo_rsoc=TW_CC&utm_source=ECRE+Newsletters&utm_campaign=b56954bf65-EMAIL_CAMPAIGN_2019_02_21_04_36&utm_medium=email&utm_term=0_3ec9497afd-b56954bf65-422327773%20accessed%2016%20March%202019> accessed 27 April 2019.

2. Regional Disembarkation Arrangements

After the situation of mass influx of refugees in 2015-2016, the EU introduced a series of measures to achieve effective control over its external borders and to prevent a return of the uncontrolled flows of migration in the preceding years.¹¹ Despite these measures, in 2018 the EU finds itself in a migration crisis again due to the refusal of the Italian government to allow the Aquarius, an NGO ship which conducts SAR operations, to dock in its harbours and to allow migrants to disembark. The crisis was furthermore worsened by a Maltese legal initiative to prevent NGOs from operating at sea.¹² Hence, this time the crisis was not due to high numbers of arrivals, but it was caused by a lack of consensus on the approach that should be taken to tackle irregular migration.

As a result, the EU Council Conclusions of 28 June 2018 eventually adopted, focus on externalizing the problem in adopting new measures designed to avoid “a return to the uncontrolled flows of 2015 and to further stem illegal migration”.¹³ One of the measures that was introduced is the concept of “regional disembarkation platforms” which is to be taken together with the proposal for “controlled centres” to be established in EU territory. With regard to the former concept, which is the focus of this research, the document merely calls upon the Council and the Commission to explore the concept in cooperation with relevant third countries as well as with the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organisation for Migration (IOM). On top of that, it adds that the platforms should operate distinguishing individual situations, in full respect of international law and without creating a pull factor. Because these Conclusions did not offer much clarity and remain rather vague about the concept, the concept was received with scepticism.¹⁴

Since then, both concepts have been elaborated on by the Commission in two non-papers as well as by IOM and UNHCR in their joint proposal. The first communications by the Commission on the concept refer to regional disembarkation arrangements instead of platforms and state that the objective of the concept is “to provide quick and safe disembarkation on both sides of the Mediterranean of rescued people in line with international law, including the

¹¹ Francesco Maiani “Regional Disembarkation Platforms” and “Controlled Centres”: Lifting the Drawbridge, Reaching out Across The Mediterranean, or Going Nowhere?” RefLaw <<http://www.reflaw.org/regional-disembarkation-platforms-and-controlled-centres-lifting-the-drawbridge-reaching-out-across-the-mediterranean-or-going-nowhere/>> accessed 27 April 2019.

¹² European Council on Refugees and Exiles (ECRE) ‘Asylum at the European Council 2018: outsourcing or reform?’ Policy Paper 4 (2018) <<https://www.ecre.org/wp-content/uploads/2018/08/Policy-Papers-04.pdf>> accessed 28 April 2019, pp 3-4.

¹³ European Council ‘Conclusions’ (n 1).

¹⁴ ECRE ‘Asylum at the European Council 2018’ (n 12) p 3.

principle of non-refoulement, and a responsible post-disembarkation process.”¹⁵ As was already quickly touched upon in the introduction, the Commission finds that disembarkation in a third country is possible if the search and rescue is carried out in the territorial waters of that country by its coast guard or by other third country vessels.¹⁶ Additionally, disembarkation in a third country would be possible if the search and rescue occurs in international waters and involves an EU State’s flag vessel if the principle of non-refoulement is respected. As was mentioned in the introduction, this thesis will focus on regional disembarkation arrangements concerning SAR operations conducted by EU coast guard vessels in international waters and in a third country’s SAR zone.

The document further lists the main features of disembarkation arrangements as being: clear rules for all developed by UNHCR and IOM, partnerships on equal footing, no pull factors created by resettlement options and no detention or camps. According to the Commission regional disembarkation arrangements provide for “a set of established procedures and rules to ensure safe and orderly disembarkation and post-disembarkation processing in full respect of international law and human rights”.¹⁷ It also says that the EU is ready “to provide financial and operational support for disembarkation and post-disembarkation activities as well as for border management with equipment, training and other forms of support.”¹⁸

In their joint proposal on the arrangements, UNHCR and IOM have declared their main aims concerning such arrangements. These include ensuring that people rescued in international waters are quickly disembarked in a predictable manner, in line with international maritime law, upholding respect for their rights and avoiding serious harm or other risks,¹⁹ as well as ensuring that responsible post-disembarkation processing “leads to rapid and effective differentiated solutions and reduces onward movement through an effective cooperation agreement”.²⁰ The proposal reiterates among others that the mechanism should ensure that the right to seek asylum is safeguarded, and that the human rights of all individuals, including non-refoulement and the right not to be disembarked in or transferred to a place where there is a risk of persecution,

¹⁵ European Commission ‘Managing migration’ (n 2); European Commission ‘Migration: Regional Disembarkation Arrangements’ Follow-up to the European Council Conclusions of 28 June 2018 (COM), p 2.

¹⁶ European Commission ‘Migration: Regional Disembarkation Arrangements’ (n 15) p 2; European Commission ‘The legal and practical feasibility of disembarkation options’ Follow-up to the informal meeting of 24 June 2018 (COM).

¹⁷ European Commission ‘Managing migration’ (n 2); European Commission ‘Migration: Regional Disembarkation Arrangements’ (n 15) p 2.

¹⁸ Ibid.

¹⁹ UNHCR ‘Proposal for a regional cooperative arrangement ensuring predictable disembarkation and subsequent processing of persons rescued at sea’ (2018) pp 1-2.

²⁰ Ibid, p 2.

torture or other serious harm are respected.²¹ It further outlines six steps to be taken in such disembarkation arrangements. These are summarized by the Commission as follows:

“First, after determining the place of disembarkation, those rescued at sea would be disembarked promptly and transported to reception facilities providing adequate, safe and dignified reception conditions. There, they would be registered, screened and receive assistance based on their specific needs. Points of reception should be established as far away as possible from points of irregular departure, in particular from sections of the coast where smugglers operate in order to reduce possibilities for re-departures and thereby reducing risks of pull factors. Furthermore, swift further processing of disembarked and registered migrants is necessary for the well-functioning of such arrangements. In the case of third countries, UNHCR and IOM could, after disembarkation, provide support to quickly distinguish between irregular migrants and those in need of international protection, taking into account individual situations, and operating in full respect of international law. In all cases, a solution must be achieved within a reasonable time frame. Throughout the different steps, close cooperation between UNHCR, IOM, and host country authorities will be paramount.”²²

The UNHCR and IOM proposal additionally states the following:

“the determination of places of disembarkation should be based on a geographic distribution with due consideration for available capacities in the identified centers, and in a manner that ensures respect for human rights, including respect for the safety and dignity of all people on the move, and the principle of non-refoulement. Achieving this outcome is subject to operational arrangements which would need to be sought and formalised through a set of understandings among concerned States.”²³

Solutions for refugees would include third country resettlement and humanitarian admission, family reunification, local solutions, voluntary repatriation and reintegration in their home country. With regard to the available solutions, the Commission suggests that a number of

²¹ Ibid.

²² Ibid, pp 3-5; European Commission ‘Non-paper on regional disembarkation arrangements’ (COM) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-regional-disembarkation-arrangements_en.pdf> accessed 23 January 2019, p 2.

²³ UNHCR ‘Proposal for a regional cooperative arrangement’ (n 19) p 3.

refugees could be resettled to the EU under current Member States' obligations, which are undertaken under the EU resettlement program. This program consists of voluntary programs undertaken by Member States with the aim of providing international protection and durable solutions to refugees identified as eligible for resettlement by UNHCR.²⁴ Under these programs Member States assess refugees' resettlement needs and relocate them to their territories to provide them legal status. The Commission however does not state any specifics with regard to the option for resettlement to the EU.²⁵

This is the envisaged outline of regional disembarkation arrangements according to the Commission on the basis of the joint UNHCR and IOM proposal. In order to initiate the establishment of these arrangements, the EU Council has stated that the initial phase consisting of outreach towards partner countries in Northern Africa, should be undertaken by interested Member States.²⁶ This means that those countries with privileged relationships with a respective third country should reach out to these third countries in cooperation with EU institutions and taking into account the roles of IOM and UNHCR. The EU Council underlines that any such concrete arrangements should be in line with the basic principles outlined above. It is also emphasized that sufficient funds should be made available and that Member States will contribute to the tailor-made packages of incentives and support measures.²⁷ The role of the EU and its Member States in supporting North African countries undertaking the arrangements is thus not explicitly explained, except for its emphasis on financial and technical support the proposals do not yet elaborate on specific obligations to be undertaken by the EU or its Member States.²⁸

²⁴ Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [2014] OJ L 150.

²⁵ Oxfam Novib 'Controlled centres' and 'disembarkation platforms' 18 September 2018

<https://www.oxfam.de/system/files/hintergrundpapier_hotspots_final.pdf> accessed 21 January 2019, pp 3-4.

²⁶ European Council 'Working Paper on Regional Disembarkation Arrangements' 17 September 2018

<<http://www.statewatch.org/news/2018/oct/eu-council-wk-paper-disembarkation.pdf>> accessed 21 January 2019, pp 2-3.

²⁷ Ibid.

²⁸ Oxfam Novib (n 25).

3. EU Obligations under International Law

As explained above, this thesis will focus on the obligations the EU has with respect to the return of people rescued at sea to North African countries. It will focus on the EU's principal obligations when its coast guards conduct SAR operations in international waters and in non-EU countries' SAR zones. UNHCR has set out a legal framework applying to such operations and the treatment of people involving refugees and asylum-seekers when conducted outside the search and rescue area of the rescuing flag State, and where disembarkation and/or processing is being considered in another state than the State of the rescuing vessel.²⁹ This legal framework is contained in the international law of the sea, international refugee law and human rights law.³⁰ It provides the following core principles:

- *“The duty to render assistance to those in distress at sea without discrimination.”*³¹
- *The obligation to ensure arrangements for distress communication and coordination.*³²
- *The duty to cooperate to ensure that shipmasters providing assistance for those in distress are released from their obligations and that survivors are disembarked from the assisting ship and delivered to a place of safety as soon as reasonably practicable.*³³
- *The principle of non-refoulement, which prohibits return to territories where an individual may face persecution, torture, inhuman and degrading treatment or*

²⁹ UNHCR ‘Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea’ (2002) para 3; UNHCR ‘Refugees and Asylum-Seekers in Distress at Sea – how best to respond?’ Expert Meeting in Djibouti (2011) para 9 and Annex A; UNHCR ‘The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees’ (2008) A/AC.259/17.

³⁰ UNHCR ‘Refugees and Asylum-Seekers in Distress at Sea’ (n 29) para 9; UNHCR ‘Background Note’ (n 29); UNHCR ‘The treatment of persons rescued at sea’ (n 29).

³¹ Article 98, United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS); Regulation 33 1-1, International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) (SOLAS Convention); Chapter 2.1.10, 1979 International Convention on Maritime Search and Rescue (as amended by MSC.70(69) and MSC.155(78)) (SAR Convention).

³² Article 98(2), UNCLOS; Chapter V, Regulation 7, SOLAS Convention.

³³ Regulation 33, 1-1, SOLAS Convention; Chapter 3.1.9, SAR Convention; Annex 34, IMO Resolution MSC.167(78) ‘Guidelines on the treatment of persons rescued at sea’ (adopted on 20 May 2004) (IMO Guidelines).

*other irreparable harm.*³⁴ *The principle of non-refoulement also applies when a State acts extraterritorially.*³⁵

- *The obligation to treat rescued persons humanely in line with international human rights law.*³⁶
- *The duty to respect the sovereignty of other States.*³⁷
- *The underlying principle of international cooperation in the refugee regime, stemming from the Charter of the United Nations and the 1951 Convention relating to the Status of Refugees.*³⁸³⁹

The main obligations of the EU will be analysed in light of this framework. The first three principles will be discussed under the section on the law of the sea, while the following two will be discussed under the section on international refugee and human rights law. The research will not focus on the duty to respect the sovereignty of other States or the principle of international cooperation, because these do not seem to be in dispute. The concept of regional disembarkation arrangements is presumed to be based on an agreement between States and because the research focuses on operations taking place on the high seas and/or in a State's SAR zone with the permission of the respective State, thus respecting State sovereignty and underpinning international cooperation.

This chapter will first discuss the EU's principal obligations under international law of the sea and thereafter delve into its obligations under international refugee and human rights law. It will not examine the application of international humanitarian law and the law concerning human trafficking.

3.1 International law of the sea

The obligations under international maritime law and the law of the sea are enshrined in multiple international conventions, namely the 1982 UN Convention on the Law of the Sea

³⁴ Article 33 of the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention); Articles 6 and 7, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Article 3 Covenant against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

³⁵ 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' (2007).

³⁶ ICCPR, CAT and 1966 International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 003 UNTS 3 (ICESCR); Regulation 33.6, SOLAS Convention.

³⁷ Article 2, Charter of the United Nations, entered into force 24 October 1945 (UN Charter).

³⁸ Articles 55-56, *ibid*; Preamble, Refugee Convention.

³⁹ UNHCR 'Refugees and Asylum-Seekers in Distress at Sea' (n 29) p 4.

(UNCLOS), 1974 International Convention for the Safety of Life at Sea (SOLAS Convention), 1979 International Convention on Maritime Search and Rescue (SAR Convention) and on top of that the 1958 Convention on the High Seas.⁴⁰ They are furthermore complemented by guidelines developed by the International Maritime Organization (IMO Guidelines). The EU Council has stated that it considers itself bound by UNCLOS, the SOLAS and SAR Conventions and the associated IMO Guidelines.⁴¹ These instruments impose duties on flag States, coast States and shipmasters concerning the assistance of persons in distress at sea.⁴² As this thesis examines the EU's obligations for actions of its coast guards which are also sailing under the flag of the respective state, this section will focus on the obligations of flag States under the law of the sea. With regard to flag States, noteworthy is that it is accepted as a rule under public international law that vessels are subject to the exclusive jurisdiction of their flag State.⁴³ This means that the obligations of the EU and its Member States under international law of the sea apply to vessels sailing under its flag and conducting SAR operations.

3.1.1 The duty to render assistance

The duty to help those in peril at sea is one of the oldest and most fundamental obligations under the law of the sea and constitutes a norm of customary international law.⁴⁴ It applies on the high seas and arguably also in other maritime zones.⁴⁵ This obligation is enshrined in UNCLOS and the SAR and SOLAS Conventions.^{46,47} Article 98(1) UNCLOS reads as follows:

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

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

⁴⁰ 1958 Convention on the High Seas (adopted on 29 April 1958, entered into force 30 September 1962) (1958 Convention); it only applies as far as its obligations are not superseded by UNCLOS; UNHCR ‘Background Note’ (n 29) para 4.

⁴¹ European Council ‘Working Paper’ (n 26) pp 3-4.

⁴² Art 98 UNCLOS; Chapter V SOLAS Convention; SAR Convention; UNHCR ‘General legal considerations: search-and-rescue operations involving refugees and migrants at sea’ (2017) p 4.

⁴³ Arts 92(1) and 87(1) UNCLOS; Art 6 1958 Convention.

⁴⁴ UNHCR ‘Background Note’ (n 29) para 4; ILC ‘Commentary on Draft Art. 12 of the United Nations Convention on the High Seas’ (1956) UN doc. A/3179; Violeta Moreno-Lax ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23(2) International Journal of Refugee Law, p 194; Seline Trevisanut ‘Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict’ (2010) 25(4) The International Journal of Marine and Coastal Law, pp 526-527.

⁴⁵ Myron H. Nordquist *UNCLOS 1982: A Commentary* Vol. III (Martinus Nijhoff Publishers 1993) p 170.

⁴⁶ Art 98 UNCLOS; Chapter V, Regulation 33 1-1, SOLAS Convention; Chapter 2.1.10 SAR Convention.

⁴⁷ The EU ratified UNCLOS on 1 April 1998 and is therefore bound by the obligations under the Convention; UN Oceans & Law of the Sea ‘Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements’ Last updated 08 April 2019 <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 24 June 2019.

- (b) *To proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;*
- (c) *After a collision, to render assistance to the other ship, its crew and its passengers and, where possible to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.*⁴⁸

Paragraph 2 adds that States are also under an obligation to ensure arrangements for distress communication and coordination.⁴⁹ Paragraph 1 entails that the flag State has to put the shipmaster under an obligation to render assistance to those in distress at sea without discrimination, meaning without regard to their nationality, status, or the circumstances in which they are found, if informed of their need of assistance, in so far as such action may reasonably be expected.⁵⁰ The SOLAS and SAR Conventions similarly list the principle, but add that the State shall also ensure that the persons rescued are disembarked from the ship and delivered to a place of safety.⁵¹ The latter definitions of rescue imply disembarkation of people rescued because the requirement of delivery to a place of safety cannot be fulfilled by maintaining people on board the rescuing vessel indefinitely.⁵² The duty to render assistance is therefore not limited to carrying out rescue operations, but also extends to the disembarkation of the rescued persons in a place of safety.⁵³ Additionally, the Conventions oblige States to cooperate to ensure that shipmasters providing assistance for those in distress are released from their obligations and that survivors are disembarked from the assisting ship and delivered to a place of safety as soon as reasonably practicable.⁵⁴

Although these Conventions do set out which State is responsible for the SAR operation, there are no clear rules on which state is obliged to allow disembarkation on its territory, nor do they purport a meaning on the concept of a place of safety.⁵⁵ The Conventions merely state that the shipmaster and the States involved in the SAR operation have to determine the appropriate

⁴⁸ Article 98 UNCLOS.

⁴⁹ Article 98(2) UNCLOS; Chapter V, Regulation 7, SOLAS Convention.

⁵⁰ Arts 98(a) and (b) UNCLOS; European Union Agency for Fundamental Rights ‘Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations’ (2018) <<https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>> accessed 24 June 2019.

⁵¹ Article 4.1-1 Annex 3, IMO Resolution MSC.153(78) ‘Adoption of amendments to the International Convention for the Safety of Life at Sea, 1974, as amended’ (adopted on 20 May 2004); Article 3.1.9, SAR Convention.

⁵² UNHCR ‘Background Note’ (n 29) para 12.

⁵³ Trevisanut (n 44) p 529.

⁵⁴ Regulation 33, 1-1, SOLAS Convention; Chapter 3.1.9, SAR Convention; Annex 34, IMO Guidelines.

⁵⁵ ECRE ‘Defending Refugees: Access to Protection in Europe’ (2007) <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Defending-Refugees-Access-to-Protection-in-Europe_December-2007.pdf> accessed 23 January 2019, p 41.

place of safety by taking the relevant circumstances into account.⁵⁶ The lack of clarity on the definition of a place of safety and the rules on State responsibility are problematic.⁵⁷ Because the Conventions do not elaborate on the criteria for disembarkation and delivery to a place of safety, UNHCR argues for prompt disembarkation at the next port of call.⁵⁸ However, the IMO Guidelines to the contrary lay down that the State responsible for the SAR zone should accept the disembarkation of the persons rescued into a place of safety under its control if disembarkation cannot be arranged swiftly elsewhere.⁵⁹ Hence, contrary to the Conventions which highlight primary responsibility for the flag State, this puts the State in whose SAR zone the operation was conducted under a duty to secure a place of safety for the rescued persons.⁶⁰ The normative approach therefore seems to be that flag States and shipmasters first aim to disembark at the next port of call, but if this is impossible for any reason, the State responsible for the SAR zone in which the operation was conducted, should allow for disembarkation in a place of safety under its control, i.e. on its territory.

With regard to the definition of a place of safety, the IMO Guidelines on the treatment of persons rescued at sea further state the duty of the shipmaster to “seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized”.⁶¹ A place of safety is defined in the same document as:

*“a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further it is a place from which transportation arrangements can be made for the survivors’ next or final destination.”*⁶²

Additionally, by delivery to a place of safety account should be taken of the particular circumstances of the case,⁶³ and in case of asylum-seekers and refugees among those rescued there is a need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened.⁶⁴ With regard to the former

⁵⁶ Moreno-Lax (n 44) p 175.

⁵⁷ James Z. Pugash ‘The Dilemma of the Sea Refugee: Rescue Without Refuge’ (1977) 18 Harvard International Law Journal 577, p 578.

⁵⁸ UNHCR ‘Background Note’ (n 29) para 12.

⁵⁹ Principle 3, IMO Facilitation Committee ‘Principles relating to administrative procedures for disembarking persons rescued at sea’ (2009).

⁶⁰ Trevisanut (n 44) p 530.

⁶¹ Art. 5.1.6 Annex 34, IMO Guidelines.

⁶² Art. 6.12 Annex 34, *ibid.*

⁶³ Art. 6.15, *ibid.*

⁶⁴ Art. 6.17, *ibid.*

requirement, it is argued that if the particular circumstances of the case are not taken into account, and disembarkation takes place in a pre-determined place, this disregards the safety of asylum seekers on board, and therefore leads to a mala fide implementation of the law of the sea.⁶⁵ The latter requirement will be discussed more elaborately in the next section as this is interlinked with international refugee law, but it is necessary to mention one point of debate here. It is often argued that the obligations under the international law of the sea governing SAR operations are upheld only when the principle of non-refoulement is observed.⁶⁶ However, according to some the duty to render assistance to persons in distress at sea is only part of customary law to a limited extent and the practice of not disembarking persons in a place where they are at risk of persecution would not yet be part of customary law, which means that there would be no customary obligation binding the EU and its Member States to only disembark in places where there is no risk of persecution.⁶⁷ Consequently, it is asserted that with regard to the principle of non-refoulement, only Member States that are party to the SAR Convention and the other international agreements on search and rescue at sea are bound by the obligation to only disembark rescued asylum seekers at a port where they are not at risk. The EU, contrary to its Member States, is not a party to the SAR or SOLAS Convention and does therefore not have search and rescue obligations by which it is bound directly.⁶⁸ However, the author here wishes to put forward that it is first of all questionable whether the customary law obligation to render assistance to persons in distress at sea does not extend to not disembarking persons in a place where they are at risk of persecution.⁶⁹ UNHCR has for instance been arguing that the principle of non-refoulement constitutes a rule of international customary law since 1994.⁷⁰ Furthermore, even though the EU is party to neither Convention, the EU Council considers itself bound by both Conventions, and moreover all of its Member States are party to the SOLAS Convention which means that it will de facto have to abide by the obligations under

⁶⁵ *LaGrand (Germany v USA)* [2001] (Judgment) ICJ Rep 466, from para 77; Moreno-Lax (n 44) p 200.

⁶⁶ Roberta Mungianu *Frontex and Non-Refoulement: The International Responsibility of the EU* (CUP, 2016) p 203; Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21(2) *International Journal of Refugee Law* 256, p 291; Guy S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-refoulement' (2011) 23(3) *International Journal of Refugee Law*, pp 443, 452.

⁶⁷ Mungianu (n 66) p 203.

⁶⁸ *Ibid.*

⁶⁹ See for instance Irini Papanicolopulu 'The duty to rescue at sea, in peacetime and in war: A general overview' (2016) 98(2) *International Review of the Red Cross*, pp 491-514.

⁷⁰ UNHCR 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93' 31 January 1994.

the latter Convention at least.⁷¹ The EU and its Member States are therefore considered to be under the obligation not to disembark rescued asylum-seekers at a place where they are at risk.

It is further emphasized that the place of disembarkation should be sought within the boundaries of the obligations under the SAR and SOLAS Conventions, the principle of non-refoulement, and practical considerations such as geographical proximity.⁷² Requirements of a place of safety therefore include the determination of a place on a case-by-case basis, the requirement of non-existence of a threat to the lives and freedoms of asylum-seekers with a well-founded fear of persecution, nor a general threat to safety of their lives, and the requirement that basic human needs can be met in the respective place.

To sum up, shipmasters are under a duty to assist those who are in distress at sea. Corresponding to this obligation is the obligation for States to coordinate and cooperate to ensure that the rescued people can be disembarked as soon as possible. International law of the sea first puts primary responsibility for the SAR operation on the flag State, but with respect to disembarkation it seems to put the primary responsibility on the State in whose SAR zone the operation was conducted. It is therefore this State that should allow for disembarkation in a place of safety on its territory in case prompt disembarkation at the next port of call is for any reason not possible. The requirements of a place of safety are not further defined in the Conventions, it is merely stated that the particular circumstances of the case should be taken into account and that in case the people on board are asylum-seekers, disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened should be avoided, thereby connecting the law of the sea to refugee law. It is furthermore required that the respective place of disembarkation can meet basic human needs.

3.2 International refugee and human rights law

This section focuses on obligations which arise when there are asylum-seekers among those rescued and general human rights obligations which have to be respected. The EU is currently no party to most international human rights treaties⁷³ but one noteworthy exception is the EU Charter of Fundamental Rights (EUCFR), which applies to the EU institutions and bodies and

⁷¹ European Council 'Working Paper' (n 26) pp 3-4; List of SOLAS Signatory Nations <http://www.cruiselaws.com/List_Of_Solas_Signatory_Nations.html> accessed 26 June 2019; Not all Member States are party to the SAR Convention however, see:

<<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>> under heading 'Status of Conventions - Comprehensive information including Signatories, Contracting States, declarations, reservations, objections and amendments', accessed 26 June 2019.

⁷² ECRE 'Asylum at the European Council 2018' (n 12) p 8.

⁷³ It is party to the Convention on the Rights of Persons with Disabilities, which is not very relevant for the purpose of this research.

to the authorities of the Member States when they are implementing EU law.⁷⁴ Obligations can also be inferred by other means. Firstly, according to Article 6 of the Treaty on EU (TEU), the ECHR and the constitutional traditions of the Member States are a source of the general principles of EU law.⁷⁵ Whenever needed, the Court of Justice of the European Union (CJEU) may refer to these principles and use them as a source of inspiration. Secondly, the EU Council has stated in this context that it considers itself bound by the Refugee Convention and the principle of non-refoulement.⁷⁶ Furthermore, internal EU legislation also purports to apply the obligations under the Refugee Convention.⁷⁷ With respect to human rights, some of these have attained customary law status, which means that these would be binding on the EU as well. According to the literature this should probably include the entire Universal Declaration of Human Rights (UDHR),⁷⁸ but it should at least include the human rights which have been recognized by the International Court of Justice (ICJ) as being part of customary law. For the purpose of this research these rights include: freedom from racial discrimination and the prohibition on slavery,⁷⁹ freedom from arbitrary detention and the right to physical integrity,⁸⁰ and protection against denial of justice.⁸¹ In general, the entire body of human rights law becomes applicable when a State exercises jurisdiction, meaning that any act of a state agent whereby persons are sufficiently affected brings persons within the EU's jurisdiction.⁸² More

⁷⁴ Article 51(1) Charter of Fundamental Rights of the European Union [2000] OJ C 364/01 (EUCFR).

⁷⁵ Article 6 Consolidated Version of the Treaty on European Union [2008] OJ C 115/13 (TEU).

⁷⁶ European Council 'Working Paper' (n 26) pp 3-4.

⁷⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/09 (Qualifications Directive); Art 78 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU); Joined Cases C-175/08 and 179/08 *Salahadin Abdulla* [2010] ECLI:EU:C:2010:105; Case C-31/09 *Bolbol* [2010] ECLI:EU:C:2010:351; Office of the United Nations High Commissioner for Human Rights (OHCHR) 'the European Union and International Human Rights Law' <https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf> pp 22-23.

⁷⁸ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR); OHCHR 'the European Union and International Human Rights Law' (n 77) p 23; Hurst Hannum 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 Georgia Journal of International & Comparative Law 287; Louis Henkin 'Human Rights and State "Sovereignty"' (1996) 25 Georgia Journal of International & Comparative Law 31; B.G. Ramcharan *The Concept and Present Status of the International Protection of Human Rights, Forty Years after the Universal Declaration* (Martinus Nijhoff Publishers, 1989); Oscar Schachter *International Law in Theory and Practice* (Springer, 1991) pp 335-345; Louis B. Sohn 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 American University Law Review.

⁷⁹ *Barcelona Traction Light and Power Co. Ltd* [1970] (Judgment) ICJ Rep 3, 32; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] (Advisory Opinion) ICJ Rep 16, 57.

⁸⁰ *US Diplomatic and Consular Staff in Tehran* [1980] (Judgment) ICJ Rep 3, 42.

⁸¹ *Barcelona Traction* 47.

⁸² Maarten den Heijer *Europe and extraterritorial asylum* (Hart 2012), Chapter 2, pp 35-76; *X v Federal Republic of Germany* App no 1611/62 (ECHR, 25 September 1965), *X v UK* App No 7547/76 (ECHR, 15 December 1977); *Stocké v Germany* App No 11755/85 (ECHR, 12 October 1989), para 166; *Vearncombe v UK and Germany* App no 12816/87 (ECHR, 18 January 1989). See also *Legal Consequences of the Construction of a*

specifically, the ECtHR has stated that ‘the special nature of the maritime environment’ cannot justify a situation where people have no access to a legal system affording them the rights and guarantees under the ECHR.⁸³ It therefore found that the contracting parties always have to act in conformity with the ECHR regardless of territorial constraints.⁸⁴ Similar approaches have been taken by the judicial bodies under the International Covenant on Civil and Political Rights (ICCPR) and the Inter-American Court of Human Rights (IACtHR).⁸⁵ The EU is therefore bound by its human rights obligations when its Member States’ coast guards conduct SAR operations because they would be exercising jurisdiction by requiring the rescued migrants to disembark in North African countries.⁸⁶

Moreover, international human rights law could also become applicable when the EU exercises effective control over the disembarkation process in a third country, thereby exercising jurisdiction or control over another state’s territory.⁸⁷ The responsibility of the EU or its Member States will thus be engaged when it or they have jurisdiction because of the level of control exercised over the people concerned.⁸⁸ This section will distinguish between the EU’s obligations under human rights law because of jurisdiction over vessels sailing under its Member States’ flags and obligations derived from control over post-disembarkation processes.

3.2.1 EU flag state obligations

Contrary to international maritime law, which imposes the duty to provide assistance to persons in distress at sea regardless of the nationality and status of the individuals,⁸⁹ the application of international refugee law is based on a person’s well-founded fear of persecution on specific grounds, in order to avail him or herself of international protection.⁹⁰ As stated above, State responsibility under international refugee law, and more particularly the Refugee Convention,

Wall in the Occupied Palestinian Territory [2004] (Advisory Opinion) ICJ Rep 136, para 111; Art 1, ECHR; *Loizidou v Turkey*, App No. 15318/89 (ECHR, 18 December 1996); ECRE ‘Defending Refugees’ (n 55) p 22; UNHCR Protection Policy Paper ‘Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing’ (2010) para B II 9.

⁸³ *Medvedyev v France* App No. 3394/03 (Grand Chamber) (ECHR, 10 July 2008), para 81.

⁸⁴ *Ibid*; Den Heijer (n 82) pp 229-279; It is even questioned in the literature whether physical involvement by a State is still required when there is a causal relationship between bilateral agreements and violations of customary international human rights law, see Tineke Strik & Ashley Terlouw ‘Territorialiteit en vluchtelingenrecht: verantwoordelijkheid nemen, afschuiven of delen?’ *Handelingen Nederlandse Juristen-Vereniging* 149/2019, p 172.

⁸⁵ Den Heijer (n 82) pp 229-279.

⁸⁶ See for instance *N.D. and N.T. v. Spain*, App Nos 8675/15 and 8697/15 (ECHR, 3 October 2017); *Legal Consequences of the Construction of a Wall* para 111; Art 1, ECHR; *Loizidou*; ECRE ‘Defending Refugees’ (n 55) p 22; UNHCR Protection Policy Paper (n 82) para B III 10.

⁸⁷ *Ilascu and Others v Moldova and Russia*, App No. 48787/99 (ECHR, 8 July 2004); *Issa and Others v Turkey*, App No. 31821/96 (ECHR, 16 November 2004); ECRE ‘Defending Refugees’ (n 55) p 22.

⁸⁸ ECRE ‘Defending Refugees’ (n 55) pp 38-39.

⁸⁹ As specified in for example Annex, Chapter 2, paragraph 2.1.10 SAR Convention.

⁹⁰ UNHCR ‘Background Note’ (n 29) paras 17-20.

arises when it becomes clear that there are asylum-seekers among those rescued in the operation.⁹¹ UNHCR expands on this stating that States need to ensure the following before disembarking or otherwise returning a person in need of international protection to the territory of another state:⁹²

- The person concerned will be admitted and protected against refoulement there;⁹³
- The person will have access to fair and efficient procedures for the determination of refugee status or other forms of international protection;⁹⁴
- The person concerned will be treated in accordance with international refugee law and human rights standards, including appropriate reception arrangements and safeguards against arbitrary detention and assistance for persons with special needs;
- If the person concerned is recognized as being in need of international protection, he or she should be able to enjoy it in line with relevant standards.⁹⁵

These requirements will now be more elaborately evaluated. A first requirement is that the principle of non-refoulement must be ‘scrupulously observed’.⁹⁶ This principle is indeed one of the most universally accepted rights under international refugee law and it is among others incorporated under Art. 33 of the Refugee Convention.⁹⁷ It is also argued that the principle is part of customary international law.⁹⁸ The provision stipulates that refugees have a right not to be returned to a country where his or her life or freedom would be threatened on account of race, religion, nationality or membership to a particular social group or political opinion.⁹⁹ The principle of non-refoulement thus prohibits returns to territories where an individual may face persecution,¹⁰⁰ torture,¹⁰¹ inhuman and degrading treatment or other irreparable harm.¹⁰² It also

⁹¹ UNHCR ‘Background Note’ (n 29) para 18.

⁹² For relevant standards, see generally UNHCR ‘Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers’ (2013); The best interests of the child shall also be a primary consideration in any disembarkation affecting children.

⁹³ UNHCR Executive Committee, Conclusion No. 22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx (1981), Part II A (2).

⁹⁴ UNHCR Executive Committee, Conclusion No. 82 (XLVIII) Safeguarding Asylum (1997), para d (iii); UNHCR Executive Committee, Conclusion No. 85 (XLIX) Conclusion on International Protection (1998) para q.

⁹⁵ UNHCR ‘General legal considerations’ (n 42) p 3.

⁹⁶ UNHCR Executive Committee, Conclusion No. 22 (n 93) Part II A (2).

⁹⁷ Article 33 Refugee Convention; Articles 6-7 ICCPR; Article 3 CAT.

⁹⁸ UNHCR ‘Advisory Opinion (n 35); UNHCR and others, ‘Protecting Refugees a Field Guide for NGOs’ (1999).

⁹⁹ Ibid.

¹⁰⁰ Art 33 Refugee Convention.

¹⁰¹ Art 3 CAT; Art 7 ICCPR.

¹⁰² UN Human Rights Committee, General Comment No 31 ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) CCPR/C/21/Rev.1/Add.13.

includes the prohibition of arbitrary deprivation of the right to life.¹⁰³ The provision prohibits the return ‘in any matter whatsoever’, which means it covers any action exposing the person concerned to the risk of persecution and it applies to refugees as well as to asylum-seekers waiting for a final decision on their claim.¹⁰⁴ It furthermore also includes protection from indirect refoulement, meaning that disembarkation in a State cannot lead to expulsion to a third country where the person concerned would be at risk. The protection from direct or indirect refoulement must be effective, i.e. it must be upheld in practice.¹⁰⁵

There has been a debate on whether the principle also applies extraterritorially, such as in instances of SAR operations. The United States Supreme Court namely considered that the principle of non-refoulement only applied in case of prior access to the US territory.¹⁰⁶ This view is however not supported by most other authorities, most literature and also the Inter-American Commission on Human Rights have argued that this ruling constituted faulty reasoning.¹⁰⁷ From the perspective of these authorities, the prohibition of refoulement applies outside a State’s territory as well. The principle of non-refoulement is therefore considered to apply whenever a State exercises jurisdiction, including extraterritorially, and in instances of SAR operations in international waters.¹⁰⁸ Because the principle of non-refoulement under the Refugee Convention applies extraterritorially, the argument made in the previous section concerning the extent to which the duty not to disembark people in a place where they risk

¹⁰³ Art 6 ICCPR; UNHCR Protection Policy Paper (n 82) paras B III 12-13.

¹⁰⁴ Fischer-Lescano et al (n 66) p 268; UNHCR Protection Policy Paper (n 82) para B III 13.

¹⁰⁵ *M.S.S. v Belgium and Greece* App No 30696/09 (ECHR, 21 January 2011), para 286; Guy S. Goodwin-Gill, ‘The Right to Seek Asylum’ (n 66) p 454.

¹⁰⁶ According to the Court, it did therefore not apply to the Haitian interdiction program that was carried out by the US Coast Guard on the high seas; see Moreno-Lax (n 44) p 205.

¹⁰⁷ *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am. CHR, OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), paras 183-188; Fischer-Lescano et al (n 66) pp 266-267; UNHCR ‘Advisory Opinion’ (n 35) para 24 and following; UNHCR ‘Background Note’ (n 29) paras 18 & 30; UNHCR & IMO ‘Rescue at Sea – A Guide to Principles and Practice As Applied to Migrants and Refugees’ (2015); UNHCR Executive Committee ‘Interception of Asylum Seekers and Refugees: The International Framework and recommendations for a Comprehensive Approach’ UN doc. EC/50/SC/CRP.17 (2000); UNHCR Executive Committee, Conclusion No. 22 (n 93) part II.A.2; UNHCR Executive Committee, Conclusion No. 81 (XLVII) General Conclusion on International Protection (1997) para (h); and UNHCR Executive Committee, Conclusion No. 82 (n 94) para (d) (iii), as a violation, as well as the prevention of access to the territory of the state; compare, UNHCR Executive Committee, Conclusion No. 85 (n 94) para (q); ECRE ‘Defending Refugees’ (n 55) para 20 and following.

¹⁰⁸ UNHCR ‘UNHCR’s oral intervention at the European Court of Human Rights - Hearing of the case *Hirsi and Others v. Italy*’ App No. 27765/09 (22 June 2011); UNHCR ‘Advisory Opinion’ (n 35) paras 24, 26, 32-43; UNHCR ‘Submission by the Office of the United Nations High Commissioner for Refugees in the case of *Hirsi and Others v. Italy*’ (2010) paras 4.1.1-4.2.3; UNHCR ‘UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR’ (17 February 2012) para 2(4); The extraterritorial applicability of human rights obligations is firmly established in international human rights law; See *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] (Judgment) ICJ Rep 168, para 180; *Legal Consequences of the Construction of a Wall* para 111.

persecution is part of customary law and the question of whether the EU is bound by the obligations under the SAR and SOLAS Conventions, is irrelevant because the principle of non-refoulement would nevertheless apply if the operation concerns an EU flag State due to its extraterritorial application under the Refugee Convention and the EUCFR.¹⁰⁹

The application of the principle of non-refoulement also implies the application of related procedural guarantees. In order to determine whether a person can be returned to a particular country it has to be established whether a person's life or freedom would be at risk in this country on account of his or her race, religion, nationality, membership of a particular social group or political opinion.¹¹⁰ It is therefore asserted by UNHCR and in the literature that to be able to implement the provisions of the Refugee Convention, refugees have to be identified, which implicitly requires States to perform status determination procedures.¹¹¹ Such procedures must be organized as individual procedures investigating the circumstances of the specific case.¹¹² Asylum-seekers or refugees should therefore at least be allowed temporary entrance on a territory where there is no risk of persecution in order to determine the person's status and protection needs.¹¹³ UNHCR states that this requires clarity on the identification of asylum-seekers among those rescued and determination of the State responsible under international refugee law for admission and processing of asylum seekers.¹¹⁴ States can thus not reject asylum-seekers at the border without such a procedure if they are bound by the Refugee Convention or other human rights conventions that lay down this obligation.¹¹⁵ It is therefore necessary to determine the status of those who have been rescued, which in turn requires that prompt access to fair and efficient asylum procedures is provided in order to ensure adequate protection of refugees.¹¹⁶ This further aligns with the right to seek asylum under the UDHR which, although non-binding, states that "everyone has the right to seek and to enjoy in other

¹⁰⁹ Article 19(2) EUCFR.

¹¹⁰ J. C. Hathaway *The Rights of Refugees under International Law* (CUP, 2005) p 279; G. S. Goodwin-Gill and J. McAdam *The Refugee in International Law* (OUP, 3rd Ed., 2007) p 215.

¹¹¹ Alice Edwards 'Human Rights, Refugees, and the Right "To Enjoy Asylum"' (2005) 17(2) *International Journal of Refugee Law*, p 301; H. Battjes *European Asylum Law and International Law* (Martinus Nijhoff, 2006) p 467; UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (Reissued Geneva, December 2011), para 189; Moreno-Lax (n 44) p 211; UNHCR 'Background Note' (n 29) para 19 and following; UN General Assembly 'Note on International Protection' UN doc. A/AC.96/882 (1997) para 14; UNHCR Executive Committee Conclusion No. 8 (XXVIII) *Determination of Refugee Status* (1977) para (vii).

¹¹² UNHCR Executive Committee Conclusion No. 30 (XXXIV) *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum* (1983) paras (e)(i); Fischer-Lescano et al (n 66) pp 284-285.

¹¹³ UNHCR 'Background Note' (n 29) para 25; UNHCR Executive Committee, Conclusion No. 85 (n 94) para q; Fischer-Lescano et al (n 66) p 287.

¹¹⁴ UNHCR 'Background Note' (n 29) paras 19-20.

¹¹⁵ UNHCR Executive Committee, Conclusion No. 82 (n 94) para d (iii); UNHCR Executive Committee, Conclusion No. 85 (n 94) para q.

¹¹⁶ UNHCR 'Background Note' (n 29) para 17.

countries asylum from persecution”.¹¹⁷ The EUCFR also states that the right to asylum “shall be guaranteed with due respect” for among others the rules of the Refugee Convention.¹¹⁸

The Refugee Convention defines the term refugees and establishes key principles governing their protection.¹¹⁹ It does however not set out specific procedures for determining refugee status, but according to UNHCR it is accepted by States that fair and efficient procedures are an essential element in the full application of the Convention.¹²⁰ Otherwise it is left for each State to establish a procedure it considers appropriate.¹²¹ An annex to the Djibouti Conclusions furthermore establishes the framework for situations such as the one at hand, where disembarkation in a place of safety and/or processing of rescued persons would be conducted in a State other than the flag State of the vessel.¹²² In case disembarkation also includes the processing of international protection needs, the framework allows for processing in the country of disembarkation, the flag State of the rescuing vessel or a third State which has agreed to assume responsibility in line with applicable international standards. All these options allow for processing to be undertaken by the authorities of the State where it occurs as well as by authorities of another relevant State, subject to applicable international standards.¹²³ It is said that in determining the location of processing, the capacity of a State to undertake fair and efficient asylum procedures should play a role.¹²⁴ In principle, international refugee and human rights law do therefore allow for processing of asylum applications by any authorities as long as the procedures align with applicable international standards. The right of access to legal remedies further includes the right to an effective legal remedy.¹²⁵

It is furthermore asserted by NGOs that the EU should in such situations ensure that the reception facilities in the respective third country can meet medical and psychosocial needs. Under international refugee and human rights law, a third country also has to be compliant with

¹¹⁷ Art 14(1) UDHR.

¹¹⁸ Article 18 EUCFR.

¹¹⁹ Articles, 1, 31 and 33 Refugee Convention.

¹²⁰ Only in cases of mass influx situations may individual procedures prove not to be practicable and therefore other responses may be required in such instances; See UNHCR ‘Background Note’ (n 29) fn 14; UNHCR Executive Committee, Conclusion No. 81 (n 107) para (F); UNHCR Executive Committee, Conclusion No. 82 (n 94) para (d)(iii); UNHCR Executive Committee, Conclusion No. 85 (n 94) para (q).

¹²¹ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (n 114) para 189; Moreno-Lax (n 44) p 212.

¹²² UNHCR ‘Refugees and Asylum-Seekers in Distress at Sea’ (n 29) p 9.

¹²³ ECRE ‘Asylum at the European Council 2018’ (n 12) pp 8-9.

¹²⁴ Ibid.

¹²⁵ Art 2(3) & 7 ICCPR, Art 3 & 13 ECHR; Robert Schuman Centre for Advanced Studies Policy Papers ‘Rescue at Sea – Human Rights Obligations of States and Private Actors, with a focus on the EU’s External Borders’ Policy Paper 2012/05 (2012)

<http://cadmus.eui.eu/bitstream/handle/1814/22389/RSCAS_PP_2012_05.pdf> accessed 29 January 2019, p 5.

human rights standards, including protection from refoulement as elaborated on above, and effective access to socio-economic rights, including sufficient means of subsistence.¹²⁶ According to the ECtHR, mere ratification of human rights treaties is not sufficient to fulfill this requirement, a country has to be compliant in practice.¹²⁷

Under international refugee and human rights law, the EU as a de facto flag state is thus at least required to ensure that asylum-seekers will be allowed (temporary) entrance on a territory where they do not risk direct or indirect refoulement and where they can access fair and efficient procedures determining their protection needs. Compliance with the Refugee Convention needs to be ensured and, beside from asylum procedures, this includes the prohibition of inhuman and degrading treatment and as said before the right to an effective remedy.¹²⁸ It remains possible that the flag State will be requested by the State of disembarkation to provide additional support for reception arrangements, subject to capacity and available resources.¹²⁹ With regard to the processing of international protection needs of these people, international law allows for the processing of these claims in any State and by any authorities as long as it complies with international standards and the capacity of a State to perform fair and efficient procedures is taken into account. The country of disembarkation furthermore has to provide effective access to minimum socio-economic rights as laid down in the Refugee Convention.

3.2.2 EU Post-disembarkation obligations

The current communications on regional disembarkation arrangements seem to give the EU a limited role in the respective third countries. The EU will probably provide financial and operational support for post-disembarkation activities.¹³⁰ This will probably not be sufficient to establish EU jurisdiction over the territory, unless EU authorities would become responsible for the processing itself. Instead, the preferable approach seems to be that UNHCR and IOM support the post-disembarkation processing, thereby avoiding responsibility for the EU.¹³¹ Because the proposal remains unclear however, this section will briefly outline the consequences in case the EU does gain effective control over the disembarkation platforms.¹³²

¹²⁶ ECRE ‘Asylum at the European Council 2018’ (n 12) p 8.

¹²⁷ Despite the European Court of Justice’s recent refusal of accession of the EU to the ECHR, the EU is still de facto bound by ECHR obligations, because all its Member States are party to the Convention.

¹²⁸ ECRE ‘Defending Refugees’ (n 55) p 40.

¹²⁹ UNHCR ‘Refugees and Asylum-Seekers in Distress at Sea’ (n 29) Annex A, p 8.

¹³⁰ European Commission ‘Managing migration’ (n 2); European Commission ‘Migration: Regional Disembarkation Arrangements’ (n 15) p 2.

¹³¹ UNHCR ‘Proposal for a regional cooperative arrangement’ (n 19) p 2.

¹³² For more information on the possibilities for and the implications of extraterritorial processing, see UNHCR Protection Policy Paper (n 82) para B IV pp 5-7.

In the situation outlined above, the body of human rights obligations by which the EU is bound under international law, will become applicable to the treatment of the asylum seekers and the processing of their claims in the respective third country. According to UNHCR, the EU therefore becomes responsible for ensuring adequate reception arrangements at the port of disembarkation and such reception arrangements should address the immediate needs of new arrivals, e.g. medical treatment, shelter and food and provide for a stay consistent with an adequate standard of living as explicitly mentioned in Art 21 of the Refugee Convention.¹³³ Under the UDHR this is listed as a requirement to provide “a standard of living adequate for the health and well-being of himself and his family”.¹³⁴ An adequate standard of living is sufficient when it includes the following:

“food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.¹³⁵

The UNHCR Guidelines define this right as “non-discriminatory, humane and dignified treatment, including guarantees of shelter/housing, access to health and other basic services and education”.¹³⁶ The reception centres furthermore need to be open, because closed centres would qualify as detention, which is prohibited under international human rights law.¹³⁷

The EU will also have to abide by supplementary customary law obligations laid down by the ICJ, which include freedom from racial discrimination and the prohibition on slavery;¹³⁸ the right to physical integrity;¹³⁹ and protection against denial of justice.¹⁴⁰ Protection against denial of justice is also enshrined in the Refugee Convention, which incorporates the right of access to justice.¹⁴¹ This includes access to courts and free legal assistance on appeal.

¹³³ Art 25 UDHR; Art. 11 ICESCR.

¹³⁴ Art 25 UDHR.

¹³⁵ Ibid; Similarly, the ICESCR recognizes that this right shall include adequate food, clothing and housing, and the continuous improvement of these living conditions by its State Parties; Art 11.1 ICESCR; For the interpretation of this right see also OHCHR, ‘International Standards: Adequate Housing’

<<http://www.ohchr.org/EN/Issues/Housing/Pages/InternationalStandards.aspx>> accessed 23 March 2019.

¹³⁶ UNHCR, ‘Guidelines on Temporary Protection or Stay Arrangements’ (2014) para 16.

¹³⁷ Art 9 ICCPR; Art 9 UDHR; A corollary to the freedom from arbitrary detention is also enshrined in the Refugee Convention as the right to freedom of movement; UNHCR Protection Policy Paper (n 82) para B V 26.

¹³⁸ *Barcelona Traction* 32; *Namibia* 57.

¹³⁹ *US Diplomatic and Consular Staff* 42.

¹⁴⁰ *Barcelona Traction* 47.

¹⁴¹ Art 16 Refugee Convention.

4. The Legality of Regional Disembarkation Arrangements

This Chapter will examine if and how regional disembarkation arrangements could be concluded that would satisfy the requirements of international law of the sea and international refugee and human rights law. It will provide an answer to the main research question by stating what requirements regional disembarkation arrangements will have to meet for the return of migrants rescued by EU coast guard vessels to North African countries to be in compliance with the EU's obligations under international law and whether the relevant North African countries could meet these requirements. The next chapter will more thoroughly apply these criteria to the arrangement between Morocco and Spain.

It first needs to be mentioned that with regard to the countries in question it is questionable whether any of them would be willing to host the EU's regional disembarkation platforms.¹⁴² So far the EU seems to be looking primarily at Tunisia, Libya, Morocco and perhaps also Algeria for concluding the envisaged arrangements, but the African Union has stated among others that the establishment of such platform in Africa would contravene international law, EU law and the African Union's legal instruments on refugees and displaced persons.¹⁴³ Representatives of the respective governments have also repeatedly asserted that they are not willing to host such centers.¹⁴⁴ Tunisia's ambassador to the EU has for instance said that the EU proposal was "put to the head of our government a few months ago ... and the answer is clear: no!"¹⁴⁵ Next to the question of whether the countries would be willing to conclude such agreements, it is also questionable whether they would be able to meet the required conditions.

As was discussed in the previous chapter, international law of the sea and international refugee and human rights law impose several obligations on the EU and its Member States when its coast guards conduct SAR operations in international waters and/or the SAR zone of third States and thereafter disembark these migrants in a third country. Because a vessel is subject to the exclusive jurisdiction of the flag state, the obligations of the Member State conducting the SAR operation would apply.¹⁴⁶ The duty to render assistance requires the coast guard to render assistance to all people in distress at sea and thus does not allow coast guards to discriminate

¹⁴² Boffey (n 6).

¹⁴³ Ibid.

¹⁴⁴ Tasnim Abderrahim 'Pushing the boundaries: How to create more effective migration cooperation across the Mediterranean' European Council on Foreign Relations (15 January 2019) <https://www.ecfr.eu/publications/summary/pushing_the_boundaries_effective_migration_cooperation_across_Mediterranean> accessed 21 June 2019.

¹⁴⁵ Ibid.

¹⁴⁶ Arts 92(1) and 87(1) UNCLOS.

between e.g. asylum-seekers and other migrants.¹⁴⁷ A disembarkation arrangement can therefore not distinguish in who will be rescued by the respective coast guard. The duty furthermore entails that the people rescued are disembarked in a place of safety and that this is done as soon as reasonably practicable. Any regional disembarkation agreement thus has to provide for disembarkation in a place that qualifies as a place of safety, and flexibility has to be provided in the agreement with regard to the assigned place as the time it takes for disembarkation cannot be unnecessarily long. Any disembarkation agreement also has to take into account the particular circumstances of each SAR operation. With regard to the time criterium it would therefore be desirable to disembark people that are saved in a country's respective SAR zone in that particular country. However, when migrants are rescued at the high seas, this requirement may not allow a coast guard to sail to a third country when it is further away than its own territory or any other country that could meet the criteria.

International law of the sea as well as international refugee and human rights law require that asylum-seekers are not disembarked in territories where their lives and freedoms would be threatened. Before disembarking people on the basis of a disembarkation arrangement, it therefore needs to be ensured that the port of disembarkation is a place of safety in the particular case and that there is no threat to the lives and freedoms of asylum-seekers with a well-founded fear of persecution, nor a general threat to safety of their lives. On top of that the place of safety needs to be able to satisfy basic human needs, including food, shelter and medical needs, for all rescued migrants. A disembarkation agreement can thus only establish a pre-determined place of safety that meets these basic human rights. The fact that the respective country has ratified the relevant human rights instruments is not sufficient, these human rights need to be effective. Moreover, in case of asylum-seekers, international law allows the processing to take place in the country of disembarkation as long as the country complies with international standards and the capacity of this state to perform status determination procedures is taken into account. The flag State may be requested to provide additional support. Substantively, this requires that EU coast guards ensure that asylum-seekers will be allowed (temporary) entrance on a territory where they do not risk direct or indirect refoulement and in a place where they can access fair and efficient procedures determining their protection needs. The country of disembarkation needs to be compliant with the Refugee Convention, meaning that a country must also provide

¹⁴⁷ Arts 98(a) and (b) UNCLOS.

the right to an effective remedy and effective access to minimum socio-economic rights for those that have acquired refugee status, as laid down in the Refugee Convention.

These requirements may pose several problems for disembarkation agreements concluded with North African countries. Most North-African countries have ratified the Refugee Convention, however Libya has not.¹⁴⁸ Moreover, the execution of and compliance with the obligations of the Refugee Convention is often left to UNHCR.¹⁴⁹ Other relevant (UN) Conventions,¹⁵⁰ the African Refugee Convention¹⁵¹ and the African Charter for Human Rights¹⁵² also govern some relevant human and refugee rights, but in the literature it is claimed that these Conventions do not provide refugees with specific socio-economic rights, making them dependent on the national legal system for such rights.¹⁵³ In practice, the enforcement of essential human and refugee rights is even more problematic. Although the prohibition of refoulement is applicable to all countries either on the basis of a specific Convention or customary international law, several reports indicate that there is a risk of deportation without the necessary examination of an asylum request. Access to socio-economic rights such as medical aid, education and employment is also often limited for refugees. Libya for instance fails to meet the required guarantees, although it is party to several international human rights treaties.¹⁵⁴ It has for instance ratified the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa which among others obliges it to refrain from torture and ill-treatment, but which does not include the socio-economic rights enshrined in the Refugee Convention.¹⁵⁵ Libya also has no asylum legislation or procedures and severe criticism as to the treatment of migrants and refugees in Libya has arisen in recent years.¹⁵⁶ A recent UN report states that migrants and refugees are vulnerable to e.g. killings, extreme violence, rape and torture.¹⁵⁷ Libya is

¹⁴⁸ UNHCR 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' <<https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>> accessed 15 May 2019.

¹⁴⁹ Strik & Terlouw (n 84) p 177.

¹⁵⁰ See for instance UN Treaty Body Database <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=117&Lang=EN> accessed 15 May 2019.

¹⁵¹ OAU Convention governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974).

¹⁵² African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986).

¹⁵³ Strik & Terlouw (n 84) p 177.

¹⁵⁴ E.g. the ICCPR, ICESCR, CAT.

¹⁵⁵ OHCHR 'Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya' (2018) pp 19-22.

¹⁵⁶ Ibid, p 19.

¹⁵⁷ Ibid, pp 25-34; Amnesty International 'Human Rights in the Middle East and North Africa' (2018) <<https://www.amnesty.org/download/Documents/MDE0194332019ENGLISH.PDF>> accessed 21 June 2019, pp 44-45.

furthermore currently facing a power struggle at the highest level and the other Maghreb countries are also facing serious socio-economic problems.¹⁵⁸ Tunisia is currently dealing with an internal crisis, there is political unrest and protests have been taking place against unemployment, poor living conditions and water shortages.¹⁵⁹ Algeria has arbitrarily arrested thousands of migrants and expelled them to neighbouring countries such as Niger and Mali.¹⁶⁰ A UN Committee stated that they were at a high risk of violence.¹⁶¹ In Morocco, the situation is not as hostile as it is in the other countries, but there are also reports of migrants being unlawfully arrested and being expelled their countries of origin which in some cases constituted a violation of the principle of non-refoulement.¹⁶²

To sum up, legal disembarkation arrangements in general could be in conformity with international law, if the rescuing coast guard does not discriminate in who it wishes to rescue, if it ensures that people are disembarked in a place of safety as soon as is reasonably possible, and in deciding on the location of this place of safety it takes into account the particular circumstances of the case. This place of disembarkation needs to protect people from refoulement and be able to provide effective access to basic human rights. In case there are asylum-seekers among those rescued, the country of disembarkation not only has to uphold the prohibition of refoulement, it also has to provide for fair and efficient asylum procedures that determine protection needs on an individual basis and comply with the substantive rights of the Refugee Convention. It is however unlikely that the North African countries can meet these requirements because across the Maghreb countries, severe human rights violations and dire economic conditions make it highly unlikely that refugees could be guaranteed protection from refoulement and access to basic human rights and needs. On top of that, their weak or lack off asylum systems makes it unlikely that asylum will even be granted to refugees.¹⁶³

¹⁵⁸ Editorial ‘The EU’s ‘regional disembarkation platforms’ (*The Arab Weekly*, 1 July 2018) <<https://theArabweekly.com/eus-regional-disembarkation-platforms>> accessed 21 June 2019.

¹⁵⁹ UNHCR ‘Operational Update Tunisia 01 October – 01 January 2018’ <<http://reporting.unhcr.org/sites/default/files/UNHCR%20Tunisia%20Operational%20Update%20-%20October-December%202017.pdf>>; Abderrahim (n 144); Amnesty International ‘Human Rights in the Middle East and North Africa’ (n 157) pp 64-65.

¹⁶⁰ Amnesty International ‘Human Rights in the Middle East and North Africa’ (n 157) p 15.

¹⁶¹ Ibid.

¹⁶² Ibid, pp 47-48.

¹⁶³ Abderrahim (n 144)

5. Pilot

This chapter will zoom in on the recently concluded agreement between Morocco and Spain concerning the return of refugees rescued by the Spanish coast guard to Morocco. It will first examine the substance of the concluded agreement. It will thereafter delve into the obligations of respectively Spain and Morocco. The final paragraph of this chapter will conclude on the legality of the arrangement under the fields of international law discussed in this research.

5.1 Current arrangement

Although Morocco's Minister of Foreign Affairs had previously rejected the EU's idea to establish migrant processing centres in North African countries,¹⁶⁴ Morocco now does seem to have agreed with Spain on the return of migrants to Morocco. Several news outlets have reported that Spain and Morocco have in March 2019 reached an agreement to curb irregular immigration.¹⁶⁵ According to these sources, the agreement allows Spain's sea rescue services to return rescued migrants to Moroccan ports when they are assisting the Moroccan coast guard in their SAR zone and when the nearest port is in Morocco.¹⁶⁶ The deal became effective immediately.¹⁶⁷ The arrangement thus simply allows Spain to conduct SAR operations in Morocco's SAR zone and automatically disembark the rescued migrants in Morocco when the nearest port is in Morocco. By conducting SAR operations Spain exercises jurisdiction which means its obligations under international law apply to the operations.

5.2 Spain

Spain is a party to UNCLOS since 1997.¹⁶⁸ Spain is also party to the 1979 SAR Convention and the 1974 SOLAS Convention and its protocols.¹⁶⁹ Spain is thus bound by the international law of the sea obligations explained in Chapter 3. A first obligation for the Spanish coast guard would be to assist those who are in distress at sea and to ensure that these people can be disembarked as soon as possible.¹⁷⁰ The fact that the Spanish coast guard assists the Moroccan coast guard in rescuing migrants in Morocco's SAR zone and returns them to Morocco when this the nearest port of disembarkation seems to be fully in line with this obligation.

¹⁶⁴ Ivan Dikov 'Morocco Rejects Setting Up Migrant Centers, Wants Role in EU Decisions' (*European Views*, 3 October 2018) <<https://www.european-views.com/2018/10/morocco-rejects-setting-up-migrant-centers-wants-role-in-eu-decisions/>> accessed 27 April 2019.

¹⁶⁵ Ibid; Abellán & Martín (n 10).

¹⁶⁶ Abellán & Martín (n 10).

¹⁶⁷ Dikov (n 164).

¹⁶⁸ UN Treaty Collection Status of Treaties 'UNCLOS' <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#11> accessed 28 May 2019.

¹⁶⁹ Except for the SOLAS Agreement of 1996; see IMO Status of Conventions 'Ratifications by State' <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>> accessed 25 May 2019.

¹⁷⁰ Article 98 UNCLOS; Regulation 33 1-1 SOLAS Convention; Chapter 2.1.10 SAR Convention.

International law of the sea seems to put the primary responsibility for disembarkation on the State in whose SAR zone the operation was conducted. Morocco therefore has to allow for disembarkation in a place of safety on its territory when disembarkation at the next port of call is not possible.¹⁷¹ Although a place of safety is not defined in any of the Conventions, it is required that the particular circumstances of the case should be taken into account. Spain can therefore not automatically opt for disembarkation in Morocco when the nearest port is in Morocco. More problematic may also be the requirement of disembarking in a place of safety which meets basic human needs and where the lives and freedoms of refugees are not threatened. Here, international law of the sea overlaps with international refugee law. Spain is party to the Refugee Convention and the ECHR.¹⁷² Also, as it is a Member State of the EU it is bound by the EUCFR when it implements EU law.¹⁷³ Spain therefore has to ensure that asylum-seekers will be allowed entrance on Moroccan territory and that they do not risk direct or indirect refoulement. Additionally, Spain has to ensure that these asylum-seekers can access fair and efficient procedures in Morocco. These procedures have to determine their protection needs and comply with international standards and Morocco's capacity to process asylum applications needs to be taken into account. Compliance with the Refugee Convention also needs to be ensured, this includes, beside from asylum procedures, the prohibition of inhuman and degrading treatment and the right to an effective remedy.¹⁷⁴ Morocco furthermore has to provide effective access to minimum socio-economic rights as laid down in the Refugee Convention in order for Spain to legally disembark asylum-seekers and refugees in Morocco.

5.3 Morocco

As explained above, for the agreement to be in compliance with Spain's international obligations, Morocco has to allow entrance on its territory for asylum-seekers. It also has to provide protection against refoulement and access to fair and efficient procedures that comply

¹⁷¹ Morocco is a party to UNCLOS and the SOLAS and SAR Conventions, see UN Treaty Collection Status of Treaties 'UNCLOS' <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#11> accessed 7 June 2019; IMO Status of Conventions 'Ratifications by State' <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>> accessed 7 June 2019.

¹⁷² UNHCR 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' <<https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>> accessed 15 May 2019; ECHR Chart of signatures and ratification of Treaty 005 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=wrWG2seP> accessed 28 May 2019.

¹⁷³ Article 51(1) EUCFR.

¹⁷⁴ ECRE 'Defending Refugees' (n 55) p 40.

with international standards to determine protection needs. Furthermore, Morocco has to comply with the Refugee Convention and provide access to minimum socio-economic rights.

Morocco is a party to several international human rights treaties such as the Refugee Convention, the Covenant against Torture (CAT), the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child.¹⁷⁵ It would therefore in principle have to uphold the prohibition against refoulement, provide for status determination procedures and allow access to socio-economic rights for refugees. However, for the agreement to be legal, these rights also have to be upheld in practice. It will therefore now be examined how these obligations are implemented and enforced in Morocco.

A Royal Decree of 29 August 1957 provides the modalities for implementation of the Refugee Convention.¹⁷⁶ It established the ‘Bureau des réfugiés et apatrides’ (BRA) which is to ensure judicial and administrative protection of those falling within the scope of the Refugee Convention.¹⁷⁷ The BRA is furthermore made responsible for recognizing the refugee status of persons meeting the criteria of the Refugee Convention and to that end issue residence permits to applicants.¹⁷⁸ The BRA only started functioning in 2013 when it also established a Commission for the Regularization of Refugees Registered with UNHCR.¹⁷⁹ This Commission validates the status of persons that have been granted refugee status by UNHCR.¹⁸⁰ This allows these persons access to a residence permit, such as refugee cards and renewable sojourn permits.¹⁸¹ In practice however, not all refugees seem to obtain formal refugee status. For instance, several Syrians claim they have not obtained refugee status, which prevents them from exercising their rights, in particular the right to access to employment.¹⁸² Moreover, there is a lack of a national asylum system, meaning that there is no possibility to seek asylum at border

¹⁷⁵ UNHCR ‘States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol’ <<https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>> accessed 15 May 2019; UN Treaty Body Database ‘Ratification Status for Morocco’ <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=117&Lang=EN> accessed 25 May 2019.

¹⁷⁶ National Legislative Bodies / National Authorities, Maroc ‘Décret No. 2-57-1256 du 2 safar 1377 (29 août 1957) fixant les modalités d’application de la convention relative au statut des réfugiés signée à Genève le 28 juillet 1951’ 6 September 1957 <<http://www.refworld.org/docid/3ae6b4f04.html>>.

¹⁷⁷ Articles 1 & 2 Décret No. 2-57-1256.

¹⁷⁸ UNHCR ‘Universal Periodic Review 3rd Cycle, 27th Session Morocco’ (2016) p 1.

¹⁷⁹ Ibid, p 2.

¹⁸⁰ Fanny Tittel-Mosser ‘The Unintended Legal and Policy Relevance of EU Mobility Partnerships: A Comparative Implementation Analysis of Morocco and Cape Verde’ (2018) 20 European Journal of Migration and Law, pp 323-324.

¹⁸¹ Ibid; UNHCR ‘Universal Periodic Review Morocco’ (n 178) p 2.

¹⁸² UNHCR ‘Universal Periodic Review Morocco’ (n 178) p 3.

points. Requests for international protection can therefore only be made at the office of UNHCR.¹⁸³ This hampers access to protection mechanisms because only if asylum-seekers reach the UNHCR office in Rabat can their status be determined and may they have access to several rights.¹⁸⁴ This is further complicated by the fact that the authorities prevent asylum-seekers from reaching Rabat by requiring legal papers to get on transport to Rabat, and thus they often remain stuck in the border cities of Morocco.¹⁸⁵

In 2003 Morocco also adopted a law setting out the procedural conditions for granting asylum-seekers and refugee residence cards.¹⁸⁶ The final sentence of Article 29 of this law emphasizes that migrants cannot be deported to a country where their life or freedom is threatened or where they would be exposed to inhuman treatment, thereby incorporating the prohibition of refoulement.¹⁸⁷ It is however asserted that in practice persons have been deported in such instances.¹⁸⁸ Moreover, also with regard to the situation in Morocco itself reports indicate that migrants are exposed to inhumane treatment and that the authorities have quite recently launched a widespread crackdown on migrants, asylum-seekers and refugees.¹⁸⁹

With regard to socio-economic rights, the Moroccan constitution provides that foreigners under Moroccan jurisdiction shall enjoy to same fundamental freedoms as Moroccan citizens.¹⁹⁰

¹⁸³ Ibid, p 4.

¹⁸⁴ Ibid; Aysen Üstübici *The governance of International Migration* (Amsterdam University Press, 2018) pp 88-89.

¹⁸⁵ Üstübici (n 184) pp 88-89.

¹⁸⁶ National Legislative Bodies / National Authorities, Maroc 'Loi n° 02-03 relative à l'entrée et du séjour des étrangers au Royaume du Maroc, à l'émigration et l'immigration irrégulières' 11 November 2003 <<http://www.refworld.org/docid/3ae6b4ed5c.html>> UNHCR 'Universal Periodic Review Morocco' (n 178) p 1.

¹⁸⁷ Article 29 Loi n° 02-03.

¹⁸⁸ Alarmphone 'Borders of violence: "When I resisted to enter the small dark room, they started beating me.."' 3 June 2019 <https://alarmphone.org/en/2019/06/03/borders-of-violence/?utm_source=ECRE+Newsletters&utm_campaign=4c28f67774-EMAIL_CAMPAIGN_2019_06_05_09_48&utm_medium=email&utm_term=0_3ec9497afd-4c28f67774-422328653#_ftn23> accessed 7 June 2019; Khaled Mejri 'A Comparative Study of Refugee Laws in Arab Countries' (2018) 16 Konrad Adenauer Stiftung Mediterranean Dialogue Series <<https://www.kas.de/documents/282499/282548/MDS+16+A+Comparative+Study+of+Refugee+Laws+in+Arab+Countries+ENGLISH.pdf/1fea19a8-4aa7-35d4-3aa7-106dd9943363?version=1.3&t=1546956641330>> 27 May 2019, p 5; Üstübici (n 184) pp 181-182.

¹⁸⁹ UN General Assembly 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' A/HRC/22/53/Add.2 (30 April 2013) paras 24-25; Amnesty International 'Human Rights in the Middle East and North Africa' (n 157) pp 47-48; Alarmphone (n 188); Yassine Benargane 'Maroc: Les agressions des migrants dans le nord vont crescendo selon l'AMDH' (*Yabiladi*, 4 June 2019) <https://www.yabiladi.com/articles/details/79212/maroc-agressions-migrants-dans-nord.html?utm_source=ECRE+Newsletters&utm_campaign=4c28f67774-EMAIL_CAMPAIGN_2019_06_05_09_48&utm_medium=email&utm_term=0_3ec9497afd-4c28f67774-422328653> accessed 7 June 2019.

¹⁹⁰ Article 30 Moroccan Constitution 'Textes Generaux Dahir No 1-11-91 du 27 chaabane 1432 (29 juillet 2011) portant promulgation du texte de la Constitution' 30 July 2011 <http://www.maroc.ma/en/system/files/documents_page/bo_5964bis_fr_3.pdf>.

These freedoms include among others the right to healthcare, the right to education and the right to work.¹⁹¹ Instructions given by the Ministry of Education facilitate the enrolment of migrant, refugee and asylum-seeking children in schools.¹⁹² Refugees generally also have access to primary health care, but access to secondary and tertiary health care services is not guaranteed.¹⁹³ With regard to the right to employment, Morocco is trying to reduce the restrictions on access to the labour market for regular immigrants, but so far this remains difficult for foreigners.¹⁹⁴

UNHCR similarly notes that basic services as education and health care are indeed available in Morocco for among others refugees, but that there are obstacles to accessing these services.¹⁹⁵ Currently, several measures have been undertaken to improve refugee rights in Morocco, but they still have to enter into force.¹⁹⁶ Therefore, although Morocco is a party to among others the ICESR, which provides for the right to employment and health care as basic socio-economic rights, asylum-seekers and refugees cannot effectively exercise these rights in Morocco.¹⁹⁷ It therefore currently seems to be the case that although refugees may be granted formal refugee status and the law may acknowledge the existence of refugee rights, access to basic human rights for refugees remains problematic.¹⁹⁸

5.4 The legality of the arrangement

The fact that Spain and Morocco have concluded an arrangement allowing Spain to return migrants rescued in Morocco's SAR zone is not problematic per se. International law allows countries to conduct SAR operations in each other's SAR zone as long as the principle of territorial sovereignty is not violated,¹⁹⁹ and rescued migrants may be disembarked in the nearest port as long as this constitutes a place of safety. It is however required that the particular circumstances of the case are taken into account before deciding on a place of disembarkation, which means that international law does not allow Spain to automatically return the rescued migrants to Morocco whenever these ports are near. Moreover, what constitutes a place of

¹⁹¹ Ibid, Article 31.

¹⁹² Ministère de l'Éducation Nationale 'Circulaire No 13-487' 9 October 2013 <https://www.ccme.org.ma/images/documents/fr/2013/11/Circulaire_13-487_Ministere_de_Education_Nationale_inscription_eleves_etrangers_FR.pdf>; UNHCR 'Universal Periodic Review Morocco' (n 178) p 9.

¹⁹³ UNHCR 'Universal Periodic Review Morocco' (n 178) p 3.

¹⁹⁴ Mejri (n 188) p 6.

¹⁹⁵ UNHCR 'Universal Periodic Review Morocco' (n 178) p 3.

¹⁹⁶ E.g. the Régime d'Assistance Médicale, Draft Law 26.14 related to Asylum; see UNHCR 'Universal Periodic Review Morocco' (n 178) pp 1-2.

¹⁹⁷ UNHCR 'Universal Periodic Review Morocco' (n 178) p 3.

¹⁹⁸ Üstübcici (n 184) p 190.

¹⁹⁹ Article 2 UN Charter.

safety under international law of the sea is uncertain, but when read together with Spain's obligations under international refugee and human rights law, it seems to require that the place needs to uphold basic socio-economic rights for refugees, that asylum-seekers can access asylum procedures and legal status in accordance with international standards and that they are protected from refoulement. Morocco has ratified the relevant international agreements, which require it to uphold these obligations, but international law requires that these obligations are also upheld in practice. Although Morocco is improving its asylum procedures and the enforcement of refugee rights, most of the basic rights do currently not seem to be guaranteed in practice. Practice also illustrates that the prohibition of refoulement is not always enforced, that barriers exist to accessing asylum procedures and that even when refugee status is obtained difficulties exist to access the rights attached to it. This means that Spain by returning asylum-seekers and refugees to Morocco at least violates the prohibition of direct and indirect refoulement by returning asylum-seekers to a territory where they may face inhumane treatment, or where they may be sent to a territory where they face inhumane treatment.²⁰⁰ The arrangement also fails to ensure that refugees have access to fair, efficient and individual status determination procedures and following the determination of protection needs, access to basic refugee rights. The arrangement can therefore not be considered legal under international law.

²⁰⁰ Article 33 Refugee Convention; Articles 67 ICCPR; Article 3 CAT.

6. Conclusion

To conclude, regional disembarkation arrangements are not illegal per se and could in principle be concluded between the EU and North African countries as long as they meet the specified criteria. In short this entails that the coast guard of a Member State that is party to the relevant conventions can conduct SAR operations at the high seas and in the SAR zone of a country with which the agreement is concluded, as long as it does not discriminate between people and ensures that people are disembarked in a place of safety as soon as is reasonably practicable. What constitutes a place of safety is not explicitly defined in international law but it seems to be required that the coast guard at least takes into account the particular circumstances of the case, which thus excludes disembarkation arrangements that specify a pre-determined place of disembarkation without foreseeing in any flexibility. It is also required that people are not subjected to inhumane or degrading treatment and that the place of disembarkation can provide for basic human needs. International refugee law poses additional requirements when there are asylum-seekers among those rescued. In this situation, a State has to uphold the prohibition of refoulement, it has to provide for fair and efficient asylum procedures that determine an individual's protection needs and on the basis of such a determination it should provide access to basic socio-economic rights as laid down in the Refugee Convention. When these requirements are met, the EU will not violate its obligations under international law of the sea or international human rights and refugee law by concluding such an agreement. However, as the general overview of the situation in the respective countries and the pilot case of Spain and Morocco have illustrated, satisfaction of these requirements cannot be presumed. Although Morocco has signed the relevant conventions, it is currently not able to live up to these obligations and the agreement can therefore not satisfy the requirements stated above. It is at least highly doubtful whether other North African countries would be able to meet these requirements, Libya for instance has not even signed the Refugee Convention and is currently at the verge of civil war, while Tunisia may be better suited as a counterpart for a disembarkation agreement because it has signed the relevant conventions, it also lacks a national asylum procedure system and a stable socio-economic situation. In the author's view, the EU should therefore be cautious in concluding regional disembarkation agreements with these countries, because it is highly questionable that these countries are meeting the required conditions for such agreements to meet the EU's international obligations. International law however does offer the possibility for the authorities of third countries to undertake the processing of applications for international protection, for instance in situations where the processing capacity of the respective country is not sufficient to handle the amount of

applications. Therefore, if the EU wishes to continue the pursuit of regional disembarkation agreements while also complying with international law, it could choose to assist countries such as Morocco in the processing of applications for international protection and by providing adequate reception arrangements. After international protection needs have been determined, people that are in need of such protection could be relocated to EU Member States in order for them to be able to access socio-economic rights, at least until Morocco or other North African countries with whom arrangements are made are able to guarantee access to such rights. If the EU were however to improve the arrangements by conducting asylum determination procedures in third countries, this could mean that the EU would become responsible for this procedure, which is probably something it wishes to avoid. In the author's view however, this is what would be required in order for the EU to abide by its international obligations.

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