

Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility

Authors:

Prof. Dr. Anuscheh Farahat and Prof. Dr. Nora Markard



Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility

Authors:
Prof. Dr. Anuscheh Farahat and Prof. Dr. Nora Markard

Published by Heinrich-Böll-Stiftung Brussels European Union

Authors:

Prof. Dr. Anuscheh Farahat

Prof. Dr. Nora Markard

Cover picture: Sea Watch, © Erik Marquardt, edited by Laurence Jacmin

Printed in Belgium in February 2020

Production: Micheline Gutman

Published under the following Creative Commons License CC BY-NC-ND 4.0

<https://creativecommons.org/licenses/by-nc-nd/4.0/> Attribution – You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work). Non commercial – You may not use this work for commercial purposes. No derivatives – If you remix, transform, or build upon the material, you may not distribute the modified material.

ISBN 978-9-4640-0740-4

D/2020/11.850/1

For this publication, please refer to:

Heinrich-Böll-Stiftung Brussels European Union

Rue du Luxembourg, 47-51 – B-1050 Brussels – Belgium

T + 32 (0)2 743 41 00 **E** info@eu.boell.org **W** eu.boell.org

CONTENT

| | |
|---|----|
| Preface | 7 |
| Political Implications of the Study: Europe has a Duty to Rescue | 8 |
| Executive Summary | 10 |
| Introduction | 12 |
| 1. Defining Places of Safety | 14 |
| 1.1 The Obligation to Deliver Rescues to a Place of Safety | |
| 1.2 Conditions for Places of Safety | |
| 1.3 Selecting a Place of Safety for Disembarkation | |
| 2. Places of Safety on the North African Coast? | 18 |
| 2.1. Algeria | |
| 2.2 Egypt | |
| 2.3 Libya | |
| 2.4 Morocco | |
| 2.5 Tunisia | |
| 2.6. Consequences for Finding Places of Safety in North Africa | |
| 3. Disembarkation in North African States by EU Member State Authorities | 31 |
| 3.1 Obligations of Individual EU Member States | |
| 3.2 Obligations During FRONTEX Operations | |
| 4. Disembarkation in North African States by Private Vessels | 36 |
| 4.1 The Role of MRCCs in Selecting Places of Safety | |
| 4.2 Obligations of Shipmasters Regarding Places of Safety | |
| 4.3. Who is Responsible? Attribution of Responsibility of Private Actions to States | |
| 5. Cooperating with North African Rescue Co-ordination Centres | 40 |
| 5.1 The SAR Zone System | |
| 5.2 Using Proxies in International Law | |
| 5.3 Obligations of Captains to Render Assistance in SAR Scenarios | |
| 6. Conclusions | 46 |
| Short Biographies | 49 |

Preface

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Charter of Fundamental Rights of the European Union, Article 19 (2)

The international law of the sea requires assistance to be provided to vessels in distress and that states maintain adequate SAR (Search and Rescue) capacities. It is of vital importance that rescuees are brought to a “Place of Safety”. However, SAR and the disembarkation of persons in distress at sea in the Mediterranean continue to be met with great reluctance by EU Member States and EU institutions. By ceasing rescue activities in the Mediterranean, EU governments have outsourced their responsibility for saving lives. NGOs stepping in and trying to fill this gap have been increasingly criminalised and prosecuted. At the same time, EU Member States and the European Commission have explored “regional disembarkation platforms” outside the European Union since 2018.

Against this background, the Brussels Office of the Heinrich Böll Foundation has commissioned this study by Prof. Dr. Anuscheh Farahat and Prof. Dr. Nora Markard. The authors assess the following questions from a legal point of view:

Would the disembarkation of migrants and refugees in North African countries by EU state vessels, including vessels participating in a Frontex operation, comply with international obligations and European law? Thus, can Algeria, Egypt, Libya, Morocco and Tunisia be considered “Places of Safety” for rescued persons?

Can private vessels, including NGO rescue vessels, be obliged to disembark rescued migrants and refugees in places which are unsafe? Can they refuse to follow such a command without breaking the law?

Is it in line with international and EU law if European Maritime Rescue Co-ordination Centres (MRCCs) shift their coordination responsibility for SAR onto MRCCs in North Africa?

We would like to thank the authors for their efforts and highly valuable research. We hope that the findings of this study will contribute to a fact-based discussion of the EU's responsibility and obligation to rescue and receive persons who are in distress at sea.

January 2020

Eva van de Rakt

Head of Office, Heinrich-Böll-Stiftung Brussels European Union

Anna Schwarz

Head of Global Transformation Programme, Heinrich-Böll-Stiftung Brussels European Union

Erik Marquardt

Political Implications of the Study: Europe has a Duty to Rescue

Since 2014, at least 19,000 people have lost their lives in the Mediterranean. It is outrageous that Europe's response to this humanitarian crisis at our external border is inappropriate and inhumane. Instead of stepping up European search and rescue efforts, the EU and its Member States are accepting the deaths of thousands of migrants and refugees to ensure that as few refugees as possible reach Europe. They cooperate with criminal militias in Libya and deliberately risk fundamental rights violations. Some even want to return rescued refugees and migrants immediately to North Africa. Against this background, this study has important political implications. It finds that the European Union and its Member States cannot escape their responsibility for rescuing migrants and refugees who are in distress at sea. The policy of some EU countries of closing their ports and refusing to allow NGO vessels to disembark rescued people is as illegal as the European policy of shifting the responsibility for rescuing migrants and refugees onto Libya. Member States and the EU must rescue migrants and refugees and to bring them to Europe. Their ports must remain open to NGO rescue ships.

The route from Libya to Europe is the deadliest migration route worldwide and is becoming more and more dangerous for people seeking protection in Europe. It was five times deadlier in 2018 than in 2015, notably because the EU has stopped any search and rescue activities in the Mediterranean. The European Border and Coast Guard Agency Frontex has withdrawn its vessels to the Italian coast. The European naval Operation Sophia, which rescued more than 40,000 migrants and refugees, terminated the deployment of vessels in 2019. There is no longer a single European state rescue vessel in the Mediterranean. NGOs trying to fill the SAR gap are frequently hindered, prosecuted and their vessels are confiscated. By stopping any SAR activities and obstructing NGOs from saving lives, Europe is responsible for the deaths of thousands of people in the Mediterranean.

The study makes clear that the EU and its Member States cannot escape this responsibility by shifting its SAR obligations onto Libya or any other North African coastal state. Libya is probably one of the most unsafe and dangerous country for migrants in the world. People intercepted by the Libyan Coast Guard are transferred to detention centres where they are systematically exposed to arbitrary detention in inhumane conditions, and where torture, extreme violence, rape, arbitrary killings and exploitation are endemic. The current European policy of supporting the Libyan Coast Guard and making them the "gatekeepers" of Europe is deeply inhumane and in breach of international law. The EU and its Member States have a duty to rescue people in distress and to bring them to a place of safety where their lives and safety are not under threat, where their basic needs are covered and where they are safe from persecution and from being returned to the country they fled (chain refoulement). The study shows that such a place of safety is generally available only in Europe.

Political demands:

1. A European search and rescue mission

European Member States must enhance proactive search and rescue operations by providing sufficient vessels specifically dedicated to search and rescue operations, whether under the umbrella of a Frontex-coordinated operation, or under international or separate national or regional operations. The European Commission must coordinate search and rescue operations and provide financial support to Member States for enhancing their capacity for saving lives at sea.

2. End cooperation with Libya

Europe cannot escape its SAR obligations by shifting the responsibility for saving lives onto a country which can under no circumstances be considered a place of safety. It must cease cooperating with Libya on search and rescue and migration matters. Instead of funding the Libyan Coast Guard and Libyan militias, the EU should invest in strengthening its own SAR capacities.

3. Disembarkation in Europe

The study shows that none of the North African coastal countries can generally be considered a place of safety. They are unsafe at least for vulnerable groups such as LGBTI. Since it is not feasible to carry out a proper assessment on board a rescue vessel to determine which countries would not be safe for which individuals, Europe cannot escape its responsibility to disembark the people rescued on its territory. This also holds true for NGO vessels. Instructing them to disembark survivors in an unsafe place or to cooperate with the Libyan Coast Guard constitutes a violation of international law.

4. Stop criminalisation and intimidation of NGOs

The criminalisation and prosecution of rescue NGOs and the confiscation of their vessels shows that the rule of law, freedom of association and human rights are under pressure - also in democratic EU Member States. Shipmasters and crew members should not be prosecuted for rescuing persons in distress at sea and bringing them to a place of safety. The European Commission must as a priority adopt guidelines to the so-called EU Facilitators Package specifying that humanitarian assistance should not be criminalised by Member States. The European Commission should also propose a legal reform of the Facilitators Package in order to require Member States to cease their unwarranted criminalisation of SAR NGOs.

5. Close cooperation with NGOs

NGOs cannot replace the obligations of Member States to provide for sustainable and coordinated search and rescue operations. But they can help save lives. Member States and the EU must make full use of all vessels capable of rescuing persons in distress. They should fully support them by making the registration of NGO ships less burdensome, by allowing them to operate on their territory and from their harbours and by informing them of distress cases.

6. A reliable relocation mechanism

The current ad hoc solutions for the relocation of persons rescued at sea to other Member States are fragile and unsustainable. The European Commission must immediately start working on a more sustainable, reliable and permanent mechanism for the relocation of refugees and migrants arriving at sea. It should also fully take into account the willingness of many municipalities and regions to receive asylum seekers and support them with direct EU funding. The European Commission should also include rules for a binding and fair relocation mechanism in its envisaged reform of the Dublin system.

7. Stop misusing development funding for migration control

The EU supports the Libyan Coast Guard with development funding via the EU Trust Fund for Africa. It must stop misusing development funds for border surveillance and the prevention of irregular migration. Development cooperation is about fighting poverty, not about fighting migration. EU funding to third countries must generally become much more transparent.

Executive Summary

The international law of the sea requires that assistance must be rendered to vessels in distress and that states maintain adequate Search and Rescue capacities. Crucially, rescuees must be delivered to a place of safety. The European Convention on Human Rights requires that state actors exercising jurisdiction respect the non-refoulement principle and a number of procedural guarantees. In order to avoid such responsibility for migrants in distress at sea, EU Member States are seeking to outsource it to third countries in Northern Africa, by disembarking rescued migrants there, by directing private shipmasters to do so, or by calling upon Northern African authorities for the Search and Rescue operation.

Against this background and in the framework of European and international law, the present study first examines the concept of “Places of Safety” in more depth (Part 1) before asking whether Algeria, Egypt, Libya, Morocco, and Tunisia can be considered places of safety for migrants and refugees (Part 2). It then examines the legal situation when rescuees are disembarked in unsafe places by EU Member State vessels (Part 3), when a Maritime Rescue Co-ordination Centre (MRCCs) orders private vessels to disembark rescuees in unsafe places (Part 4) or to stand by while third country authorities proceed to the rescue followed by disembarkation in unsafe places (Part 5). It closes with conclusions (Part 6).

The study makes the following findings:

1. The international law of the sea contains an obligation to provide assistance to persons in distress at sea and to deliver them to a “place of safety.” Such a place of safety must be a place where the survivors’ life and safety are not under threat, where their basic needs are covered, and where they are safe from persecution and chain refoulement.
2. Libya can under no circumstances be considered a place of safety. Not only is the situation there extremely volatile, migrants especially suffer atrocious human rights abuses, and those intercepted or rescued by the Libyan Coast Guard are routinely detained under nightmarish conditions. The situation in Algeria, Egypt, Morocco, and Tunisia can certainly not be compared to that in Libya, but detention and torture are big concerns here, too. In addition, vulnerable groups face serious human rights violations and even persecution there, and there are persistent reports of refoulement of refugees. At least for these groups, those countries cannot be considered places of safety; however, screening for protection needs aboard a private vessel is hardly feasible.
3. The duties arising from the law of the sea apply directly when the authorities of EU Member States are involved in Search and Rescue operations, including as part of Frontex missions and other border surveillance activities. Where SAR operations occur as part of border surveillance or protection operations, EU law reinforces the international guarantees.

4. When EU Member State MRCCs tell private shipmasters to disembark rescuees in unsafe places, such as Libya, or to defer to third-country coast guards who will then disembark the rescuees in an unsafe place, the shipmasters of Search and Rescue NGOs have faced criminal charges for disembarking rescuees in an EU port instead. However, the debate over the ability of private shipmasters to rely on international law to justify their noncompliance with MRCC instructions is somewhat skewed; while the law of the sea does in part directly address shipmasters, it is above all the domestic law of a flag state that contains the obligations of individual shipmasters – both the obligation to rescue (including the obligation to deliver rescuees to a place of safety) and the obligation to comply with MRCC instructions. When these two obligations clash because the MRCC instructs private shipmasters to deliver rescuees to an unsafe place, international law dictates that the duty to rescue must prevail.
5. At the same time, this debate has been obfuscating the view on relevant state obligations under international law. As the study shows, both the state running the MRCC and the flag state can be held responsible for instructing a shipmaster to disembark rescuees in an unsafe place.
6. Furthermore, where an MRCC calls upon a third-country coast guard to render assistance, knowing that the rescuees will then be disembarked in an unsafe place, its home state can also be held responsible for complicity in the third state’s breaches of international law.

The study concludes that the EU and its Member States cannot escape international responsibility by seeking to avoid direct contact with migrants when they actively contribute to violations of the international law of the sea, international refugee law, and essential human rights guarantees.

Introduction

In its ground-breaking 2011 judgment *Hirsi Jamaa and others v. Italy*, the European Court of Human Rights declared that pushbacks of migrants on the high seas constitute human rights violations. The Court made it clear that the European Convention on Human Rights (ECHR) applies wherever state authorities exercise jurisdiction in the sense of “effective control” over a person, even on the high seas. Given the abysmal human rights conditions in Libya and given the total lack of individual examination of potential protection claims, Italy had violated the non-refoulement principle and the prohibition of collective expulsion of aliens. Crucially, the Court emphasised that these human rights guarantees also apply in Search and Rescue scenarios. When EU Member State coast guards rescue migrants at sea, therefore, they cannot shift the responsibility of protecting these migrants to third countries without considering their human rights obligations. This also includes the procedural obligation to provide an opportunity for individual examination of protection claims, which can hardly be observed without first disembarking the rescuees in the Member State itself. Similar obligations flow from the 1951 Refugee Convention, which also guarantees non-refoulement.

The international law of the sea requires that states maintain adequate Search and Rescue capacities. In recent years, however, the burden of Search and Rescue (SAR) in the Mediterranean has increasingly fallen on the shoulders of private actors, as SAR, the disembarkation of persons in distress at sea in the Mediterranean, and the distribution of responsibility between the EU Member States has become highly contested between EU Member State governments. With the reduction of the operational space of Frontex Joint Maritime Operation Themis and the temporary suspension of the deployment of naval assets in the context of EUNAVFOR-MED Operation Sophia, the EU and its Member States effectively stopped all their rescue activities in the Mediterranean.

NGOs have been stepping in to fill the European SAR gap, but they are increasingly being criminalised and prosecuted, their vessels confiscated. Their situation recently became even more complicated due to Italy's “closed ports” policy. Italy's refusal to let NGO ships conducting SAR operations enter Italian ports has made disembarkation of rescued migrants and refugees increasingly difficult and raised concerns over the circumvention of human rights responsibilities by EU Member States. Instead, the Italian Maritime Rescue Co-ordination Centre (MRCC) has started instructing shipmasters to disembark the rescuees in Libya – the very country that the European Court had found to violate the most essential human rights guarantees, and in spite of the fact that nothing suggests that the situation there has improved.

In addition, the EU and its Member States are stepping up their cooperation with Northern African states with a view to replicating elements of the “EU-Turkey Deal,” where Turkey is holding back migrants from traveling onwards into the EU. This includes funding, equipment, and training for coast guards. With this support, Libya has now declared a Search and Rescue Region (SRR) and is setting up a Joint Rescue Co-ordination Centre (JRCC). Making use of these developments, the Italian Maritime Rescue Co-ordination Centre (MRCC) has started telling private vessels to stand by and calling the Libyan Coast Guard to the rescue instead, knowing full well that the migrants will then be disembarked in Libya. Cooperation is also underway with Algeria, Egypt, Morocco, and Tunisia. However, the human rights record of these “cooperation partners” is often rather dubious. In Libya, it is an established fact that migrants and refugees are frequently mistreated, tortured and indiscriminately killed. For the other countries, it is at the very least difficult to assert that refugees will be safe from persecution, chain refoulement, or other grave human rights violations.

These developments, which are all part of a move to shift the protection responsibility to third countries in Northern Africa, are worrisome both from a human rights standpoint and from a law of the sea standpoint. The duty to render assistance in distress at sea is an age-old obligation, codified in the UN Convention on the Law of the Sea (UNCLOS) and a number of specialised international treaties on maritime safety and Search and Rescue. Crucially, the duty to rescue is only discharged once the rescuees are delivered to a “place of safety.” Such a place is one, as the Maritime Safety Committee of the International Maritime Organization (IMO) has made clear, “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”; this includes, as the UN High Commissioner for Refugees (UNHCR) has explained, safety from persecution and refoulement. In that way, the law of the sea, human rights standards, and international refugee law guarantees intersect.

Against this backdrop, the question of who bears what kind of responsibility for the lives and the safety of migrants and refugees in the Mediterranean is crucial. The goal of this study, therefore, is to examine whether shifting the responsibility for receiving rescued persons by the EU and its Member States to third countries in Northern Africa by considering them places of safety constitutes a violation of European or international law. The study first outlines the current legal definition of places of safety and lay out the relevant criteria for identifying and choosing such places under international law (Section 1). We next examine whether and to what extent these criteria are met by the countries along the North African Coast from which migrants start their journey on the Mediterranean Sea (Section 2). Section 3 identifies the obligations of EU Member States in cases of disembarkation of migrants in North African States by state actors, both under EU law and international law. The study then turns to the obligations of both states and captains in cases of disembarkation of migrants in North African States by private vessels (Section 4). The final section examines how the problematic human rights situation in North African States may affect the responsibility of the EU and Member States in the context of cooperation with North African Rescue Co-ordination Centres (Section 5).

1. Defining Places of Safety

1.1 The Obligation to Deliver Rescues to a Place of Safety

The **obligation to render assistance** to persons in distress at sea is a longstanding obligation under customary international law¹ that has also been laid down in a number of binding international treaties. Vessels are considered objectively in distress if – like many refugee boats – they are not seaworthy due to overloading or lack of supplies, such that the passengers cannot reach a place of safety without assistance.²

In accordance with Article 98(1) UNCLOS, every state party “shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him [...]” While Annex 2.1.10 of the 1979 International Search and Rescue Convention (SAR Convention or SAR)³ also speaks of the *duty of the State Parties* to ensure that assistance is provided to persons in distress at sea, SOLAS⁴ regulation V/33 refers directly to the *duties of the master of a ship*.

SOLAS regulation V/33 and SAR Annex 2.1.10 specify that the obligation to provide assistance “applies **regardless of the nationality or status** of such persons or the circumstances in which they are found.” Under the duty to render assistance to persons in distress at sea, the motivation of the person to start their journey is irrelevant, as is their eventual legal status in the destination country.

In 2004, SOLAS and SAR were amended to include passages on the coordination of rescue operations⁵ and to clarify that rescues must be delivered to a “place of safety.”⁶ In particular, the government responsible for the relevant SAR region shall exercise primary responsibility for ensuring that coordination and cooperation between states occur, “so that survivors assisted are disembarked from the assisting ship and **delivered to a place of safety** [...]”⁷ Consequently, under the law of the sea, the obligation to rescue implies the disembarkation of the rescued persons in a place of safety.⁸

1.2 Conditions for Places of Safety

The 2004 Guidelines on the treatment of persons rescued at sea,⁹ passed by the Maritime Safety Committee (MSC)¹⁰ of the International Maritime Organization (IMO) concurrently with the 2004 SAR and SOLAS amendments, explain the concept of “**places of safety**”:

6.12 A place of safety [...] is a location where rescue operations are considered to terminate. It is also 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.

The 2004 MSC Guidelines emphasise that places of safety cannot be determined in the abstract, but that the assessment must be made with respect to the **specific needs and vulnerabilities** of the persons rescued:

6.15 The [SAR and SOLAS] Conventions, as amended, indicate that delivery to a place of safety should take into account the particular circumstances of the case. These circumstances may include factors such as the situation on board the assisting ship, on safe conditions, medical needs, and availability of transportation or other rescue units. Each case is unique, and selection of a place of safety may need to account for a variety of important factors.

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

A place of safety is therefore characterised by **a number of factors**: It must be a place where the survivors’ life and safety are not under threat, where their basic needs are covered, and where they are safe from persecution. Under the 1951 Refugee Convention,¹¹ which the Guidelines mention as “relevant international law” in their Appendix, this includes safety from chain refoulement.¹² Moreover, a place of safety is supposed to be temporary,¹³ which means that the survivors must be able to leave and travel onwards;¹⁴ it also means that durable solutions need not necessarily be found in the country of disembarkation.¹⁵

While a place of safety can be on land or at sea (“until the survivors are disembarked to their next destination”), the 2004 MSC Guidelines clarify that an assisting ship “should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger,” especially since it “may not have appropriate facilities and equipment to sustain additional persons on board” safely (para. 6.13–.14). In addition, a non-state vessel is not an appropriate place to screen survivors for protection needs and to devise solutions for them.¹⁶ Usually, delivery to a place of safety therefore requires **disembarkation on land**.¹⁷

- ¹ B. Oxman, “Human Rights and the United Nations Convention on the Law of the Sea,” 86 *Columbia Journal of Transnational Law* (1998) 399, at 414–15.
- ² See V. Moreno-Lax, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea,” 23 *Int’l J. Ref. L.* (2011) 174, at 195–6; M. Lehnert, *Frontex und operative Maßnahmen an den europäischen Außengrenzen*, 2014, at 236–8.
- ³ 1979 International Convention on Maritime Search and Rescue (SAR), 1405 UNTS 97, modified by Res. MSC.155(78), 20 May 2004 (SAR 2004). Ratified by all Mediterranean States except Egypt and Israel.
- ⁴ 1974 International Convention for the Safety of Life at Sea (SOLAS), 1184 UNTS 278. Ratified by all Mediterranean States except Bosnia and Herzegovina.
- ⁵ On the procedure, see below at 1.3.
- ⁶ The 2004 amendments to the SOLAS and SAR Conventions were not ratified by Malta.
- ⁷ SOLAS (2004) regulation V/33, para. 1.1, mirrored by SAR (2004) Annex 3.1.9.
- ⁸ D. Guilfoyle, in: A. Proelß (ed.), *UNCLOS: A Commentary*, 2017, Art. 98, para. 10.
- ⁹ Guidelines on the Treatment of Persons Rescued at Sea, Resolution MSC.167(78), adopted on 20 May 2004, MSC 78/26/Add.2, Annex 34 (“2004 MSC Guidelines”). Where a ship is in need of assistance without presenting a risk to the safety of life of persons, the situation is governed by the Guidelines on Places of Refuge for Ships in Need of Assistance, MSC Resolution A.949(23), adopted on 5 December 2003.
- ¹⁰ The MSC is an organ of the International Maritime Organization (“IMO”) that consists of all the member states of the IMO (Art. 27 IMO Convention) and that is in charge of all matters of maritime security (Art. 28 IMO Convention). It submits to the IMO Council, inter alia, proposals for amendments and recommendations and guidelines it has adopted (Art. 29 IMO Convention).

- ¹¹ 1951 Convention on the Status of Refugees (“Refugee Convention” or “1951 Convention”).
- ¹² R. Hofmann and T. Löhr, “Introduction to Chapter V,” in: A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, 2011, para. 78; see also ECtHR, T.I. v. The United Kingdom (Admissibility), Application No. 43844/98, 7 March 2000.
- ¹³ 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. Report of the Office of the United Nations High Commissioner for Refugees to the UN General Assembly, UN Doc. A/AC.259/17, 11 April 2008 (“2008 UNHCR Guidelines”), para. 35.
- ¹⁴ This corresponds to the right to leave any country including one’s own, which is laid down in a great number of international instruments, starting with the 1948 Universal Declaration on Human Rights (“UDHR”) and including the 1966 International Covenant on Civil and Political Rights (“ICCPR”) as well as Protocol No. 4 to the European Convention on Human Rights (“ECHR”).
- ¹⁵ 2008 UNHCR Guidelines (supra note 13), para. 35.
- ¹⁶ 2008 UNHCR Guidelines (supra note 13), para. 31.
- ¹⁷ 2008 UNHCR Guidelines (supra note 13), para. 15 footnote 3.

These Guidelines, passed by the IMO member states with only Malta not prepared to accept them,¹⁸ were affirmed by the UN General Assembly in 2007.¹⁹ According to SAR (2004) Annex 3.1.9., State Parties are bound to take the relevant guidelines of the IMO into account when searching for a place of safety.²⁰ They were also affirmed by the UNHCR in 2008 in another set of guidelines on the same topic, adopted after a series of meetings with experts and state representatives as well as an inter-agency meeting.²¹

These principles are confirmed in an EU Regulation relating to Frontex operations at sea. Article 4(2) of the External Sea Borders Regulation²² provides: “Intercepted or rescued persons shall not be disembarked, forced to enter, conducted to or otherwise handed over to the authorities of a third country when the host Member State or the participating Member States are aware or ought to be aware that this third country engages in practices as described in paragraph 1.” According to Article 4(1), such practices include, “inter alia,” the death penalty, torture or inhuman or degrading treatment or punishment, persecution, or chain refoulement.

1.3 Selecting a Place of Safety for Disembarkation

In each individual case, there will be several possible places of safety for the survivors rescued at sea, often in more than one state. This means that

a concrete place of safety must be chosen among these options. The 2004 amendments²³ address the obligations in this situation in an effort to “give the responsible Government the flexibility to address each situation on a case-by-case basis, while assuring that the masters of ships providing assistance are relieved of their responsibility within a reasonable time and with as little impact on the ship as possible.”²⁴

As the 2008 UNHCR Guidelines clarify, while “the responsibility to assist persons in distress at sea is an *obligation on shipmasters* established under international law [... and only] ends when passengers have been disembarked at a place of safety,”²⁵ “[t]he responsibility for finding solutions to enable timely disembarkation in a humane manner *rests exclusively with States* and not with private actors.”²⁶ This means that the obligations of the shipmaster to find a place of safety interlock with the obligation of states to provide such places of safety.

Pursuant to the 2004 SAR and SOLAS amendments, there is a **duty of governments to cooperate** in providing suitable places of safety for the individuals rescued,²⁷ while the **initiative for determining a place of safety** lies with the state responsible for the SAR region in which the rescue operation took place. This state is responsible for providing a place of safety, or to ensure that a place of safety is provided:²⁸

Contracting Governments shall *co-ordinate and co-operate* to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The *Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility* for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the [International Maritime] Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.²⁹

Accordingly, the **Rescue Co-ordination Centre (RCC)** or Sub-Centre of the state responsible for the SAR region “shall initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea. It shall inform the ship or ships and other relevant parties concerned thereof.”³⁰ If another RCC is seized with a distress call or with a distress message relayed by a vessel or aircraft in the vicinity of the distress situation, this RCC becomes responsible for co-ordinating the rescue operation. If it co-operates with the RCC in charge of the respective SAR zone, it must respect the obligations discussed in Section 5 below.

If the RCC responsible for the SAR region is alerted to and takes charge of a rescue operation, but directs the operation to a place that does not fulfil

the conditions of a place of safety, the rescuees and rescuers may contact another RCC, requesting it to provide a place of safety. It is unclear what legal effect such a request has, given that the RCC is not responsible for the SAR zone. However, it would appear that the RCC is only relieved from its law of the sea obligations if a rescue operation is executed that both ends the distress situation and leads to disembarkation in a place of safety. Arguably, where the latter is foreseeably not the case because the competent RCC refuses to provide a place of safety, the second RCC both can and must provide a place of safety. Systematically, that follows from the relief of private vessels from the obligation to rescue;³¹ teleologically, it follows from the purpose of the RCC’s involvement, securing an effective and timely rescue that fulfils the obligations of the law of the sea.³²

While the 2004 amendments therefore put the government responsible for the SAR region in charge of making sure a place of safety is provided, they make **no determination where this place of safety must be**. In particular, they do not specifically oblige the SAR region state to provide such a place itself.³³ Given that there are no criteria for choosing among different possible places of safety, geographical proximity is therefore not necessarily a determining factor, unless the conditions on the ship are such that immediate disembarkation in the closest place of safety imposes itself. The port for disembarkation is only defined in the negative: it must not be a place that does not fulfil the criteria of a place of safety.

The RCC of the state responsible for the SAR region – or another RCC seized with a distress situation – is therefore in charge of making sure that a rescue operation takes place and that the persons rescued are then delivered to a place of safety. The RCC’s obligation to ensure a place of safety is provided is concurrent with the **shipmaster’s remaining**

¹⁸ Malta proposed a deletion of the assurance that a place of safety will be provided by the Contracting Governments, fearing that the government responsible for the SAR region would end up having to accept the persons rescued at sea; the amendment was rejected with 46:22 votes and 12 abstentions, the original text therefore passed. According to the minutes: “The delegation of Malta reserved their position on the Guidelines and advised the Committee that for the time being they would not accept them.” Report of the Maritime Safety Committee on its Seventy-Eighth Session, MSC 78/26, 28 May 2004, para. 16.46–16.54, p. 112–113.

¹⁹ UNGA Res. 16/222: Oceans and the Law of the Sea, 16 March 2007, UN doc. A/RES/61/222, para. 70.

²⁰ Also SOLAS (2004) regulation V/33, para. 1.1.

²¹ 2008 UNHCR Guidelines (supra note 13).

²² Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2014 L 189/93, 27 June 2014 (“External Sea Borders Regulation,” “ESBR”).

²³ Malta did not ratify these revisions.

²⁴ 2004 MSC Guidelines (supra note 9), para. 2.5–2.6.

²⁵ 2008 UNHCR Guidelines (supra note 13), para. 21 (emphasis added).

²⁶ 2008 UNHCR Guidelines (supra note 13), para. 32 (emphasis added).

²⁷ See also 2004 MSC Guidelines (supra note 9), para. 6.16.

²⁸ 2004 MSC Guidelines (supra note 9), para. 2.5.

²⁹ SOLAS (2004) regulation V/33 para. 1.1 (emphasis added); SAR (2004) Annex 3.1.9 is phrased in identical terms, replacing “contracting governments” with “parties.”

³⁰ SAR (2004) Annex 4.8.5.

³¹ According to SAR (2004) Annex 3.1.9., “Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea.”

³² See in particular SAR Annex 2.2. and 2.3.

³³ This was the worry of Malta, see supra note 18.

obligation to ensure the survivors are indeed disembarked in a place of safety. The 2004 MSC Guidelines require that shipmasters “seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized” (para. 5.6).

2. Places of Safety on the North African Coast?

Can Morocco, Algeria, Tunisia, Libya, and Egypt be considered a POS for migrants and refugees?

2.1. Algeria

2.1.1. General Human Rights Situation

Algeria's semi-presidential democracy is known to be largely controlled by the military and a selected elite known as the “pouvoir.” Following massive protests between 2010 and 2012 in the course of the Arab Spring, the constitution has been amended in 2016 to reintroduce a two-term limit on the presidency and making the nomination of a prime minister from the largest party in parliament mandatory. Given the continuing de facto dominance of the military, protests flared up again in 2019, forcing President Bouteflika to step down after twenty years in power. He has been replaced by interim President Abdelkader Bensalah, who has been part of the regime before and is supported by the military. Elections have been announced for December 2019, but it is unlikely that they will lead to a fundamental change of the governmental system.

Despite some constitutional changes during the last decade, the general human rights situation in Algeria is still worrying. Algerian authorities still prosecute peaceful speech, using articles in the penal code criminalising “offending the president,” “insulting state officials,” and “denigrating Islam,” as well as articles on sharing “intelligence with foreign powers.”³⁴ Art. 98 of the Algerian penal code punishes organising or participating in unauthorised demonstrations. Demonstrations are still frequently banned and effectively thwarted by massive police mobilisation and regular detention of protesters.³⁵ Freedom of association is also largely curtailed by the necessity to re-register associations after 2012 and the authorities' inertia in processing the registration requests of many associations.³⁶

2.1.2. Situation of Migrants and Refugees

Despite having ratified the Refugee Convention of 1951, **Algeria has no legal provisions for formally requesting asylum.**³⁷ A comprehensive legislative framework and efficient administrative institutions for the protection of refugees, asylum-seekers and stateless persons is still largely lacking, with the UNHCR conducting refugee status determination (“RSD”) and trying to ensure at least basic supply and support.³⁸ Refugee and asylum-seeking children have only limited access to public schools and vital health care services.³⁹

Algeria continues to operate **chain refoulement**. In 2017, the authorities started arbitrary mass deportations of refugees to Mali and Niger **under inhumane conditions** and in most cases without considering their legal status and individual vulnerabilities.⁴⁰ Security forces raid areas where refugees

are known to live and arrest based on appearance and skin colour.⁴¹ Being expelled near the border to Niger and Mali, the refugees still have to walk kilometres in the desert to reach their destination.⁴² Even under Algerian law, these actions are considered illegal.⁴³ Non-governmental organisations fighting this practice of arbitrary deportation have been significantly restrained in their activities.⁴⁴

2.1.3. Situation of Particularly Vulnerable Groups

Particular **religious groups** are exposed to persecution in Algeria. Members of the Ahmadi religious movement are frequently harassed and subjected to arbitrary arrests.⁴⁵ Authorities closed several Christian churches in 2018 because they allegedly don't comply with the decree on “non-Muslim cults.”⁴⁶

In his 2016 report on his visit to Algeria, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health noted **discrimination against certain groups of the population such as homosexuals, people living with HIV, migrants and refugees.**⁴⁷ Same-sex sexual relations are punished with up to two years imprisonment.⁴⁸ Strong anti-LGBTI rhetoric from politicians and media has contributed to increased violence and harassment against LGBTI people and organisations.⁴⁹

Women continue to face discrimination under Algerian law. Algerian penal law allows persons abducting a minor to escape prosecution if they marry their victim.⁵⁰ Despite some changes in the Family Code, women are still discriminated in matters of marriage, divorce, child custody and guardianship, and inheritance.⁵¹ Rape is prohibited by the penal code but not explicitly defined.⁵² Moreover, the law allows convictions to be dropped if the victim pardons the perpetrator.⁵³ Some forms of domestic violence and sexual harassment in public are meanwhile criminalised, but not sufficiently prosecuted due to the pardon clause as well as a lack of protection orders and obligations for law enforcement.⁵⁴

2.1.4. Conclusion

In the absence of a comprehensive legal framework and effective asylum procedures, the UNHCR carries out key protection activities in Algeria, including RSD and the provision of basic shelter and medical treatment. However, Algeria still does not respect the non-refoulement principle and conducts mass deportations of Sub-Saharan Africans under inhumane conditions. Moreover, members of the Ahmadi religion are still persecuted in Algeria, facing arbitrary arrests and harassment. LGBTI migrants are particularly vulnerable as they are exposed to harassment and prison sentences that must be considered persecution.⁵⁵ Against

³⁴ Human Rights Watch (HRW), *World Report 2018*, p. 23–4; HRW, *World Report 2019*, p. 25–6.

³⁵ HRW, *World Report 2019*, p. 24.

³⁶ HRW, *World Report 2019*, p. 25.

³⁷ HRW, *Algeria: Inhumane Treatment of Migrants*, available at: <https://www.hrw.org/news/2018/06/28/algeria-inhumane-treatment-migrants>. All URLs last accessed on 25 November 2019.

³⁸ UNHCR, *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 27th Session – Algeria*, Aug 2016, p. 1, available at: <https://www.refworld.org/docid/59198a024.html>

³⁹ UNHCR, *Submission for the Universal Periodic Review – Algeria* (supra note 38), p. 12, para. 44.

⁴⁰ HRW, *Algeria: Inhumane Treatment of Migrants* (supra note 37); Spokesperson for the UN High Commissioner for Human Rights, Press Briefing 22 May 2018 available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23114&LangID=E>; Amnesty International, *Report Algeria 2018*, available at: <https://www.amnesty.org/en/countries/middle-east-and-north-africa/algeria/report-algeria/>; Human Rights Watch, *World Report 2019*, p. 27.

⁴¹ HRW, *Algeria: Inhumane Treatment of Migrants* (supra note 37); Amnesty International, *Report Algeria 2018* (supra note 40); HRW, *World Report 2019*, p. 27.

⁴² HRW, *Algeria: Inhumane Treatment of Migrants* (supra note 37); Amnesty International, *Report Algeria 2018* (supra note 40).

⁴³ HRW, *Algeria: Inhumane Treatment of Migrants* (supra note 37).

⁴⁴ HRW, *World Report 2019*, p. 27.

⁴⁵ Amnesty International, *Report Algeria 2018* (supra note 40); HRW, *World Report 2019*, p. 26.

⁴⁶ Amnesty International, *Report Algeria 2018* (supra note 40).

⁴⁷ UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Preliminary Observations on Algeria*, 10 May 2000, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19934&LangID=E>

⁴⁸ HRW, *World Report 2019*, p. 27.

⁴⁹ HRW, *World Report 2018*, p. 28.

⁵⁰ HRW, *World Report 2019*, p. 26.

⁵¹ Amnesty International, *Report Algeria 2018* (supra note 40); HRW, *World Report 2019*, p. 26.

⁵² Amnesty International, *Report Algeria 2018* (supra note 40); HRW, *World Report 2019*, p. 26.

⁵³ HRW, *World Report 2019*, p. 26.

⁵⁴ HRW, *World Report 2018*, p. 25.

⁵⁵ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/12/09, 23 October 2012, para. 26.

this background, **Algeria cannot generally be considered a place of safety.**

2.2 Egypt

2.2.1 General Human Rights Situation

Egypt experienced a major uprising in the course of the Arab Spring in 2011, toppling Hosni Mubarak. Muslim Brotherhood candidate Mohammed Morsi, elected President in 2012, was ousted in a violent coup in 2013, with former army chief Abdel Fattah el-Sisi winning the elections in 2014 and confirmed in March 2018 in elections considered unfair and unfree.⁵⁶ Between 2015 and 2018, Egypt has witnessed 571 terrorist attacks.⁵⁷

Under the guise of combating terrorism, el-Sisi has stepped up his repression against political opponents, civil society activists.⁵⁸ Under the emergency laws, thousands of civilians have been tried in military courts, often receiving death sentences.⁵⁹ The 2019 Freedom of the Press Index ranks Egypt at #163 of 180, now behind Libya (#162), and calls it “one of the world’s biggest prison for journalists.”⁶⁰ Under the new NGO Law, the ongoing crackdown on civil society actors is expected to continue.⁶¹ This makes it even easier for the security forces to operate with near-impunity, torturing detainees and committing enforced disappearances and arbitrary arrests.⁶²

The socioeconomic conditions have been worsening under sharply rising inflation; of the 99 million

population, 7.3 m have no access to clean water and 50 m have no proper sewage.⁶³

2.2.2 Situation of Migrants and Refugees

Egypt is a party to the 1951 Refugee Convention but has no national asylum legislation or system. Based on a 1954 Memorandum of Understanding, the UNHCR is assuming the functions of refugee status determination and can issue six-month renewable residence permits.⁶⁴ As of 2018, 244,910 asylum-seekers and refugees are registered with the UNHCR, with Syrians forming the largest group (54%), followed by Sudanese (17%) and Ethiopians and Eritreans (7% and 6%).⁶⁵ Most of them live in urban areas, but **many of them are not able to meet their household’s basic needs**; in a strained labour market, language barriers further limit their earning capacity.⁶⁶ The UNHCR has been struggling to meet needs due to funding limitations; in 2018, **more than 60% of basic needs went unmet** among persons of concern, and the UNHCR was unable to cover the needs of all registered children with specific protection needs.⁶⁷

The Law on Entry and Residence⁶⁸ **prohibits unauthorised entry and exits** and limits border crossings to officially designated checkpoints, sanctioned by fines and imprisonment for up to six months for non-citizens; no exception is made for refugees and asylum seekers.⁶⁹ This suggests a violation of the right to leave any country including one’s own.⁷⁰ It also means that migrants

having departed from Egypt without permission may be fined or prosecuted.⁷¹

It is not easy to distinguish between **criminal and administrative immigration detention**. Migrants are often put in pre-trial custody, incarcerated at the discretion of national security upon sentencing, or kept in informal administration detention pending deportation; such administrative detention is unlimited.⁷² In Egyptian prisons, **torture is being used systematically and on a widespread scale**.⁷³ **Prison conditions** are cruel, and torture, neglect, and the absence of medical care repeatedly lead to deaths in detention.⁷⁴

The intensified cooperation between Egypt and the EU has led to an intensified crackdown on irregular migration since 2016, as Egypt has sought to position itself as a “poster child” for the fight against irregular immigration and human smuggling. A new anti-smuggling law was passed along with a “National Strategy on Combating Illegal Migration” (2016–26), which has not been officially published.⁷⁵ NGOs report dozens of **deportations in violation of the non-refoulement principle**,⁷⁶ especially targeted against Sudanese.⁷⁷ In past years, the UNHCR has also been denied access to refugees and asylum seekers in detention.⁷⁸

2.2.3 Activities of the Egyptian Coast Guard

Up-to-date reporting on the practices of the Egyptian Coast Guard is hard to come by. In past years, however, there have been reports of **violence against intercepted or rescued migrants**. In September 2013, two migrants en route to Italy were killed by coast guards shooting at them at sea.⁷⁹ In August 2015, navy forces firing at a boat leaving for Europe killed an eight-year-old Syrian girl.⁸⁰ In September 2016, the Coast Guard failed to respond to a SAR incident (“the Rashid incident”) of the Egyptian coast and even held back local fishermen coming to the rescue. Over 200 Sub-Saharan and Egyptian migrants drowned in the incident, and the survivors were arrested and detained.⁸¹

The case garnered wide media attention and went on to be the first instance where the new anti-smuggling law was applied; raids followed against the fishing community, whose SAR operations had been tolerated until about 2017, when the **Egyptian navy all but closed the sea border**. In February 2018, Egypt announced that no “illegal” vessel had left its territorial waters since the end of 2016,⁸² suggesting systematic violations of the right to leave. To date, Egypt has not ratified the SAR Convention.

⁵⁶ HRW, *World Report 2019*, p. 184.

⁵⁷ OHCHR, *Summary of Stakeholders’ submissions on Egypt, Report to the Human Rights Council Working Group on the Universal Periodic Review*, UN Doc. A/HRC/WG.6/34/EGY/3, 14 August 2019, para. 24.

⁵⁸ HRW, *World Report 2019*, p. 184.

⁵⁹ OHCHR, *Summary of Stakeholders’ submissions on Egypt* (supra note 57), para. 34.

⁶⁰ Reporters Without Borders, *2019 World Freedom of the Press Index*, available at: <https://rsf.org/en/egypt>

⁶¹ OHCHR, *Summary of Stakeholders’ submissions on Egypt* (supra note 57), para. 46–9; HRW, *Egypt: New NGO Law Renews Draconian Restrictions*, 24 July 2019, available at: <https://www.hrw.org/news/2019/07/24/egypt-new-ngo-law-renews-draconian-restrictions>

⁶² HRW, *World Report 2019*, p. 184–5; OHCHR, *Summary of Stakeholders’ submissions on Egypt* (supra note 57), para. 6.

⁶³ OHCHR, *Summary of Stakeholders’ submissions on Egypt* (supra note 57), para. 61–2.

⁶⁴ UNHCR, *Egypt Response Plan for Refugees and Asylum-Seekers from Sub-Saharan Africa, Iraq & Yemen*, 2019 (“Egypt Response Plan”), p. 4.

⁶⁵ UNHCR, *Egypt Response Plan* (supra note 64), p. 4 and 6.

⁶⁶ UNHCR, *Egypt Response Plan* (supra note 64), p. 4 and 7.

⁶⁷ UNHCR, *2018 Year-End report, Operation: Egypt*, 1 July 2019, available at <http://reporting.unhcr.org/egypt>

⁶⁸ Law 97 of 1059.

⁶⁹ EuroMed Rights, *EU-Egypt Migration Cooperation: At the expense of human rights*, July 2019, p. 12.

⁷⁰ N. Markard, “The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries,” 27 *EJIL* (2016) 591, at 602.

⁷¹ According to UNHCR, no arrests were recorded in 2018, though; see <http://reporting.unhcr.org/egypt>

⁷² EuroMed Rights, *EU-Egypt Migration Cooperation* (supra note 69), p. 13.

⁷³ OHCHR, *Summary of Stakeholders’ submissions on Egypt* (supra note 57), para. 31.

⁷⁴ OHCHR, *Summary of Stakeholders’ submissions on Egypt* (supra note 57), para. 33.

⁷⁵ EuroMed Rights, *EU-Egypt Migration Cooperation* (supra note 69), p. 11.

⁷⁶ OHCHR, *Summary of Stakeholders’ submissions on Egypt* (supra note 57), para. 83.

⁷⁷ EuroMed Rights, *EU-Egypt Migration Cooperation* (supra note 69), p. 14.

⁷⁸ Global Detention Project, *Immigration Detention In Egypt: Military Tribunals, Human Rights Abuses, Abysmal Conditions, and EU Partner. Country Report*, September 2018, p. 10 (citing sources from 2008–11).

⁷⁹ G. Faure, “Exclusive testimony: Syrian refugees shot trying to leave Egypt,” *France24*, 20 September 2013, available at: <https://observers.france24.com/en/20130920-syrian-refugees-shot-egypt-italy>

⁸⁰ D. Smith, “Analysis: Egypt cracks down on irregular migrants,” *Middle East Eye*, 21 August 2015, available at: <https://www.middleeasteye.net/news/analysis-egypt-cracks-down-irregular-migrants>. Further deadly incidents were reported from the Sinai border, see M. Akkerman, *Expanding the Fortress: The policies, the profiteers and the people shaped by EU’s border externalisation programme*, Transnational Institute, May 2018, p. 55.

⁸¹ P. Magid, “Report from Rashid: Where was the state when hundreds drowned?,” *Mada*, 13 Oct 2016, available at: <https://madamasr.com/en/2016/10/13/feature/politics/report-from-rashid-where-was-the-state-when-hundreds-drowned/>; EuroMed Rights, *EU-Egypt Migration Cooperation* (supra note 69), p. 15.

⁸² EuroMed Rights, *EU-Egypt Migration Cooperation* (supra note 69), p. 17.

2.2.4 Situation of Particularly Vulnerable Groups

Women and girls continue to face discrimination under the Personal Status Law and to suffer endemic sexual harassment and violence.⁸³

Egypt criminalises consensual **same-sex relations**, using Law 10/1961 on Combating prostitution, particularly Article 9(c) on “debauchery,” and a draft law to specifically criminalise male homosexuality that is under review in Parliament.⁸⁴ In September 2017, at least 57 individuals were arrested for their actual or perceived sexual orientation or gender identity, and in 2018, at least 76 were prosecuted under the “debauchery” law.⁸⁵ This constitutes persecution for reasons of membership of a particular social group.⁸⁶

Religious minorities, especially Christians, fear discrimination and sectarian violence, against which they tend not to receive adequate protection.⁸⁷

2.2.5 Conclusion

While the UNHCR has assumed all of the protection tasks in Egypt and is conducting RSD and issuing residence permits, migrants also end up in detention and prisons, where conditions are notoriously bad and torture and abuse are widespread – especially where there is a (purported) suspicion of terrorism. The non-refoulement principle is not respected throughout, so there

may be chain refoulement. LGBTI migrants are in a particularly vulnerable situation, facing prosecution and prison sentences that must be considered persecution. But even outside detention, the UNHCR can only meet 40% of the basic needs of the refugee population, putting into question the essential livelihood of returned migrants. Against this background, **Egypt cannot be considered a place of safety.**

2.3 Libya

2.3.1 General Human Rights Situation

Since the fall of Muammar al Ghaddafi, Libya has been suffering from a power vacuum. The West, including Tripoli, is ruled by the internationally recognised Government of National Accord (GNA), established by the Libyan Political Agreement after a UN-facilitated Libyan political dialogue in 2015. The East and South are under the control of the Tobruk government and the House of Representatives, elected in 2014, and supported by the Libyan National Army (LNA) under Field Marshal Khalifa Haftar.⁸⁸ ISIS no longer controls territory but continues to be active and carried out attacks in 2018.⁸⁹ The situation has worsened following an attack by the Haftar's LNA on Tripoli in April 2019, with the political process at a standstill.⁹⁰

Civilians are often affected by fighting, and in addition they are sometimes abducted or subjected

to atrocities by various actors.⁹¹ The resumed conflict has worsened the economic conditions even more.⁹² The general human rights situation is atrocious; violations perpetrated by government-affiliated and extra-legal armed groups, militias, and private actors include arbitrary killings, forced disappearances, torture, arbitrary detention, trafficking in persons, forced labour, harsh and life-threatening conditions of detention, and violence against journalists, and widespread sexualised violence. Efforts to curb such abuses are minimal, and limited government reach and resources contribute to a climate of impunity and lawlessness.⁹³

2.3.2 General Situation of Migrants and Refugees

IOM estimates that there are at least 655,000 migrants in Libya (as of July 2019), 62% of them from Sub-Saharan Africa and 30% from Northern Africa.⁹⁴ About 20% of them are based in the small region of Tripoli.⁹⁵ **Libya is not a party to the 1951 Refugee Convention, has no asylum system in place, and does not formally recognise the UNHCR.**⁹⁶ As a result, the UNHCR cannot provide refugees in Libya with status; efforts are underway to provide persons of concern to the UNHCR with another ID document that is supposed to prevent their (renewed) detention.⁹⁷ Given there is no asylum system, there is also no protection against refoulement.

Irregular migration is criminalised without distinction between migrants, refugees, asylum seekers, and victims of trafficking,⁹⁸ and the fact that most refugees and migrants do not have access to residence permits increases their risk of detention.⁹⁹ In a Note for the EU High-Level Working Group on Asylum and Migration by the EU Council Presidency in September 2019, the situation is characterised as follows:

Conditions for migrants in Libya have deteriorated severely recently due to security concerns related to the conflict and developments in the smuggling and trafficking dynamics and economy, in addition to the worsening situation in the overcrowded detention facilities.¹⁰⁰

The situation of migrants is highly precarious, not least because they are usually in an irregular situation and therefore constantly at risk of detention. They are at risk of assault and exploitation, have little to no access to medical services, and no effective access to police protection.¹⁰¹

In addition, migrants consistently report killings, extreme violence, torture, rape, detention under inhuman conditions, extortion, and forced labour by smugglers or traffickers, apparently with the collusion or complicity of some government-affiliated actors.¹⁰² Virtually all migrants intercepted or rescued at sea coming from Libya have relied on smugglers, meaning that they will likely have experienced traumatising conditions and events in Libya, in addition to possible persecution in their home country.

⁸³ OHCHR, *Summary of Stakeholders' submissions on Egypt* (supra note 57), para. 58 and 68.

⁸⁴ OHCHR, *Summary of Stakeholders' submissions on Egypt* (supra note 57), para. 19–21.

⁸⁵ OHCHR, *Summary of Stakeholders' submissions on Egypt* (supra note 57), para. 20.

⁸⁶ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/12/09, 23 October 2012, para. 26.

⁸⁷ OHCHR, *Summary of Stakeholders' submissions on Egypt* (supra note 57), para. 41–2.

⁸⁸ US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2018: Libya 2018 Human Rights Report*, p. 1, available at: <https://www.state.gov/wp-content/uploads/2019/03/LIBYA-2018-HUMAN-RIGHTS-REPORT.pdf>

⁸⁹ EU Council Presidency, *Note: Libya and the surrounding area: current situation and need for immediate action*, 11538/19 LIMITE, 4 September 2019, p. 6.

⁹⁰ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 6; Oral update of the United Nations High Commissioner for Human Rights on Libya pursuant to Human Rights Council resolution 40/27, 25 September 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25048&LangID=E>; “Libya's Khalifa Haftar says open to dialogue as fighting drags on,” *Aljazeera*, 26 September 2019, available at <https://www.aljazeera.com/news/2019/09/libya-khalifa-haftar-open-dialogue-fighting-drags-190926082047283.html>

⁹¹ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 6.

⁹² EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 7.

⁹³ US Department of State, *Libya 2018 Human Rights Report* (supra note 88), p. 1.

⁹⁴ IOM Displacement Tracking Matrix (DTM), *Libya's Migrant Report*. Round 26: June–July 2019, p. 3.

⁹⁵ IOM DTM, *Libya's Migrant Report* (supra note 94), p. 3.

⁹⁶ OHCHR and UNSMIL, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 20 December 2018, p. 5.

⁹⁷ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 12.

⁹⁸ OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 24.

⁹⁹ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 3.

¹⁰⁰ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 2.

¹⁰¹ OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 51–54; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (“CMW”), *Concluding observations on the initial report of Libya*, UN Doc. CMW/C/LBY/CO/1, 8 May 2019, para. 10, 34, 36, 38, and passim.

¹⁰² OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 26–34; see also, *Final Report of the Panel of Experts Established Pursuant to Resolution 1973 (2011) Concerning Libya*, UN Doc. S/2017/466, Annex 17, 5 May 2017.

By all accounts, the human rights situation is particularly horrific for migrants rescued at sea, both because of the Libyan Coast Guard's actions (Section 2.4.3) and because of the detention conditions (Section 2.4.4).

2.3.3 Activities of the Libyan Coast Guard

Libya declared a Search and Rescue Region in December 2017, confirmed by the IMO in June 2018.¹⁰³ According to the UNHCR, in the first half of 2018, of the 22,752 migrants intercepted or rescued at sea near Libya, some 46% were disembarked in Libya by the Libyan Coast Guard (LCG), whereas 50% were disembarked in Italy; in the second half of 2018, the number went down to 5,635 migrants, of which 85% were disembarked in Libya.¹⁰⁴ This shift is a result of the **LCG stepping up its operations in the newly established Libyan SRR**,¹⁰⁵ combined with reduced European SAR activities and increased restrictions on SAR NGOs.¹⁰⁶

The actions of the LCG during interceptions or rescues have continuously been cause for grave concern; according to a 2018 report by the UN High Commissioner for Human Rights (OHCHR):

UNSMIL/OHCHR documented the use of firearms, physical violence and threatening language by coastguard officials during search-and-rescue operations in Libyan and international waters. For instance, on 10 May [2017], a Libyan Coast Guard patrol boat intervened in an ongoing rescue operation of some 500 people in a wooden vessel run by the German non-governmental organization Sea-Watch, some 20 nautical miles from Libyan

shores. According to testimonies by the rescue crew and survivors, members of the Coast Guard pointed their firearms at the migrants, threatened them, and rammed into their wooden boat twice. Survivors were taken to centres run by the Department for Combating Illegal Migration, where some were subjected to torture or ill-treatment. In a similar incident, on 6 November [2017], some 28 nautical miles from Libyan shores, members of the Libyan Coast Guard reportedly beat migrants with a rope as they boarded, threatened Sea-Watch rescuers and instructed them to leave the location. The Coast Guard reportedly engaged in reckless behaviour during search-and-rescue operations and did not provide life jackets, further endangering the lives of people in distress at sea.¹⁰⁷

Such incidents have continued in 2019. For example, in October 2019, the SAR NGO Sea-Eye reported dangerous efforts by Libyan Coastal Security¹⁰⁸ to interfere with an ongoing rescue operation, causing a collision, pointing guns at the migrants, and firing warning shots into the air and into the water.¹⁰⁹

The EU Presidency observes that departures from Libya have dramatically decreased in 2019,¹¹⁰ whereas “the activities of the Libyan Coast Guard (LCG) in rescuing or intercepting migrants off the Libyan coast have continued despite the conflict that has been ongoing since the beginning of April. According to the UNHCR, the LCG has so far rescued or intercepted 5,280 people at sea in 2019 (up to 16 August [2019]) and brought them back to Libya. This is nearly equal to the number of

migrants who have reached the EU from Libya so far in 2019 (6,126). The LCG is thus now intercepting or rescuing a higher proportion of migrants departing from Libya than in the past.”¹¹¹

2.3.4 Detention Conditions for Intercepted Migrants in Libya

Migrants disembarked in Libya after interceptions or rescue missions at sea are subsequently transferred to detention centres,¹¹² where migrants are held indefinitely without being charged, tried, or sentenced, pending deportation or evacuation.¹¹³ The number of detention facilities in Libya is unclear, as there are also unofficial ones, some of which are run by militias; even the official ones appear not to be catalogued.¹¹⁴ In December 2018, there were some 26 official detention centres overseen by the Libyan Directorate for Combatting Illegal Migration (DCIM) but often run by armed groups.¹¹⁵ The official facilities are currently estimated to hold around 5,000 migrants, 3,700 of whom are held in conflict areas.¹¹⁶ In 2017, they still held nearly 20,000 migrants, but thousands were repatriated to their home countries.¹¹⁷ In 2017 and 2018, IOM returned about 30,000 migrants; given the detention conditions, it is likely that their return decisions may have been made under duress.¹¹⁸ The bodies of migrants found in remote areas often bear gunshot wounds.¹¹⁹

The conditions in these centres were investigated in detail by the UN High Commissioner for Human Rights (OHCHR) and the UN Support Mission in Libya (UNSMIL) between January 2017 and August 2018.¹²⁰ In February 2018, OHCHR summarised the preliminary findings as follows:

Migrants faced arbitrary detention in inhuman conditions and continued to be subjected to torture, including rape and other forms of sexual violence, abduction for ransom, extortion, forced labour, forced prostitution, and unlawful killings. Those held in official detention centres run by the Department for Combating Illegal Migration under the Ministry of the Interior were held indefinitely, with no judicial process. UNSMIL/OHCHR gathered information on unlawful killings, rape, torture and other extreme violence in unofficial detention places run by armed groups, smugglers and traffickers in Beni Walid, Sabratha and Sabha. Sub-Saharan Africans were especially vulnerable to abuse as a result of racial discrimination. Rape and other forms of sexual violence against women and girls were widespread.

[...] Detainees were often crammed into hangars with appalling sanitary conditions, little space to lie down, and no or extremely limited access to light, ventilation or appropriate hygiene facilities. Most were denied outdoor time and were not provided with any means to communicate with their families. UNSMIL/OHCHR also received numerous and consistent reports of torture, including beatings, electric shocks and sexual violence, and of forced labour of detainees.¹²¹

In September 2019, the EU Presidency characterised the situation in similar terms:

The government has continued to arbitrarily detain migrants, many of whom are in a vulnerable position. The centres suffer from overcrowding and the conditions are poor. In particular, there are difficulties in relation

¹⁰³ See below, at 5.1.

¹⁰⁴ UNHCR, *Desperate Journeys: Refugees and migrants arriving in Europe and at Europe's borders, January – December 2018*, January 2019, p. 16. A further 1,363 people arrived in Italy and 989 in Malta either directly from Libya or after rescues in Italy's or Malta's SRR; *ibid.*

¹⁰⁵ UNHCR, *Desperate Journeys* (supra note 104), p. 5.

¹⁰⁶ UNHCR, *Desperate Journeys* (supra note 104), p. 9.

¹⁰⁷ OHCHR, *Report: Situation of human rights in Libya, and the effectiveness of technical assistance and capacity-building measures received by the Government of Libya*, UN Doc. A/HRC/37/46, 21 February 2018, para. 46.

¹⁰⁸ Unlike the LCG, who reports to the Libyan Ministry of Defense, the Coastal Security is subordinated to the Libyan Ministry of Interior; its border control mandate only extends up to 12nm into the sea.

¹⁰⁹ M. Vella, “Libyan militia fires warning shots at Sea-Eye during rescue of 90 lives,” *Malta Today*, 27 October 2019, https://www.maltatoday.com.mt/news/national/98257/libyan_militia_fires_warning_shots_at_seaeye_during_rescue_of_90_lives

¹¹⁰ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 2.

¹¹¹ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 3.

¹¹² OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 39.

¹¹³ OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 25.

¹¹⁴ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 9.

¹¹⁵ OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 38–9.

¹¹⁶ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 9, citing IOM.

¹¹⁷ OHCHR, *Situation of human rights in Libya*, February 2018 (supra note 107), para. 44.

¹¹⁸ OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 40.

¹¹⁹ OHCHR, *Situation of human rights in Libya*, February 2018 (supra note 107), para. 45.

¹²⁰ OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 38–47.

¹²¹ OHCHR, *Situation of human rights in Libya*, February 2018 (supra note 107), para. 43.

to sanitary facilities and food and water supply. Severe human rights violations have been widely reported. Some of the detention centres are alleged of having links to human trafficking. There is no proper registration system for migrants. Serious cases of corruption and bribery in the centres have been detected. Another major issue is that of migrants and refugees rescued or intercepted at sea being transferred to detention centres and the lack of traceability, transparency and accountability. Limited registration is carried out by the LCG at disembarkation points but disappearances are regularly reported by humanitarian actors. The Libyan government has not taken steps to improve the situation in the centres. The government's reluctance to address the problems raises the question of its own involvement. [...] It has proven very difficult, if not impossible, for experts from the IOM and the UNHCR to enter certain areas of Libya. The reluctance of officials to cooperate is closely linked to the widely reported human rights violations that take place in the detention centres and to the fact that the facilities form a profitable business model for the current Libyan government.¹²²

Detention centres are often located in conflict zones and affected by fighting or directly targeted.¹²³ On 2 July 2019, the Tajoura detention facility in Tripoli was bombed. At the time, 644 migrants and refugees were held there, including women and children; at least 53 died and 130 were injured.¹²⁴ On 10 July, the 482 survivors were moved to the newly opened UNHCR Gathering and Departure Facility in Tripoli, which is by now overcrowded, hosting 1,005 migrants.¹²⁵

Evacuation in the form of resettlement to Niger is slowing down, as the agreed capacity of 1,500 persons is nearly reached and the government has communicated its wish to lower the number to 1,000.¹²⁶ Rwanda has signalled its willingness to resettle 500 migrants, but details are not yet known.¹²⁷

2.3.5 Situation of Particularly Vulnerable Groups

Migrants certainly are among the most vulnerable groups in Libya. Their situation is such that the International Criminal Court is considering extending the investigations in Libya into crimes against migrants, including human trafficking.¹²⁸ In addition, dark-skinned, **Sub-Saharan** refugees and migrants, including migrant workers, have been facing widespread racism and violent attacks, especially since there were reports of "African mercenaries" in the 2011 armed conflict.¹²⁹ In 2017, reports of slave markets surfaced.¹³⁰

Women and girls are particularly vulnerable across groups. They do not have formally equal rights with men; domestic violence is not criminalised, sentences can be reduced if a man kills or injures his wife or female relative because he suspects extramarital sexual relations, which are a criminal offense, and rapists can escape prosecution by marrying their victim.¹³¹

LGBTI individuals are also particularly vulnerable. Same-sex sexual relations are criminalised and punished with flogging and up to five years in prison. Armed groups have also been reported to detain people because of their sexual orientation.¹³²

2.3.6 Conclusion

The situation of migrants disembarked in Libya is such that **Libya can under no circumstances be considered a place of safety**. In December 2018, OHCHR and UNSMIL concluded:

At this time Libya cannot be considered a place of safety for the purpose of disembarkation following rescue or interception at sea, given the considerable risk of those returned being subjected to serious human rights violations and abuses, including prolonged arbitrary detention in inhuman conditions, torture and other ill-treatment, unlawful killings, rape and other forms of sexual violence, forced labour, extortion and exploitation.¹³³

UNHCR concurred in its most recent Position on Returns Libya:

In light of the volatile security situation in general and the particular protection risks for third-country nationals (including detention in substandard conditions, and reports of serious abuses against asylum-seekers, refugees and migrants), UNHCR does not consider that Libya meets the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea.¹³⁴

In light of the EU Council Presidency's assessment from September 2019, **there is nothing to indicate that the situation has changed or is likely to change soon**.

2.4 Morocco

Following pressure by the Arab Spring protests, the Moroccan constitution has been amended so as to expand the powers of parliament and the prime minister. However, this reform still leaves the king with broad authority over all branches of government. Broadcast media in Morocco is still largely dominated by the state. Continuing strong socio-economic inequality has spurred protests in the northern Rif region in 2016 and 2017. In June 2019, the leaders of the protest movement were sentenced to up to 20 years in prison after an unfair trial, triggering a new wave of public demonstrations.¹³⁵

2.4.1. General Human Rights Situation

The general human rights situation in Morocco is still critical. Regime-critical protests are repeatedly answered by **arbitrary arrests and excessive use of force** despite the majority of demonstrations being tolerated.¹³⁶ In March 2019, socioeconomic protests in the mining town Jerada were met with a brutal crackdown during which the police broke into houses without showing warrants, beat several men upon arrest, and broke doors and windows.¹³⁷ Moreover, freedom of speech is significantly curtailed in Morocco. The Moroccan penal code punishes several non-violent speech offenses, such as "causing harm to Islam" and "territorial integrity" with severe prison sentences, despite the Press and Publications Code of 2016 eliminating prison sentences for speech-related offenses.¹³⁸ Even today, however, journalists and social media activists are still frequently prosecuted for their activities.¹³⁹

¹²² EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 9, 12.

¹²³ See OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 41, for an account from 2018.

¹²⁴ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 6.

¹²⁵ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 9.

¹²⁶ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 11.

¹²⁷ EU Council Presidency, *Note: Libya and the surrounding area* (supra note 89), p. 12.

¹²⁸ Statement of ICC Prosecutor to the UNSC on the Situation in Libya, 8 May 2017, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>

¹²⁹ OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 11–12; CMW, *Concluding Observations on Libya* (supra note 101), para. 28.

¹³⁰ "Libya must end 'outrageous' auctions of enslaved people, UN experts insist," 30 November 2017, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22475&LangID=E>

¹³¹ HRW, *World Report 2019*, p. 362.

¹³² HRW, *World Report 2019*, p. 362.

¹³³ OHCHR and UNSMIL, *Desperate and Dangerous* (supra note 96), p. 17.

¹³⁴ UNHCR, *UNHCR Position on Returns to Libya (Update II)*, September 2018, para. 42, available at: <https://www.refworld.org/docid/5b8d02314.html>. UNHCR adds that this position is not changed by the establishment of the GDF as an alternative to detention, "noting also that all individuals transferring through this facility would have to be evacuated from Libya for protection-related reasons, although this may not be an option for all." Ibid.

¹³⁵ HRW, *World Report 2019*, p. 400.

¹³⁶ HRW, *World Report 2019*, p. 400.

¹³⁷ HRW, *World Report 2019*, p. 401.

¹³⁸ HRW, *World Report 2019*, p. 40.

¹³⁹ HRW, *World Report 2019*, p. 402.

Morocco still has not established a national preventive mechanism against torture. Detainees have repeatedly reported **incidents of ill-treatment and torture** in police custody.¹⁴⁰ Also, witnesses are rejected, and attorneys have insufficient access to their clients.¹⁴¹

2.4.2. Situation of Migrants and Refugees

Morocco's first **law on the right to asylum is still pending** governmental approval, despite Morocco being a State Party to the Refugee Convention of 1951.¹⁴² In the absence of a proper asylum system, Morocco has allowed UNCHR-registered refugees access to basic public services, such as health care and education, since 2017.¹⁴³ Since 2013, the authorities have been distributing refugee cards and residency permits to many persons recognised as refugees by the UNHCR.¹⁴⁴

However, in July 2018, the authorities launched **massive arrests of refugees and asylum seekers**, especially in the north of Morocco. They were transported to remote areas in the south or near the Algerian border, raising concerns over refoulement. Both registered and unregistered refugees were affected.¹⁴⁵ Both detention of migrants under precarious circumstances in police stations as well as raids against Sub-Saharan migrants are reported.¹⁴⁶ Moreover, unrecognised refugees **hardly have access to the judicial**

system.¹⁴⁷ Migrants risk imprisonment for unlawful entry, stay and exit from Moroccan territory.¹⁴⁸

2.4.3. Actions of the Moroccan Coast Guard

Moroccan authorities have been reported to prevent potential refugees from leaving the country, **violating the right to leave** under Art. 12 (2) ICCPR. During an incident in September 2019, the Moroccan coastguard **fired at a vessel** in the Mediterranean carrying students trying to migrate to Europe, under the pretext of the boat acting "suspiciously" in Moroccan waters.¹⁴⁹ One student was killed, three more persons injured.

2.4.4. Situation of Particularly Vulnerable Groups

Although the constitution of 2011 guarantees equality, **women** still experience discrimination by law.¹⁵⁰ Due to the criminalisation of sexual relations outside of marriage, rape victims risk prosecution if they cannot sustain the rape charges during the proceedings.¹⁵¹ An Act to combat violence against women came into effect in September 2019, adding new offences and increasing penalties.¹⁵² However, rape is not defined in line with international standards, and obstacles to accessing justice were not addressed.¹⁵³

Same-sex sexual relations are punished with up to three years of jail. LGBTI people and supporting organisations face police harassment.¹⁵⁴

2.4.5. Conclusion

While Morocco has accepted a considerable number of UNHCR-registered refugees over the last years, a law on the right to asylum is still pending. Moreover, refugees in Morocco face unlawful arrest under precarious circumstances and do not have full access to judicial review. Moroccan authorities violate the right to leave, thereby preventing migrants from departing. Moreover, LGBTI risk to be imprisoned due to their sexual identity or orientation. Against this background, **it is at least doubtful whether Morocco can be considered a place of safety at all.** It is certainly **no place of safety** for individuals belonging to particularly **vulnerable groups**.

2.5 Tunisia

The protests during Arab Spring movement unseated President Ben Ali in 2011 and initiated an incremental transition towards more democracy. Recent presidential elections in 2019 were won by Kais Saied, a 61-year old law professor with decidedly conservative views on homosexuality, women's rights, and capital punishment, but with a strong anti-corruption agenda. Tunisia has repeatedly been shaken by terrorist attacks by Islamist militants. In 2018, protests against social inequality spread again after a journalist set himself on fire. The protests led to hundreds of arrests and massive police intervention.

2.5.1. General Human Rights Situation

Despite Tunisia's transition to democracy, civil rights are still not sufficiently guaranteed. The human rights to freedom of expression and movement are only partly respected by the Tunisian authorities. People are **prosecuted and arrested for the expression of their views** based on vague legal phrasing and "morality" laws (punishment of expressions offensive to "public morals" and "public decency").¹⁵⁵ Authorities continue to arbitrarily impose emergency measures based on appearance and religious practices that result in travel bans and prohibition of gatherings.¹⁵⁶ These actions are legitimised on the basis of the state of emergency which has been renewed five times since 2015.¹⁵⁷ **Human rights lawyers still frequently report ill-treatment and torture** during arrest and pre-charge detention. Moreover, both the police and the Ministry of Interior still refuse to cooperate with the National Body for the Prevention of Torture.¹⁵⁸

2.5.2. Situation of Migrants and Refugees

The Constitution of 2014 contains a provision on the right to asylum and the principle of non-refoulement. However, despite this provision and despite being a State Party to the Refugee Convention of 1951, Tunisia still **lacks a proper asylum system**, as the asylum law is still pending. This results in significant deficits in refugee status determination and leaves many refugees without protection; those refugees recognised by UNHCR have no access to residency documents.¹⁵⁹ While recognised refugees in Tunisia usually have access to basic medical care and education,¹⁶⁰ given the lack of a proper asylum procedure, **chain refoulement cannot be ruled**

¹⁴⁰ Amnesty International, *Human Rights Report 2017/18*, p. 266–7.

¹⁴¹ Amnesty International, *Human Rights Report 2017/18*, p. 266–7.

¹⁴² HRW, *World Report 2019*, p. 405.

¹⁴³ HRW, *World Report 2019*, p. 405.

¹⁴⁴ HRW, *World Report 2019*, p. 405; UNHCR, *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 27th Session – Morocco*, September 2016, p. 2, available at: <https://www.refworld.org/docid/590c852b4.html>

¹⁴⁵ Amnesty International, *Morocco: Relentless crackdown on thousands of sub-Saharan migrants and refugees is unlawful*, available at: <https://www.amnesty.org/en/latest/news/2018/09/morocco-relentless-crackdown-on-thousands-of-sub-saharan-migrants-and-refugees-is-unlawful/>

¹⁴⁶ Amnesty International, *Human Rights Report 2017/18*, p. 267; Amnesty International, *Report Morocco 2018*, available at: <https://www.amnesty.org/en/countries/middle-east-and-north-africa/morocco-and-western-sahara/morocco-and-western-sahara/>; HRW, *World Report 2019*, p. 405.

¹⁴⁷ US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2018: Morocco 2018 Human Rights Report*, p. 23, available at: <https://www.state.gov/wp-content/uploads/2019/03/MOROCCO-2018.pdf>

¹⁴⁸ Amnesty International, *Human Rights Report 2017/18*, p. 267.

¹⁴⁹ HRW, *World Report 2019*, p. 401

¹⁵⁰ HRW, *World Report 2019*, p. 405

¹⁵¹ HRW, *World Report 2019*, p. 405.

¹⁵² HRW, *World Report 2019*, p. 406.

¹⁵³ Amnesty International, *Report Morocco 2018* (supra note 146).

¹⁵⁴ Amnesty International, *Report Morocco 2018* (supra note 146); HRW, *World Report 2019*, p. 406.

¹⁵⁵ Amnesty International, *Human Rights Report 2017/18*, p. 366; HRW, *World Report 2019*, p. 582.

¹⁵⁶ Amnesty International, *Human Rights Report 2017/18*, p. 365; HRW, *World Report 2019*, p. 586.

¹⁵⁷ HRW, *World Report 2019*, p. 586.

¹⁵⁸ Amnesty International, *Human Rights Report 2017/18*, p. 365.

¹⁵⁹ UNHCR, *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 27th Session – Tunisia*, September 2016, para. 77, available at: <https://www.refworld.org/docid/5a12b5503.html>

¹⁶⁰ UNHCR, Tunisia Fact Sheet September 2019, p. 3, available at <https://data2.unhcr.org/en/documents/details/71809>; US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2018: Tunisia 2018 Human Rights Report*, p. 17, available at: <https://www.state.gov/wp-content/uploads/2019/03/TUNISIA-2018.pdf>

out. According to NGO reports, as recently as August 2019, Tunisian authorities deported a group of 36 migrants, including minors, to the border with Libya and abandoned them in the desert without any supplies.¹⁶¹

Moreover, there is no legal framework for the detention of those who are found to have entered Tunisia illegally.¹⁶² As a result, **irregular migrants** possibly in need of international protection are **arbitrarily arrested**.¹⁶³ Legal actions against the arrests are often not possible due to the missing legal basis for the detention.¹⁶⁴ Following the reviews of the UNHCR, refugees are imprisoned for up to one year without knowing the charges against them or having access to a lawyer.¹⁶⁵

Torture and ill-treatment in detention and during arrest are reported repeatedly and are not limited to a particular group of detainees.¹⁶⁶ Legal actions against human rights violations are rarely possible and successful.¹⁶⁷

2.5.3. Situation of Particularly Vulnerable Groups

Consensual **same-sex sexual relations** are still criminalised in Tunisia. The authorities prosecute LGBTI people under article 230 of the penal code with **up to three years imprisonment**. Men presumed to be gay are subjected to forced anal examinations, sometimes in order to “prove” their homosexuality, practices which are inter-

nationally condemned as torture.¹⁶⁸ Transgender individuals are not recognised and face police harassment under the “public decency” law.¹⁶⁹ Refugees who belong to these particularly vulnerable groups therefore cannot expect their rights to be respected in Tunisia.

Women and girls also continue to face particular discrimination in Tunisia. In February 2018, a law to eliminate **gender-based violence against women and girls** came into effect. Since 2017, women have been allowed to marry non-Muslim men, though it continues to be difficult to get these marriages registered in practice.¹⁷⁰ In February 2018, a law eliminating violence against women entered into force.¹⁷¹ It repealed a provision in the penal code that had enabled rapists to escape prosecution by marrying the victim if the latter was under the age of 20.¹⁷² In 2018, the President asked the Parliament to introduce a bill to eliminate discrimination against women in the Personal Status Code.¹⁷³ A draft law has been submitted to parliament.¹⁷⁴

2.5.4. Conclusion

Despite significant progress having been made by the inclusion of the right to asylum and the principle of non-refoulement in the Tunisian constitution, asylum seekers in Tunisia still cannot be said to be effectively protected. Due to the lack of a proper asylum procedure, chain refoulement is not effectively ruled out. In addition, potential refugees are still exposed to arbitrary

detention and have practically no access to effective legal remedies. Vulnerable groups, in particular LGBTI, are exposed to severe discrimination and ill-treatment. In sum, **it is at least doubtful whether Tunisia can be considered a place of safety at all**. It is certainly **no place of safety** for individuals belonging to particularly vulnerable groups.

2.6. Consequences for Finding Places of Safety in North Africa

As the analysis in this chapter has shown, **Libya can under no circumstance be considered a place of safety**. Not only is the general situation there extremely volatile, migrants especially suffer severe human rights violations in Libya. Moreover, those rescued and intercepted at sea are detained under dreadful conditions on a day-to-day basis. Libya neither respects the principle of non-refoulement, nor does it even come close to meeting the basic needs of rescued individuals.

The situation **in the other four states** can certainly not be compared to that in Libya, but **detention and torture are big concerns** here, too. Algeria and Egypt are known to deport migrants in **violation of the non-refoulement principle**, while this cannot be ruled out in Morocco and Tunisia. In addition, **vulnerable groups** face serious human rights violations and even persecution in Algeria, Egypt, Morocco and Tunisia. At least for these groups, those countries cannot be considered places of safety.

Even if the assessment may vary for different groups, screening for protection needs aboard a private vessel is hardly feasible. Aboard rescuing vessels, it is therefore usually the **shipmaster who must assess**, ad hoc, whether a designated place of safety can indeed be considered safe for all rescuees on board. If this is doubtful for at least some of them, given their belonging to a vulnerable group, shipmasters must not bring rescuees to the designated place. The question of whether shipmasters are allowed under international or domestic law to refuse such instructions

by MRCCs will be discussed in Part 4 and 5. For now, suffice it to conclude that **none of the five North African countries under review can generally be considered a safe place** under the law of the sea.

3. Disembarkation in North African States by EU Member State Authorities

Would the disembarkation of migrants and asylum seekers in Northern African countries by European state vessels, including vessels participating in a Frontex operation, be in line with international obligations and European law?

3.1 Obligations of Individual EU Member States

Where a rescue operation is performed by officials of an EU Member State, e.g. by its border patrols or by its SAR forces, it is the Member State's responsibility under the law of the sea to make sure the rescued persons are delivered to a place of safety, as laid out above – whether on its own territory or elsewhere. Given that the five North African countries discussed above cannot be considered places of safety (Section 2), disembarking them there would constitute a violation of the law of the sea. In addition, EU Member States have to respect their obligations under international refugee law and international human rights law.

The principle of **non-refoulement** as enshrined in the 1951 Refugee Convention obliges EU Member States not to “expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (Art. 33). In addition, the European Court of Human Rights (“ECtHR”) has derived from the ECHR¹⁷⁵ a non-refoulement principle that prohibits sending a person to a country where they would be exposed to torture,

¹⁶¹ “Tunisie: un groupe de migrants ivoiriens abandonnés dans le désert non loin de la Libye,” *InfoMigrants*, 5 August 2019, available at: <https://www.infomigrants.net/fr/post/18628/tunisie-un-groupe-de-migrants-ivoiriens-abandonnes-dans-le-desert-non-loin-de-la-libye>

¹⁶² UNHCR, *Submission for the Universal Periodic Review – Tunisia* (supra note 159), Issue 2, p. 4.

¹⁶³ UNHCR, *Submission for the Universal Periodic Review – Tunisia* (supra note 159), Issue 2, p. 4.

¹⁶⁴ UNHCR, *Submission for the Universal Periodic Review – Tunisia* (supra note 159), Issue 2, p. 4.

¹⁶⁵ UNHCR, *Submission for the Universal Periodic Review – Tunisia* (supra note 159), Issue 2, p. 4 and para. 68.

¹⁶⁶ Amnesty International, *Human Rights Report 2017/18*, p. 365.

¹⁶⁷ Amnesty International, *Human Rights in the Middle East and North Africa, Review 2018: Tunisia*, p. 2; US Department of State, *Tunisia 2018 Human Rights Report* (supra note 160), p. 1.

¹⁶⁸ Amnesty International, *Human Rights Report 2017/18*, p. 365; HRW, *End Persecution of LGBTI People*, May 2019, available at: <https://www.hrw.org/news/2019/05/17/tunisia-end-persecution-lgbt-people>; HRW, *World Report 2019*, p. 366–7.

¹⁶⁹ Amnesty International, *Human Rights in the Middle East and North Africa, Review 2018: Tunisia*, p. 3.

¹⁷⁰ Amnesty International, *Human Rights in the Middle East and North Africa, Review 2018: Tunisia*, p. 3.

¹⁷¹ Amnesty International, *Human Rights in the Middle East and North Africa, Review 2018: Tunisia*, p. 3.

¹⁷² Amnesty International, *Human Rights Report 2017/18*, p. 366.

¹⁷³ HRW, *World Report 2018*, p. 558.

¹⁷⁴ HRW, *World Report 2019*, p. 586.

¹⁷⁵ 1950 European Convention on Human Rights, ETS No. 5 (“ECHR”).

inhuman or degrading treatment, the death penalty, or other severe fundamental human rights violations.¹⁷⁶ This includes chain-refoulement, where the risk of such severe violations is not present in the destination state itself but in another state, to which the individual will then be further deported.¹⁷⁷

Finally, Art. 4 Protocol 4 ECHR **bans collective expulsions**. This provision prohibits an immediate return of persons intercepted at sea without any form of identity check¹⁷⁸ and requires State Parties to at least provide them the “genuine and effective possibility of submitting arguments against his or her expulsion,”¹⁷⁹ even if their return does not immediately expose them to a violation of Art. 3 ECHR.¹⁸⁰ The prohibitions of refoulement and collective expulsion therefore imply procedural obligations; in order to prevent violations, states have to assess the risk in an individualised procedure.¹⁸¹

Both regimes (ECHR and Refugee Convention) significantly restrict the ability of EU Member States to disembark migrants in North African states. At the very least, they oblige them to **examine the situation of each rescued individual and the potential threats faced in the country of destination**. While this obligation is undisputed once a person has reached the territory of a Member State, the situation becomes much more complicated if Member States act outside of their

territory, as is the case during maritime operations in the Mediterranean Sea outside territorial waters. However, non-refoulement obligations exist wherever a state exercises jurisdiction, including on the high seas.

The **application of the ECHR** is limited by Art. 1 to persons “**within the jurisdiction**” of the State Parties to the Convention. In a case not related to non-refoulement, the ECtHR already decided in 2009 that the combination of prohibiting an NGO vessel to enter the territorial waters by threatening prosecution and the presence of war ships blocking its entry constituted an exercise of jurisdiction over the vessel.¹⁸² If this holds true for an NGO wishing to make use of their right to freedom of expression, there is even more reason to apply the same argument once protection against torture and inhuman and degrading treatment (Art. 3 ECHR) as an absolute right or the right to life (Art. 2 ECHR) are at stake.¹⁸³ Later, the ECtHR interpreted the jurisdiction clause in a way that also covers situations outside the territorial waters of the Contracting States. In the *Hirsi Jamaa* case, the court established that “pushback” operations by an Italian military vessel constituted exercise of jurisdiction, since Italy had full and effective control over the refugees aboard, and therefore non-refoulement obligations applied.¹⁸⁴

The criterion of **effective and exclusive control** by the authorities of the Convention State as a

prerequisite for establishing de facto jurisdiction and extraterritorial application of the ECHR is by now established in the jurisprudence of the ECtHR.¹⁸⁵ Such jurisdiction can result from territorial control, personal control (i.e. control over individuals), or a combination of both, a situation described as “background exercise of governmental authority.”¹⁸⁶ Effective control is therefore established either if the persons are on a military or police boat of a state party to the Convention¹⁸⁷ or if the state party otherwise effectively controls the situation of the involved individuals by exercising physical power¹⁸⁸ or governmental authority combined with physical and territorial control.¹⁸⁹ Against this backdrop, non-refoulement obligations under the ECHR apply when authorities of EU Member States, all being State Parties to the Convention, actively disembark a person in a North African State without previously examining whether the person would be exposed to torture or inhuman or degrading treatment there, whether his/her life is at risk there, and/or whether the person would be facing the risk of chain refoulement or the death penalty.

By contrast, the **Refugee Convention** does not contain a jurisdiction clause. Interpreting it narrowly so as to only apply once a person has entered the State Party's territory¹⁹⁰ would lead

to the result that State Parties can avoid their Convention obligations simply by establishing a comprehensive border control that prevents refugees from entering the territory. It is therefore hard to align such an interpretation with the principle of interpretation in good faith which is recognised as customary international law.¹⁹¹ Also, the wording that State Parties must not return a refugee to a risk of persecution “in any manner whatsoever” signals a broad interpretation of the scope of the Refugee Convention. This suggests that the principle of non-refoulement enshrined in Article 33(1) of the Refugee Convention also applies in situations where State Parties exercise de facto jurisdiction.¹⁹² Accordingly, the UNHCR has expressed that the principle of non-refoulement should apply “wherever [a state] exercises effective jurisdiction.”¹⁹³ In this view, the border guards or military vessels of EU Member States taking refugees in the Mediterranean on board are therefore also bound by Article 33(1) of the Refugee Convention and have to examine in each individual case whether a disembarkation in North African States would violate that principle.

The principle of non-refoulement, the right to asylum, and the prohibition of torture, inhuman and degrading treatment are also enshrined in Art. 4, 18, and 19 of the **EU Charter of Fundamental**

- ¹⁷⁶ Regarding Art. 3 ECHR: ECtHR, *Soering v. The United Kingdom*, Application No. 14038/88, 7 July 1989; and more recently ECtHR (GC), *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011; ECtHR (GC), *Tarakhel v. Switzerland*, Application No. 29217/12, 4 November 2014; Regarding Art. 2 ECHR: ECtHR, *Al-Saadoon and Mufdhi v. The United Kingdom*, Application No. 61498/08, 2 March 2010. Regarding Art. 6 ECHR: ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, Application No. 8139/09, 9 May 2012.
- ¹⁷⁷ ECtHR, *T.I. v. The United Kingdom*, Application No. 43844/98, 7 March 2000 (decision).
- ¹⁷⁸ ECtHR (GC), *Hirsi Jamaa et al. v. Italy*, Application No. 27765/09, 23 February 2012, para. 185.
- ¹⁷⁹ ECtHR (GC), *Khlaifia et al. v. Italy*, Application No. 16483/12, 15 December 2016, para. 248.
- ¹⁸⁰ ECtHR, *N.D. and N.T. v. Spain*, Application No. 8675/15 and 8697/15, 3 October 2017, para. 105 et seqq. and 120 (case referred to the GC).
- ¹⁸¹ ECtHR (GC), *M.S.S. v. Belgium and Greece*, Application No. 30696/09, para. 359; *Tarakhel v. Switzerland*, Application No. 29217/12, para. 104; regarding the 1951 Refugee Convention; Conclusion No. 30 (XXXIV) 1983 of the Executive Committee of the UNHCR, para. (e) (i); Sir E. Lauterpacht and D. Bethlehem, “The scope and content of the principle of non-refoulement: opinion,” in: E. Feller, et al. (eds.), *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection*, 2003, pp. 87–177, para. 100–3.
- ¹⁸² ECtHR, *Women on Waves and ors. v. Portugal*, Application No. 31276/05, 3 February 2009, para. The case concerned NGOs that provided information on abortion and reproductive rights on a ship and wanted to hold information meetings with interested women in Portugal, which the Portuguese government sought to prevent.
- ¹⁸³ K. Gombeer, “Human Rights Adrift? Enabling the Disembarkation of Migrants to a Place of Safety in the Mediterranean,” 10 *The Irish Yearbook of International Law* (2015), 23, at 24.
- ¹⁸⁴ ECtHR (GC), *Hirsi Jamaa et al. v. Italy*, Application No. 27765/09, 23 February 2012, para. 73, 76 et seqq.

- ¹⁸⁵ Before *Hirsi Jamaa*: ECtHR, *Loizidou v. Turkey*, Application No. 15318/89, 18 December 1996, para. 52 (in the context of military action); ECtHR (GC), *Banković and ors. v. Belgium*, Application No. 52207/99, para. 74 et seqq. (with a specification of the type of control exercised and a narrow interpretation); ECtHR, *Al-Saadoon and Mufdhi v. The United Kingdom*, Application No. 61498/08, 2 March 2010, paras. 86–9, 140; ECtHR (GC), *Medvedyev and ors. v. France*, Application No. 3394/03, 29 March 2010, para. 67; ECtHR (GC), *Al-Skeini and ors. v. The United Kingdom*, Application No. 55721/07, 7 July 2011, para. 132 and 136 et seq.; After *Hirsi Jamaa*: ECtHR, *N.D. and N.T. v. Spain*, Application No. 8675/15 and 8697/15, 3 October 2017, para. 54 (referred to the Grand Chamber).
- ¹⁸⁶ C. Costello, *Human Rights of Migrants and Refugees in European Law*, 2016, p. 214, building on and expanding a typology introduced by M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, 2011, p. 122.
- ¹⁸⁷ As was the case in *Hirsi Jamaa* (supra note 184) and *N.D. and N.T.* (supra note 185).
- ¹⁸⁸ As was the case in *Medvedyev* (supra note 185).
- ¹⁸⁹ As was the case in *Al-Skeini* (supra note 185).
- ¹⁹⁰ This has been the historical understanding of the Refugee Convention and the word “return,” UNHCR, *Commentary on the Refugee Convention 1951, Articles 2–11, 13–37*, 1997, available at <https://www.refworld.org/docid/4785ee9d2.html>, Art. 33. It is also the understanding of the US Supreme Court: *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993).
- ¹⁹¹ Similarly, J.C. Hathaway, *The Rights of Refugees under International Law*, 2005, p. 163 et seq. On the concept of good faith in international law M. Kotzur, “Good faith (bona fide),” in: *Max Planck Encyclopedia of Public International Law*, para. 22.
- ¹⁹² J.C. Hathaway, *The Rights of Refugees under International Law*, 2005, p. 160 et seqq.
- ¹⁹³ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, p. 19, available at: <https://www.unhcr.org/4d9486929.pdf>

Rights (“EU Charter”). The EU Charter applies whenever Member States implement EU law (Art. 51 EU Charter).¹⁹⁴ While compliance with the duty to render assistance under the international law of the sea does not constitute an implementation of EU law, things look different where a SAR operation is part of border surveillance activities. Border surveillance is governed by the Schengen Borders Code (SBC)¹⁹⁵ and consequently constitutes an implementation of EU law.¹⁹⁶ This was also confirmed by the European Commission.¹⁹⁷ The SBC not only applies to activities of border control at the physical borders of the Member States, but also extraterritorially.¹⁹⁸ This follows from the territorial flexibility of the instruments of border control mentioned in the SBC,¹⁹⁹ as well as from the reference to extraterritorial border control in SBC Annex VI 1.1.4.3. As soon as Member States engage in border surveillance activities covered by the SBC, they consequently take their responsibility for EU fundamental rights standards with them.²⁰⁰ The characterisation as “portable responsibility” underlines that it is the function of border surveillance and not a territorial link or a particular type of control that triggers the applicability of the EU Charter of fundamental rights.²⁰¹

The application of asylum-related fundamental rights in the context of border surveillance is also

confirmed by Art. 3 (b) of the SBC, stipulating that the SBC applies “without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.” Moreover, Art. 14 (1) of the SBC clarifies that the general rules for entry “shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection.”

In the light of these considerations, Member States disembarking persons rescued during a border surveillance operation are bound by the EU Charter. EU Charter Art. 4 mirrors Art. 3 ECHR. In addition, Art. 18 EU Charter guarantees the **right to asylum** and emphasises the respect of non-refoulement under the Refugee Convention. Arguably, this creates a subjective right to access an asylum procedure in an EU Member State, at least in situations where disembarkation to a third country would amount to refoulement.²⁰² Where border surveillance activities take place inside the territorial waters of a Member State, they are even obliged to proactively provide information on the availability of asylum procedures to potential asylum seekers according to Art. 8 in conjunction with Art. 3 of the EU Asylum Procedures Directive,²⁰³ once there are “indications that [they] may wish to make an application for international protection.”

3.2 Obligations During FRONTEX Operations

Where rescue operations are performed during border surveillance operations coordinated by the European Border and Coast Guard Agency (“EBCG” or “Frontex”), **Member States and their staff continue to be bound by their obligations under international law and under EU law**, including the obligation to render assistance to persons in distress at sea. This also applies to Frontex staff;²⁰⁴ in addition, Frontex now has legal personality and is liable for any activities it undertakes in exercising its mandate.²⁰⁵

The 2019 Frontex Regulation²⁰⁶ now explicitly includes **SAR operations as part of European integrated border management** when they occur during border surveillance operations at sea (Art. 3(b) Frontex Reg.), as governed by the External Sea Borders Regulation 656/2014 (ESBR).²⁰⁷ When assisting Member States at the external borders by coordinating and organising joint operations, Frontex has to “tak[e] into account that some situations may involve humanitarian emergencies and rescue at sea in accordance with Union and international law” (Art. 10(1)(g) Frontex Reg.). Moreover, the agency is tasked with “provid[ing] technical and operational assistance to Member States and third countries in accordance with Regulation (EU) No. 656/2014 and international law, in support of search and rescue operations for persons in distress at sea which may arise during border surveillance operations at sea” (Art. 10(1)(i), 36(2)(e) Frontex Reg.). The operational plan for joint operations must provide for “procedures whereby persons in need of international protection, victims of trafficking in human beings, unaccompanied minors

and persons in a vulnerable situation are directed to the competent national authorities for appropriate assistance” (Art. 38(3)(m) Frontex Reg.). The operational plan shall also contain the key obligations provided for in the SAR Convention, including the definitions (e.g. uncertainty phase, distress phase) and the procedure to follow in case of SAR situations (Art. 9 ESBR).

Both instruments state clearly that **non-refoulement also applies during Frontex operations**. Thus, Frontex “shall guarantee the protection of fundamental rights in the performance of its tasks [...] in accordance with relevant Union law, in particular the Charter, relevant international law – including the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol thereto and obligations related to access to international protection, in particular the principle of non-refoulement” (Art. 80(1) Frontex Reg.). It shall also “ensure that no person is disembarked in, forced to enter, conducted to, or otherwise handed over or returned to, the authorities of a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle” (Art. 80(2) Frontex Reg.) and take into account the special needs, inter alia, of persons in distress at sea (Art. 80(3) Frontex Reg.). These obligations are also clearly stated in the External Sea Borders Regulation (Art. 4(1) ESBR), which prohibits disembarking intercepted or rescued persons in a third country where the host Member State or the participating Member State “are aware or ought to be aware” that there is a risk of the death penalty, torture or inhuman or degrading treatment or punishment, or persecution in the third country, based on a thorough assessment of the general situation in that country

¹⁹⁴ The European Court of Justice (“ECJ”) has clarified that this condition is fulfilled at least in all situations where EU law is applicable and where there is “a certain degree of connection” between Member State action and an EU regulation (ECJ, *Cruciano Siragusa*, C-206/13, ECLI:EU:C:2014:126, para. 21, 24; more recently: *Paoletti and ors.*, C-218/15, ECLI:EU:C:2016:748, para. 13 et seq.; for a slightly wider interpretation of Art. 51 CFR, see ECJ, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, para. 21).

¹⁹⁵ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77/1, 23 March 2016.

¹⁹⁶ K. Gombeer, “Human Rights Adrift?” (supra note 183), at 40–1.

¹⁹⁷ Letter of the then Vice-President of the Commission Mr. Jaques Barrot of 15 July 2009, quoted in para. 34 of the Hirsi judgment (supra note 184).

¹⁹⁸ K. Gombeer, “Human Rights Adrift?” (supra note 183), at 40–1.

¹⁹⁹ M. den Heijer, *Europe and Extraterritorial Asylum*, 2012, p. 199; V. Moreno-Lax, “(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law,” in: M. Maes, M.-C. Foblets, and P. de Bruycker (eds.), *The External Dimensions of EU Asylum and Immigration Policy*, 2011, p. 415, at 474–5.

²⁰⁰ V. Moreno-Lax, “(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law” (supra note 199), p. 476.

²⁰¹ S. Carrera and R. Cortinovis, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean Sea. Sailing Away from Responsibility?*, CEPS Paper No. 2019, 10 June 2019, p. 10, available at: https://www.ceps.eu/wp-content/uploads/2019/06/LSE2019-10_ReSoma_Sailing-Away-from-Responsibility.pdf

²⁰² K. Gombeer, “Human Rights Adrift?” (supra note 183), at 40–7.

²⁰³ Directive 2013/32/EU of the European Parliament and the Council on common procedures for granting and withdrawing international protection, OJ L 180/60, 29 June 2013.

²⁰⁴ The staff deployed as members of Frontex teams to joint operations or rapid border interventions used to be taken from the national staff pools made available by the Member States and instructed by the Member State hosting the Frontex operation (Art. 20(1), (2) and 21(1) 2016 Frontex Reg.); now, Frontex is building up a standing corps, composed of Frontex’s statutory staff, staff seconded from the Member States, and Member State staff made available for short-term deployment or for rapid reaction (Art. 54(1) Frontex Reg.). Art. 80 Frontex Reg. requires full compliance with international law.

²⁰⁵ Art. 93(1) and 97(1) of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624 (“Frontex Reg.”).

²⁰⁶ Supra note 205.

²⁰⁷ Regulation (EU) No. 656/2014 (“External Sea Borders Regulation,” “ESBR”), supra note 22.

(Art. 4(2) ESRB). In addition, the individual situation of the intercepted and rescued persons must be assessed, and they must be given an opportunity to claim that their disembarkation in a third country would amount to refoulement (Art. 4(3) ESRB).

This must be remembered when the operational plan provides that, in the case of interception on the high seas, “disembarkation may take place in the third country from which the vessel is assumed to have departed” (Art. 10(1)(b) ESRB) and that, in case of SAR situations, “the host Member State and the participating Member States shall **cooperate with the responsible Rescue Co-ordination Centre to identify a place of safety** and, when the responsible Rescue Co-ordination Centre designates such a place of safety, they shall ensure that disembarkation of the rescued persons is carried out rapidly and effectively” (Art. 10(1)(c) ESRB). Given that the five North African countries discussed above cannot be considered places of safety (Section 2), persons rescued during Frontex operations cannot automatically be returned to these countries. In any case, if disembarkation in the designated place or the country of departure is not possible, disembarkation is foreseen in the host Member State.

4. Disembarkation in North African States by Private Vessels

Can private vessels, including NGO rescue vessels, be obliged by MRCCs to disembark rescued migrants in places which are unsafe? Are they bound by the Geneva Convention? And can they refuse to follow the MRCC order without breaking the law?

4.1 The Role of MRCCs in Selecting Places of Safety

Maritime Rescue Co-ordination Centres (MRCCs) are in charge of coordinating SAR operations, in-

cluding by private vessels that are near the scene. The **MRCC's task** is to undertake preparatory measures and to receive, evaluate, and respond to distress calls.²⁰⁸ As part of this response, an MRCC can notify other MRCCs whose help may be required or which may be concerned with the operation and request assistance from vessels and aircrafts not specifically included in the SAR organisation, “considering that, in the majority of distress situations in ocean areas, other vessels in the vicinity are important elements for search and rescue operations,”²⁰⁹ which would include private vessels.

As set out above (Section 1.3), the government responsible for the Search and Rescue Region “shall exercise primary responsibility for ensuring [that] co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and **delivered to a place of safety**, taking into account the particular circumstances of the case and guidelines developed by the Organization.”²¹⁰ SAR (2004) Annex 4.8.5 specifies that “The rescue co-ordination centre or rescue sub-centre concerned shall initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea.”

As organs of the state responsible for the SAR region, it is an MRCC's task to ensure that survivors are delivered to a place of safety in line with the state's obligations under the law of the sea – that is, a place that fulfils the criteria set out above (Section 1.2). When directing private vessels that have performed a rescue operation, therefore, the responsible MRCC **must not instruct the shipmaster to disembark the rescued persons in an unsafe place**.

Problems arise **where an MRCC nonetheless instructs the shipmaster of a private vessel to disembark rescued migrants in places which are unsafe**.²¹¹ Public International Law is first and foremost an instrument binding on states,

not private individuals.²¹² However, in rescue operations by private vessels, it is typically the shipmaster who is actually making the decisions aboard the ship. The question therefore arises whether private shipmasters can refuse instructions by an MRCC to disembark a person in an unsafe place, based on the obligations from the law of the sea, the Refugee Convention, or human rights law (Section 4.2). To determine the legality of the measures taken, it is crucial to determine the relation between state obligations on the one hand and the actions of private shipmasters on the other (Section 4.3).

4.2 Obligations of Shipmasters Regarding Places of Safety

If the MRCC in charge instructs captains of private vessels to disembark rescued persons in an unsafe place, may private shipmasters disregard such an instruction based on their own SAR obligations?

As mentioned (see above, Section 1.1), Art. 98 UNCLOS and SAR Annex 2.1.10 speak of the **duty of the State Parties** to ensure that assistance is provided to persons in distress at sea, whereas SOLAS regulation V/33 refers directly to the **duties of the master of the ship**. Article 10 of the Salvage Convention²¹³ provides: “(1) Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea. (2) The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1. (3) The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.” SOLAS regulation V/33 further requires that a failure to assist and its reasons must be entered in the log-book. The obligation to render assistance applies until the master of a ship learns that other ships have been requisitioned by the master of the ship in distress or the Search and Rescue (“SAR”) service concerned and are complying with the requisition,

or until he or she is informed that assistance is no longer necessary.

In keeping with these normative statements, the 2004 MSC Guidelines require that shipmasters “seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized” (para. 5.6). In doing so, they must “comply with any relevant requirements of the Government responsible for the SAR region where the survivors were recovered, or of another responding coastal State,” and they must “seek additional guidance from those authorities where difficulties arise in complying with such requirements” (para. 5.7). In this, they remain obliged to guarantee the safety of the survivors; thus, SOLAS (2004) regulation V/34.1 emphasises the **shipmaster's “discretion”**:

The owner, the charterer, the company operating the ship [...], or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgment, is necessary for safety of life at sea [...].

Consequently, it arises clearly from the international law of the sea that while states are the primary duty bearers, **shipmasters also have obligations in the rescue system** – if not by virtue of international law directly, then by virtue of domestic legislation. This mechanism of holding private individuals responsible for the implementation of state duties at seas is clearly envisaged in Art. 98 UNCLOS, requiring the states to oblige private shipmasters to render assistance if necessary. The domestic legislation passed applies on board as part of the flag state's jurisdiction over ships flying their flag (Art. 94 UNCLOS).

With respect to the instructions of an MRCC, international law of the sea only obliges states directly. Art. 98(2) UNCLOS requires coastal states to “promote the establishment, operation and maintenance of an adequate and effective search

²⁰⁸ SAR Annex 4 and 5.

²⁰⁹ SAR Annex 5.3.3.4–5.

²¹⁰ SOLAS (2004) regulation V/33, para. 1.1, mirrored by SAR (2004) Annex 3.1.9.

²¹¹ Situations where the MRCC orders a private shipmaster to abstain from rescuing persons in distress altogether are discussed below, at 5.4.

²¹² This is also emphasised by S. Talmon, “Private Seenotrettung und das Völkerrecht,” *74 JuristenZeitung* (2019) 802, at 803.

²¹³ 1989 International Convention on Salvage, 1953 UNTS 165. Ratified by all Mediterranean EU member States except Cyprus and Malta; in Northern Africa, only Egypt and Tunisia are State Parties.

and rescue service.” More concretely, SOLAS and SAR require the State Parties to “co-ordinate and co-operate” to ensure that the persons rescued can be disembarked and delivered to a place of safety.²¹⁴ However, none of the international instruments explicitly formulates a duty of private actors to **follow the instructions of the MRCC** in charge of coordinating the rescue operation. Here again, it is up to the states as the primary duty bearers to ensure by way of domestic legislation that private captains are bound to follow the instructions of MRCCs and implement the law of the sea's duties aboard the ship.

What does this now imply for shipmasters of a private vessel? A shipmaster will typically be obligated by domestic law to both disembark rescuees in a place of safety and to follow the instructions of an MRCC, even if they contradict this duty. Consequently, shipmasters are confronted with (potentially) conflicting obligations. However, by stressing the independence of shipmasters from the instructions of ship owners, international law acknowledges a certain discretion of the shipmaster during rescue operation. Arguably, this also strengthens shipmasters' positions vis-à-vis instructions of MRCCs that would clearly result in exposing rescuees to an unsafe situation. Moreover, as rescuing under international law only ends with the disembarkation of the rescuees in a place of safety, when confronted with a possible breach of the corresponding duty under domestic law, which must be read in light of this, **private shipmasters may argue that they cannot be obliged to deliver a person to a place which is considered unsafe** for at least a part of the rescued persons on board due to severe human rights violations and disrespect for the principle of non-refoulement.

4.3. Who is Responsible? Attribution of Responsibility of Private Actions to States

As international law primarily addresses states, the core question is not whether shipmasters have duties under international law, but rather **whether states are responsible for private actions**.²¹⁵ International human rights and refugee law obligations, including non-refoulement and the prohibition of collective expulsion, address only states directly. While the law of the sea emphasises the responsibility of the shipmaster in rescue operations, the ultimate responsibility nonetheless rests with the states, as set out above (Section 4.2). Consequently, unless a state explicitly obliges private shipmasters through domestic legislation, they are not bound to comply with international law obliging the state.²¹⁶

If only states are directly bound by international law, what does that entail if a flag state obliges the master of a ship flying their flag to follow MRCC instructions that result in refoulement or more generally leave the rescuees in an unsafe place? **Can the flag state or the SRR state be held responsible for a breach of international law** by the actions of the private shipmaster in such a situation?

Effective control in the traditional sense will usually not be fulfilled. Flag state jurisdiction over a private vessel as such does not constitute effective and exclusive control over private vessels;²¹⁷ it simply means that the flag state's laws apply. Thus, Art. 94 UNCLOS clarifies that the flag state will hold private ship owners and ship masters accountable under domestic law while not exercising control over the situation on board. By contrast, an SRR state certainly exercises more control over the situation on board the rescuing

vessel. Whether this type of control can be qualified as effective control is still subject to debate. Therefore, the actions of a shipmaster will generally not be considered to directly engage the refugee law and human rights obligations of the flag state or the SRR state.

However, disembarkation in an unsafe place by a private vessel may be **attributed to either the SRR state or the flag state under the rules of state responsibility**. In the literature, the concept of “contactless responsibility” has been developed to attribute responsibility under international law to EU Member States, even if they do not undertake any action themselves, but nonetheless use the action of third parties to achieve goals that they could not reach legally themselves.²¹⁸

As set out above (Section 3), when a state vessel disembarks rescued migrants in an unsafe place, this constitutes a violation of the law of the sea and can constitute refoulement under the Refugee Convention and/or the ECHR, that is, **an internationally wrongful act**. The law of state responsibility for internationally wrongful acts (i.e. non-justified breaches of international law, including the law of the sea) has mostly developed as customary international law. These binding customary rules were laid down in the Articles on State Responsibility (“ASR”), a document that in itself is non-binding.²¹⁹

Under the Articles on State responsibility²²⁰ **a state is generally responsible** for the actions of its own state organs (Art. 4 ASR) or where elements of its governmental authority are exercised by other (private) persons or entities (Art. 5 ASR) or by organs of another state placed at its disposal

(Art. 6 ASR). In addition, a state is responsible for the conduct of a (private) person or group of persons acting on its instructions or under its direction or control (Art. 8 ASR) or where it acknowledges or adopts the conduct as its own (Art. 11 ASR).

According to Art. 8 ASR, states can be held accountable for private actions if the private person acted under the **instruction of the state**. Art. 8 ASR stipulates that “the conduct of a person [...] shall be considered an act of a State under international law if the person [...] is in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct.” Significantly, Art. 8 ASR does not require a private person to be integrated in the official structure of the state, nor does it matter “whether their conduct involves ‘governmental activity.’”²²¹ Art. 8 ASR seeks to cover constellations where states use private persons as their auxiliary, while not requiring them to be “specifically commissioned by the State.” Consequently, if an MRCC as a state authority **instructs the shipmaster of a private vessel to bring rescuees to an unsafe place, this disembarkation can be considered an act of the SRR state under Art. 8 ASR**²²² – an act that, if executed by officials of the SRR state, would clearly constitute a breach of the principle of non-refoulement under the Refugee Convention and/or the ECHR as well as of the obligations under the law of the sea. Consequently, the Council of Europe Commissioner for Human Rights has urged the states to “refrain from issuing instructions to shipmasters to disembark in countries that cannot be considered a place of safety, either directly or indirectly.”²²³

²¹⁴ SOLAS (2004) regulation V/33, para. 1.1; SAR (2004) Annex 3.1.9

²¹⁵ The question posed by Talmon (supra note 212) whether private individuals are obliged to rescue persons in distress and to respect the principle of non-refoulement, is therefore simply misleading. The crucial question rather is, to what extent international law prevents states from instructing private actors to disembark persons in an unsafe place.

²¹⁶ However, there are some developments towards international law obligations of private actors; see e.g. the corporate responsibilities developed in the “Ruggie report”: J. Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/8/5, 7 April 2008, para. 51–81.

²¹⁷ See above, 3.1.

²¹⁸ M. Giuffré and V. Moreno-Lax, “The rise of consensual containment: from ‘contactless control’ to contactless responsibility’ for migratory flows,” in: S. Juss (ed.), *Research Handbook on International Refugee Law*, 2019, p. 82, at 101 et seqq.

²¹⁹ Articles on the Responsibility of States for Internationally Wrongful Acts (“Articles on State Responsibility,” “ASR”), Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), UN Doc. A/56/10 (“ILC Report”), p. 26–30.

²²⁰ Supra note 217.

²²¹ ILC report (supra note 217), at p. 47, Art. 8 para. 2 (Commentary).

²²² E. Papastavridis, “Rescuing migrants at sea and the law of international responsibility,” in: T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds.), *Human Rights and the Dark Side of Globalization. Transnational Law Enforcement and Migration Control*, 2017, p. 161, at 173.

²²³ Council of Europe Commissioner for Human Rights, Written Submission in *S.S. and ors. v. Italy*, No. 21669/18, CommDH(2019)29, para. 32.

In addition to its responsibility for instructing private shipmasters, an SRR state is also responsible for the MRCC's own internationally wrongful acts as its state organ (Art. 4 ASR), namely where it violates its obligations under the international law of the sea to ensure that a rescue operation leads to a delivery to a place of safety (see above, Section 4.1).

The responsibility of a flag state for obliging private shipmasters to follow the instructions of the MRCC to bring a person to an unsafe place is less clear under Art. 8 ASR, as it is debatable whether a mere legislative act already qualifies as an "instruction." At the very least, such a qualification will depend on the concrete form of the obligation under domestic law. Given the high value of the duty to rescue under international law, arguably there is an "instruction," at least in cases where domestic legislation links the disobedience to the MRCC to a coercive measure, such as a heavy administrative fine or penal sanctions.²²⁴

The ultimate responsibility of both the SRR state for its MRCC designating an unsafe place and of the flag state for obliging a private vessel to follow MRCC instructions in such constellations is corroborated by an additional consideration. To interpret the law of the sea and international human rights treaties in a way so as to allow avoiding the responsibility for the breach of human rights obligations by delegating the relevant acts to a private individual goes against the principle of good faith (*bona fide*). At least in situations where EU Member States are aware of the fact that disembarkation in North African States may in many cases expose the persons rescued to persecution, chain refoulement, or torture or inhuman and degrading treatment, they can be held accountable under international law. If SRR states instruct private vessels to disembark rescuees in such

places despite their knowledge of the situation or if flag states compel private vessels flying their flag to follow MRCC such instruction without taking into account the concrete circumstances of a case, both state conducts can be considered an **unlawful attempt to obstruct or avoid international human rights violations**.

Consequently, EU Member States obliging the captain of a private vessel to disembark individuals at the designated place of safety despite serious and well-founded doubts regarding the safety of the place can be held responsible under international law for violating the principle of non-refoulement under the Refugee Convention and the ECHR as well as their obligations under the law of the sea.

5. Cooperating with North African Rescue Co-ordination Centres

Is it in line with international and European law if European MRCCs divert coordination responsibility for SAR to the JRCC Libya or other MRCCs in Northern Africa although they do not fulfil the criteria of a POS? If so, is there a difference between interceptions in the coastal area and on the high seas?

5.1 The SAR Zone System

Search and Rescue (SAR) services are designed to ensure that such assistance is provided reliably in a coastal state's Search and Rescue Region (SRR or SAR region). Therefore, Article 98(2) UNCLOS requires that every coastal state "shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way

of mutual regional arrangements cooperate with neighbouring States for this purpose."

The details are governed by the **1979 SAR Convention**. The State Parties establish their respective Search and Rescue Regions (SRRs) in agreement with each other²²⁵ and "shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts"²²⁶ and that distress calls can be responded to promptly.²²⁷ To this purpose, the state in charge of a SAR region sets up a Maritime Rescue Co-ordination Centre (MRCC), "as they consider appropriate."²²⁸ Alternatively, they can cooperate with other states in the form of "rescue Co-ordination sub-centres" that can be run jointly or by the state in which the centre is located.²²⁹ The Convention also provides for co-operation between different MRCCs.²³⁰ However, the IMO's Maritime Safety Committee (MSC) has clarified that it is impossible to arrange SAR services that can fully rely on shore-based rescue units, without the need to also rely on ships at sea,²³¹ including private or merchant vessels near the scene.

The SAR Convention has been ratified by all North African states except for Egypt.²³² **Libya**,

a member of the SAR Convention, has declared a SAR region and duly notified the IMO on 14 December 2017, which confirmed it in June 2018.²³³ In parallel, Libya defined a **Joint Rescue Co-ordination Centre**²³⁴ (**JRCC Libya**) that, however, is not yet (fully) operational. It is being set up with heavy financial support from the European Commission via the EU Emergency Trust Fund for Africa; its goal is that the JRCC "will exercise primary responsibility for ensuring the coordination of a rescue situation, including initiating the process for identifying the most appropriate place of safety for disembarkation following a search and rescue situation, in cooperation with the coastal States."²³⁵ In May 2019, "the contract negotiations between the Commission and the Italian Ministry of Interior for the construction of the MRCC [were] ongoing," with the tender procedures for the Libyan MRCC's equipment and systems to be launched in the course of 2019 and 2020.²³⁶ While the JRCC Libya is being set up, the Italian MRCC, based in Rome, functions as the regional centre and the JRCC Libya as a sub-regional centre. The MRCC in Rome regularly transmits information on distress cases to the JRCC Libya, which then proceeds to the rescue.²³⁷

²²⁴ There is a general tendency to criminalise NGOs rescuing migrants at sea. This includes seizing rescue vessels, as well as arrests for crew members, in some EU Member States. See, e.g. EU Fundamental Rights Agency, Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations, see: <https://fra.europa.eu/en/node/27683>. A recent example of criminalisation of NGOs is Art. 2 of the Italian Decree Law N. 53 of 14 June 2019 (*Decreto Sicurezza bis*) converted into Law N. 77 of 8 August 2019, available at: <https://www.gazzettaufficiale.it/eli/id/2019/08/09/19G00089/sg>. For a partial and unofficial English translation, see M. Fantinato and V. Schatz, *Extract from Decree-Law N. 53 of 14 June 2019*, available at: <https://doi.org/10.13140/RG.2.2.24789.58085>. In its converted form this provision allows for fines up to 1,000,000 EUR as well as for confiscation without repeated violation of the orders in case of non-compliance with the instructions of Italian authorities.

²²⁵ SAR Annex 2.1.4. The establishment is made by unilateral declaration, the agreement simply concerns the delimitation of the SAR region, see SAR Annex 2.1.5.

²²⁶ SAR Annex 2.1.1.

²²⁷ SAR Annex 2.1.8–9.

²²⁸ SAR Annex 2.3.1.

²²⁹ See IMO, *IAMSAR Manual*, Vol. 1: Organization and Management, 2016, p. 2-4.

²³⁰ SAR Annex 3.1.

²³¹ 2004 MSC Guidelines (supra note 9), para. 6.12.

²³² Ratifications as at 22 October 2019, see the lists provided by the IMO, available at: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>

²³³ It first declared a much larger SRR in July 2017, which was retracted on 10 December 2017, apparently at the suggestion of the IMO. That region corresponded to the Tripoli Flight Information Region; see: Wissenschaftlicher Dienst des Deutschen Bundestages, *Sachstand: Einrichtung von SAR-Zonen und Seenotrettungsleitstellen*, 13 July 2018, WD 2 – 3000 – 103/18, at 5, available at: <https://www.bundestag.de/resource/blob/565680/314b-c300770c6f5a3fe3b19b869f17f3/wd-2-103-18-pdf-data.pdf>; see also, T. Calandrino, "Wie Libyen zum sicheren Hafen wurde. Die Zuweisung einer libyschen 'Search and Rescue Zone' als europäisches Migrationsmanagement," *Borderline Europe*, March 2019, available at: <https://www.borderline-europe.de/eigene-publikationen/wie-libyen-zum-sicheren-hafen-wurde-die-zuweisung-einer-libyschen-%E2%80%9Esearch-and>

²³⁴ Joint Rescue Co-ordination Centres combine units for communication, defence, law enforcement, and aerial and naval traffic; see IMO, *IAMSAR Manual*, Vol. 1: Organization and Management, 2016, p. 2-4.

²³⁵ Answer given by Mr. Avramopoulos on behalf of the European Commission to Parliamentary Question P-003665/2018, 4 September 2018.

²³⁶ Answer given by Mr. Hahn on behalf of the European Commission to Parliamentary Question E-000190/2019, 20 May 2019.

²³⁷ See e.g. the case discussed in the Answer to a Parliamentary Question of 30 October 2018, BT-Drs. 19/5387, Antwort der Bundesregierung auf die Kleine Anfrage der Linken "Über 100 Ertrunkene nach unterbliebener Seenotrettung vor Malta," available at: <http://dipbt.bundestag.de/doc/btd/19/053/1905387.pdf>.

Despite the fact that the JRCC is not yet (fully) operational, **the Libyan Coast Guard** has therefore continuously been involved in rescue and interception operations. In September 2019, an internal EU Council document presents the state of play as follows:

The activities of the Libyan Coast Guard (LCG) in rescuing or intercepting migrants off the Libyan coast have continued despite the conflict that has been ongoing since the beginning of April. According to UNHCR, the LCG has so far rescued or intercepted 5280 people at sea in 2019 (up to 16 August) and brought them back to Libya. This is nearly equal to the number of migrants who have reached the EU from Libya so far in 2019 (6126). The LCG is thus now intercepting or rescuing a higher proportion of migrants departing from Libya than in the past. However, the situation remains highly volatile and it could change rapidly depending on the internal dynamics within Libya or external/international dynamics and the positioning of the international community.²³⁸

As Libya is bound by the SAR Convention, it also violates its obligations under the international law of the seas if the JRCC designates an unsafe place for disembarkation or if the LCG disembarks persons rescued at the high seas in Libya. Likewise, Libyan authorities violate the right to leave any country including one's own, as guaranteed by the ICCPR, if they pull back boats trying to leave the territorial waters of Libya.

5.2 Using Proxies in International Law

Implicating the Libyan Coast Guard and the JRCC Libya or other North African SAR services in rescue missions foreseeably leads to the rescued persons being taken back to countries that do not fulfil the criteria of a "place of safety" (see above, Section 2). Given that EU member states

would not be able to disembark rescued persons there themselves without violating the law of the sea and non-refoulement guarantees (see above, Section 3), this raises the question whether such cooperation or use of "proxies" is also in violation of international law.

As an example, is the Italian MRCC allowed to call upon the Libyan Coast Guard for a SAR mission, knowing they will take the rescued persons back to Libya, which is not a POS? This is a question that is governed by international law on state responsibility. EU law will not usually be applicable, as the MRCC will not be implementing EU law in rescue scenarios outside of border control situations.

5.2.1 State Responsibility and the Law of the Sea

A state is **responsible for the actions of another state** if it directs or controls (Art. 17 ASR) or coerces the other state (Art. 18 ASR); in that case, that state's actions are attributed to it as its own internationally wrongful act. If a state provides **aid or assistance** in the commission of an internationally wrongful act, it is responsible for this complicity (Art. 16 ASR). Where states **act jointly**, each of them is responsible for the internationally wrongful act (Art. 47 ASR).

Where the **Italian MRCC calls upon the Libyan Coast Guard to perform a rescue operation**, thus transferring its obligations to Libya, this does not place an organ of the Libyan state²³⁹ at the disposal of Italy in the sense of Art. 6 ASR; as the ILC's commentary makes clear, this would require that it is "appointed to perform functions appertaining to" Italy and that it acts "in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State"; Art. 6 ASR is thus "not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise."²⁴⁰ Coercion is clearly

not fulfilled,²⁴¹ and the threshold for direction and control in the sense of Art. 17 ASR is high.²⁴² In light of Italy's close involvement in Libya's SAR system, complicity appears to be the more appropriate form of responsibility.

A state is **complicit in the commission of an internationally wrongful act** if it (i) provided aid or assistance with knowledge of the circumstances and if (ii) the act would also be wrongful if committed by that state directly. A particular degree of support is not necessary as long as the support has made the commission of the act significantly easier or contributed to it – and if this was also intended. The support need not be essential to the commission of the act²⁴³ or be a *condicio sine qua non*. Examples include the permission to use military bases for the use of force, supplying arms or technology to states that commit severe human rights violations²⁴⁴ or supplying logistic support and valuable information for the commission of the act.²⁴⁵ As disembarkation in Libya would be a violation of international law also if committed by Italy, as Italy has full knowledge of the circumstances, and as the Italian MRCC is providing information on the distress case and thereby enables the commission of the violation of law of the sea obligations by Libya, complicity appears to be fulfilled.²⁴⁶

In addition to Libya's conduct and its possible complicity in it, **Italy is also responsible for the MRCC's own internationally wrongful acts** (Art. 47 ASR), namely where it violates its obligations under the international law of the sea to make sure a rescue operation leads to a delivery to a place of safety (see above, Section 4.1). As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions recalls, a SAR state has an obligation to protect:

The European Union and its member States have put in place an extensive surveillance system focused on security and border patrol, which now includes the North Atlantic Treaty Organization (NATO). Having chosen to provide security in the Mediterranean, the States members of the European Union cannot escape their obligation to protect. They are exercising sufficient functional control to be subject to the one obligation inextricably linked to ocean surveillance: an adequate and effective system of rescue. This includes the implementation of the principle of non-refoulement, including to unsafe third countries, the protection of refugees and migrants, including against preventable and foreseeable loss of lives, and support to ships operated by non-governmental organizations.²⁴⁷

²³⁸ Libya and the surrounding area: current situation and need for immediate action, Council document 11538/19 LIMITE, 4 September 2019, p. 3, available at: <http://www.statewatch.org/news/2019/sep/eu-council-libya-11538-19.pdf>

²³⁹ Problems pertaining to the problematic structure of Libya governmental power are left aside here.

²⁴⁰ ILC Report (supra note 217), p. 30–170, at p. 44, Art. 6 para. 2 (Commentary).

²⁴¹ "Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles." ILC Report (supra note 217), Art. 18 para. 2 (Commentary).

²⁴² As the commentary explains: "the term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility." ILC Report (supra note 217), at p. 69, Art. 17 para. 7 (Commentary). For agreements modelled on the EU-Turkey Deal, see, Giuffrè and Moreno-Lax (supra note 218), at 103–4.

²⁴³ ILC Report (supra note 217), at p. 66, Art. 16 para. 5 (Commentary).

²⁴⁴ ILC Report (supra note 217), at p. 66–67, Art. 16 para. 7–8 (Commentary).

²⁴⁵ H. Aust, *Complicity and the Law of State Responsibility*, 2011, p. 198–9.

²⁴⁶ See also, J.C. Hathaway and T. Gammeltoft-Hansen, "Non-Refoulement in a World of Cooperative Deterrence," *Colum. J. Transnat'l L.* 53 (2015), 235, at 277–82; HRW, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya*, 2019, p. 60–1; Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, UN Doc. A/HRC/37/50, February 2018, para. 56–9, available at: <https://undocs.org/en/A/HRC/37/50>

²⁴⁷ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *Unlawful deaths of refugees and migrants*, UN Doc. A/72/335, 15 August 2017, para. 64. For the concept of "functional jurisdiction," see also E. Papastavridis (supra note 222), at 167–8.

5.2.2 State Responsibility and Human Rights Law

While the Northern African states are not members of the ECHR, they are bound by the ICCPR that also contains a **human rights non-refoulement** guarantee.²⁴⁸ Where a risk of persecution, of chain refoulement, or of severe human rights violations exists for the individuals rescued **on the high seas** in the country where the Italian MRCC foresees disembarkation, the conditions for complicity would therefore also be fulfilled. If the rescue takes place **in the territorial waters** of the Northern African country, which are considered part of its territory, the issue appears to be not so much refoulement but a violation of the **right to leave** any country, including one's own.²⁴⁹ Here, too, complicity can exist.²⁵⁰

General international law, such as the law on state responsibility, applies in specialised international law regimes only if those regimes do not contain special rules to the exclusion of the general rules.²⁵¹ Here, both the ECHR and the ICCPR contain **jurisdiction clauses** that limit the applicability of these human rights treaties to persons on the territory or under the jurisdiction of a state, in the sense of “effective control.”²⁵² This does not as such mean that a state cannot be held responsible where it is not

exercising effective control but is only aiding or assisting another state that does.²⁵³ The fact that the human rights treaties contain jurisdiction clauses does not necessarily exclude the application of international law of state responsibility, such that states can be responsible for complicity in human rights violations.²⁵⁴

However, the European Court of Human Rights has also reached similar results based on Art. 1 ECHR.²⁵⁵ Outside of territorial jurisdiction and of *Hirsi*-type “control and authority over an individual” outside its territory,²⁵⁶ a state also exercises jurisdiction when it exercises effective control over an area through a **subordinate local administration**; in that case, it is immaterial whether it is detailed control over the policies and actions of that administration if it survives as a result of the state's military, economic, and political support.²⁵⁷ In such situations, is enough if the administration operates “at the very least under the **decisive influence**” of the other state.²⁵⁸ Turning the *Catan* standard around – where a state is *not* exercising territorial control, detailed control over the policies and actions of the local subordinate administration suffices if it only survives as a result of the support – arguably these criteria are fulfilled, given how involved Italy has been in financing, equipping, training, and liaising with the Libyan

Coast and Border Guard and the Libyan JRCC, and how it now uses it to transfer SAR cases to Libya.²⁵⁹ As the Council of Europe Commissioner stresses “any migration co-operation with third countries requires Council of Europe member states to exercise due diligence with respect to the potential human rights consequences.”²⁶⁰

In some cases, the Court has even accepted jurisdiction over individuals in another state without physical “control and authority,” e.g. in the case of investigations into crimes concerning victims abroad, especially **when international obligations are involved**.²⁶¹ Arguably, where the “power to issue decisions or to take action with extraterritorial effect is based on international legal obligations” – here, SAR obligations – a state also exercises jurisdiction under the ECHR.²⁶² Given that Italy has extensive international SAR obligations in its SRR and when alerted to a distress situation, there are good reasons to assume that “a sufficient degree of effective control or authority exists over the actors on the high seas to establish jurisdiction under Article 1 ECHR.”²⁶³ Accordingly, the Commissioner for Human Rights of the Council of Europe assumes that when cooperating with or transferring coordination to Libya, **states “fully retain their own responsibility for the preservation of life at sea and the respect of the non-refoulement obligation.”**²⁶⁴

The **1951 Refugee Convention** does not contain a jurisdiction clause; therefore, similar concerns

do not arise here. However, it only covers persons who have already left their country of origin or, where they are stateless, their country of habitual residence.²⁶⁵

In conclusion, **states are responsible for their actions in cooperative scenarios** and where they use “proxies” according to the international law on state responsibility. In the example of the Italian MRCC calling upon the Libyan Coast Guard for a SAR mission, knowing they will take the rescued persons back to Libya, Italy **can be held responsible for breach of the law of the sea as well as the principle of non-refoulement by complicity under Art. 16 ASR**. In addition, Italy's MRCC is violating its rescue obligations under the international law of the sea.

Concerns also arise in another scenario. Just like any other aircraft aware of a distress situation at sea, Member State aircrafts engaged in Frontex operations must report this situation to a Rescue Co-ordination Centre and communicate with vessels proceeding to the same area of distress.²⁶⁶ Even if the distress situation has occurred in the Libyan SRR, the state aircraft should choose to alert the Italian MRCC. If, however, it alerts the Libyan JRCC, knowing that this will result in disembarkation in an unsafe place where severe human rights violations are to be expected, this may again engage state responsibility. This type of situation, where the aircraft is not itself in a position to provide assistance but still has

²⁴⁸ The EU Member States and the EU are also parties of the ICCPR.

²⁴⁹ Article 12(2) ICCPR, Art. 2(2) Protocol 4 to the ECHR.

²⁵⁰ See, in more detail, N. Markard, “The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries,” 27 *EJIL* (2016), 591, at 615.

²⁵¹ For a detailed analysis, see, B. Simma and D. Pulkowski, “Of Planets and the Universe: Self-contained Regimes in International Law,” 17 *EJIL* (2006), 483.

²⁵² In Art. 2(1) ICCPR, the “and” is to be read as “or”; see, CCPR, General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

²⁵³ See, in more detail, M. den Heijer, *Europe and Extraterritorial Asylum*, 2012, p. 99-100.

²⁵⁴ See also Hathaway and Gammeltoft-Hansen (supra note 246), at 279–82; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (supra note 247), para. 36; Giuffrè and Moreno-Lax (supra note 218), at 101–2; A. Dastyari and A. Hirsch, “The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy,” *Hum. Rts. L. Rev.* advance article (2019); AIRE Centre, Dutch Refugee Council, ECRE, and ICJ, Written Submissions in *S.S. and ors. v. Italy*, 11 November 2019, p. 10, available at https://www.icj.org/wp-content/uploads/2019/11/ECtHR-SS_v_Italy_final-JointTPI-ICJECREAIREDCCR-English-2019.pdf

²⁵⁵ See the detailed analysis by Amnesty International and Human Rights Watch (HRW) in their 2019 Written Submissions as Third Party Interveners in the case of *S.S. and ors. v. Italy*, Application No. 21660/18, 12 November 2019, available at <https://www.hrw.org/news/2019/11/12/human-rights-watch-and-amnesty-international-submissions-european-court-human-rights>

²⁵⁶ ECtHR (GC), *Al-Skeini and ors. v. The United Kingdom*, No. 55721/07, 7 July 2011, para. 133–7.

²⁵⁷ ECtHR (GC), *Al-Skeini* (supra note 256), para. 138; ECtHR (GC), *Catan and ors. v. Moldova and Russia*, No. 43370/04, 8252/05 and 18454/06, 19 October 2012, para. 106.

²⁵⁸ ECtHR (GC), *Ilaşcu and others v. Moldova and Russia*, No. 48787/99, 8 July 2004, para. 392 (emphasis added).

²⁵⁹ Amnesty International and Human Rights Watch (HRW), Written Submissions in *S.S. and ors. v. Italy*, No. 21660/18, 12 November 2019, available at <https://www.hrw.org/news/2019/11/12/human-rights-watch-and-amnesty-international-submissions-european-court-human-rights>, para. 4–8; cf. also, Hathaway and Gammeltoft-Hansen (supra note 246), at 266–72; Giuffrè and Moreno-Lax (supra note 218), at 105–7.

²⁶⁰ Council of Europe Commissioner for Human Rights, Written Submissions (supra note 223), para. 17.

²⁶¹ ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, para. 207–8, 309; *Aliyeva and Aliyev v. Azerbaijan*, No. 35587/08, 31 July 2014, para. 56–7 (Minsk Convention); ECtHR (GC), *Güzelyurtlu v. Cyprus and Turkey*, No. 36925/07, 29 January 2019, para. 188–90; ECHR, *Romeo Castaño v. Belgium*, No. 36925/07, 29 January 2019, para. 36–42 (European Arrest Warrant).

²⁶² AIRE Centre, et al., Written Submissions in *S.S. and ors. v. Italy* (supra note 254), p. 4.

²⁶³ AIRE Centre, et al., Written Submissions in *S.S. and ors. v. Italy* (supra note 254), p. 7.

²⁶⁴ Council of Europe Commissioner for Human Rights, *Lives Saved. Rights Protected. Bridging the Gap for Refugees and Migrants in the Mediterranean*, July 2019, Recommendations nos. 4–6, p. 22 (emphasis added); similarly Council of Europe Commissioner for Human Rights, Written Submission (supra note 223), para. 32.

²⁶⁵ Note that things are difficult even then, as the discussion of embassy cases show; arguably, refoulement is a *fortiori* conceivable where the person being prevented from leaving by foreign officials is a non-national, as is the case for many would-be migrants seeking to leave Libya. See G. Noll, “Seeking Asylum at Embassies: A Right to Entry under International Law?”, 17 *IJRL* (2005), 542.

²⁶⁶ IMO, *IAMSAR Manual*, Vol. 3: Mobile Facilities, 2013, p. 2-7.

obligations under the law of the sea to report the situation, can be seen as “contactless control.” When the performance of such obligations foreseeably and avoidably leads to human rights violations, this may again constitute complicity.

5.3 Obligations of Captains to Render Assistance in SAR Scenarios

On 23 and 24 November 2017, the Italian MRCC instructed an SOS Méditerranée vessel to refrain from rescuing the persons in distress and to await the arrival of the Libyan Coast Guard.²⁶⁷ In such cases, the question arises whether the captain of a ship can decline to follow the MRCC's instructions in light of the fact that the Libyan Coast Guard would not be delivering the rescuees to a place of safety, as required by the international law of the sea.

As set out above (supra, at 4.2), obligations for captains to follow MRCC instructions are contained in domestic law – as are obligations to render assistance in situations of distress. An illustrative example of such domestic legislation can be found in the German Regulation on the safety of seafaring (*Verordnung über die Sicherung der Seefahrt*). Section 2 obliges captains to proceed with all possible speed to the rescue of persons in distress and to follow the instructions of the authorities responsible for the coordination of the rescue operation – two separate duties that may conflict with one another. While the duty to render assistance is not backed by sanctions, a breach of the obligation to follow the instructions of the responsible MRCC is an administrative offence and can lead to a fine of up to 50,000 EUR.²⁶⁸ This, however, does not suggest that the duty to follow MRCC instructions has priority over the duty to render assistance.²⁶⁹ The primary goal of the regulation – and of the entire body of the SAR regime which it seeks to

implement – is to ensure effective assistance in situations of distress at sea through coordination by an MRCC.²⁷⁰ Since the obligation to render assistance may be detrimental to the individual (often economic) interests of private ship owners and ship masters, the regulation seeks to ensure their compliance with the MRCC coordinating the rescue operation by imposing a fine for breaches. What the legislator had in mind were not NGO vessels acting against MRCC orders with the goal of rescuing persons in distress, but rather private commercial vessels not willing to proceed to rescue persons in distress at the high seas, out of fear of risking damage to their ship or suffering financial loss.

The duty to follow MRCC instructions thus has to be interpreted in the light of the overall aim to ensure effective assistance to persons in distress. It serves to strengthen, not weaken, the Search and Rescue system; consequently, the duty to rescue must take precedence in cases of conflict.

6. Conclusions

The obligation to render assistance to persons in distress at sea, no matter their immigration status, includes the duty to deliver them to a place of safety. When assessing whether a port can serve as such a place of safety for rescued migrants, the law of the sea requires taking into account the human rights situation and particularly the situation of refugees at the places of disembarkation. Against this background, Libya cannot be considered a place of safety under any circumstances. While the situation in other North African countries is less devastating, severe human rights violations, a lack of a functioning asylum system and the incidences of chain refoulement, the risk of detention in inhuman and degrading conditions resulting from the criminalisation of irregular movements, and the use of torture in

criminal investigations demonstrate that those countries cannot be considered places of safety for many migrants. This is especially the case for those belonging to particularly vulnerable groups; in particular, LGBTI migrants face persecution in all of the Northern African countries. As screening for refugee status, a risk of torture, or vulnerability will not be possible on a regular basis on board of a rescuing ship, private shipmasters have to assess in each concrete situation whether a country is a safe place for the rescued persons on board, bearing in mind that some of them may be refugees or vulnerable.

Despite the fact that they cannot be regarded as places of safety, at least not for certain groups of rescuees, EU Member States have been seeking to shift responsibility for rescued migrants to the Northern African states by promoting disembarkation there. Three constellations can be distinguished:

First, **if Member State officials disembark rescued individuals in unsafe places in North Africa themselves**, they do not only violate their law of the sea obligations; such push-backs also violate the prohibition of collective expulsion and, depending on the conditions in the destination state, the principle of non-refoulement. When rescue takes place during border surveillance activities implementing the Schengen Borders Code, EU Member States are additionally bound by the EU Charter of Fundamental Rights, including the right to asylum. Finally, the Frontex regulation explicitly reaffirms the non-refoulement guarantee, prohibits disembarkation to unsafe places, and foresees a default responsibility for the host Member States for the disembarkation of rescued persons.

In a second scenario, **EU Member States instruct private shipmasters to return rescuees to unsafe places**, through their MRCCs. While states bear the primary responsibility both for the observation of non-refoulement and of the duty to rescue of persons in distress at sea under international law, private shipmasters nonetheless have obligations in the rescue system. The law of the

sea requires State Parties to oblige private shipmasters to rescue persons in distress and to follow the instructions of the MRCC in charge. These domestic law obligations conflict when shipmasters are instructed by the MRCC to deliver rescuees to an unsafe place, since the duty to rescue implies the duty of disembarkation in a place of safety. In such situations, shipmasters must be able to rely on their discretion in choosing to prioritise the duty to rescue over the duty to follow MRCC instructions. More importantly, both the SRR state and the flag state may be held responsible in such situations for their role in the commission of an internationally wrongful act. Instructions by an MRCC to disembark rescuees in an unsafe place can be attributed to the SSR state under Art. 8 ASR, while the flag state may arguably also be responsible under Art. 8 ASR for instructing private shipmasters to act in contravention of SAR obligations in cases where noncompliance with such MRCC instructions carries heavy administrative fines or penal sanctions. Consequently, EU Member States obliging a shipmaster to disembark rescuees at the designated “place of safety” despite serious and well-founded doubts regarding the safety of the place can be held responsible under international law for violating the principle of non-refoulement under the Refugee Convention and the ECHR as well as their obligations under the law of the sea.

Third, EU Member States frequently engage in cooperative arrangements **calling upon the coastguards of North African countries to perform rescue operations** while asking private shipmasters to stand by. Given that the North African states will also violate their law of the sea obligations when disembarking rescuees in unsafe places, their implication by EU Member States can be qualified as complicity (Art. 16 ASR) when it is known that those authorities will return rescuees to unsafe places where they are exposed to severe human rights violations, persecution or chain refoulement. In addition, they will be complicit in violations of the right to leave. Recalling the words of the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment, Nils Melzer:

²⁶⁷ See the reference in K. Gombeer and M. Fink, “Non-Governmental Organisations and Search and Rescue at Sea,” *MarSafeLaw Journal* (2018), 2, note 8.

²⁶⁸ § 10 (1) No. 1 Verordnung über die Sicherung der Seefahrt in conjunction with § 15 (2) Seeaufgabengesetz (Law on the obligations at sea).

²⁶⁹ Such a priority is implied in the argumentation of S. Talmon (supra note 212) at 803–4.

²⁷⁰ K. Gombeer and M. Fink, “Non-Governmental Organisations and Search and Rescue at Sea,” *MarSafeLaw Journal* (2018), p. 17–18.

In sum, destination States cannot circumvent their own international obligations by externalizing or delegating their migration control practices to other States or non-State actors beyond their jurisdictional control; rather, any instigation, support or participation on their part may give rise to complicity in or joint responsibility for unlawful pullback operations and the resulting human rights violations, including torture and ill-treatment.²⁷¹

As to private shipmasters instructed to stand by, domestic duties to follow MRCC instructions need to be interpreted in the light of the overall aim to ensure effective assistance to persons in distress, such that the duty to rescue must take precedence in cases of conflict.

In light of this, **where EU Member States would be violating their own obligations when disembarking rescuees in unsafe places, they can also be held responsible for instructing private shipmasters to do so, or when calling upon third country authorities to achieve this effect.**

While it may be doubtful whether private shipmasters can rely on duties directly derived from international law, their duties under domestic law must be interpreted in light of their purpose to implement and effectuate the international law of search and rescue, including the duty to complete a rescue operation by delivering rescuees to a place of safety – regardless of the nationality or status of such persons or the circumstances in which they are found.

Short Biographies

Anuscheh Farahat is a Professor of Public Law, Migration Law and Human Rights Law at the University of Erlangen-Nuremberg. Since 2017, she leads an Emmy-Noether research group on the role of constitutional courts in transnational solidarity conflicts in Europe, first at the Goethe University Frankfurt a.M. and now at the University of Erlangen-Nuremberg. Since 2017, Anuscheh Farahat has also been a Senior Research Affiliate at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. She studied law in Frankfurt, Paris and Berkeley and was a research fellow and a senior research fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. Anuscheh Farahat received her PhD in law from the Goethe University Frankfurt. She publishes widely on issues of European and German constitutional law, German and international migration and citizenship law, international Human Rights Law and comparative constitutionalism.

Nora Markard is a Professor of International Public Law and International Human Rights at the University of Münster. She is a co-founder of the Humboldt Law Clinic Human and Fundamental Rights and of the Refugee Law Clinic Hamburg. She is Vice President of the Gesellschaft für Freiheitsrechte e.V. (GFF), a strategic litigation NGO, and advises the European Center for Constitutional and Human Rights (ECCHR) on its migration and gender litigation. Nora Markard studied Law and International Relations in Berlin, Paris and London. She holds a PhD from Humboldt University and an MA from King's College London and was a visiting fellow at the University of Michigan and at Columbia Law School. She publishes widely on international and constitutional law issues, with a focus on inequalities and forced migration.

Erik Marquardt is a Member of the European Parliament and the spokesperson of the German Greens in the European Parliament on asylum and migration. Before he engaged in politics, Erik Marquardt worked as a photojournalist documenting the situation of refugees on the Balkan route, in Greece and the Mediterranean, among others. He has organised many exhibitions and presentations to illustrate the situation of refugees and to promote greater understanding. He has also been involved in rescuing people in the Mediterranean and supports NGOs engaged in search and rescue.

²⁷¹ Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, UN Doc. A/HRC/37/50, February 2018, para. 57, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/347/27/PDF/G1834727.pdf>





Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility

Over the last six years, more than 19,000 people have lost their lives in the Mediterranean. After the European Union decided to cease ship patrols in the frame of Operation Sophia in March 2019, no EU or national search and rescue vessels are any longer in place to prevent more deaths. By stopping rescue activities in the Mediterranean, EU governments have outsourced their responsibility for saving lives. NGOs stepping in and trying to fill this gap have been increasingly criminalised and prosecuted. At the same time, EU Member States and the European Commission have explored “regional disembarkation platforms” outside the European Union since 2018.

Against this background, the Brussels Office of the Heinrich Böll Foundation has commissioned this study by Prof. Dr. Anuscheh Farahat and Prof. Dr. Nora Markard, who examine the concept of “Places of Safety” and legally assess whether Algeria, Egypt, Libya, Morocco and Tunisia can be considered places of safety for migrants and refugees. The study also analyses the legal situation when rescued persons are disembarked in unsafe places by EU Member State vessels, when a Maritime Rescue Co-ordination Centre orders private vessels to disembark rescuees in unsafe places or to stand by while third country authorities proceed to the rescue followed by disembarkation in unsafe places.

ISBN 978-9-4640-0740-4