

The European Union and the duty to render assistance at sea

- Legal obligations and competences -

Table of contents

| | |
|--|----------|
| A. Summary of the main findings | 4 |
| B. Background and points at issue..... | 4 |
| C. Legal appraisal | 6 |
| I. Obligation under international law and Union law to render assistance at sea..... | 6 |
| 1. Obligation under international law | 6 |
| 2. Obligation under Union law | 7 |
| 3. Scope of the obligation..... | 8 |
| II. Legal bases for maritime rescue operations | 9 |
| 1. The TFEU as a legal basis | 9 |
| a) Article 77 TFEU | 10 |
| b) Article 78 TFEU | 10 |
| c) Article 196 TFEU | 10 |
| d) Article 222 TFEU | 11 |
| e) Article 352 TFEU | 11 |
| 2. Scope of Article 214 TFEU..... | 11 |
| a) Wording of Article 214(1) TFEU | 12 |
| aa) Interpretation of the term ‘disaster’ | 12 |
| bb) Material scope: interpretation of the term ‘Union’s operations in the field of humanitarian aid’ | 15 |
| cc) Human scope: interpretation of the term ‘people in third countries’ | 15 |
| b) Structure of Article 214 TFEU | 16 |
| c) Genesis of Article 214 TFEU | 16 |
| d) Purpose of Article 214 TFEU | 17 |
| e) Interim conclusion | 19 |
| 3. Conditions governing and limits of maritime rescue operations..... | 19 |
| a) Conditions regarding Article 214 TFEU | 19 |
| aa) Conditions governing the exercise of competence | 19 |
| bb) Substantive law requirements | 21 |
| b) Measures to finance a maritime rescue operation..... | 23 |
| aa) Purposes | 24 |
| bb) Terms for granting financial support | 24 |

| | |
|--|----|
| c) Measures to establish a maritime rescue operation | 25 |
| aa) Independent measures | 25 |
| bb) Coordinating and support measures | 25 |
| d) Coalition of willing parties | 26 |

A. Summary of the main findings

- (1) In connection with all operations in the Mediterranean, the European Union has an obligation to rescue refugees in distress at sea in keeping with the duty to render assistance, as provided for in customary international law and in Article 98 of the United Nations Convention on the Law of the Sea (UNCLOS). This obligation is set out in Article 9(1) of the Regulation establishing rules for the surveillance of the external sea borders (Regulation (EU) No 656/2014). If the criteria laid down in these provisions are applied, refugee boats are regularly in distress at sea. The specific scope of the duty to render assistance at sea depends on the individual case.
- (2) On the basis of its wording, structure, genesis and purpose, Article 214 of the Treaty on the Functioning of the European Union (TFEU), as a legal basis, covers Union measures for rescuing refugees in distress at sea. Movements of refugees fleeing war, violent conflict and so on constitute a humanitarian crisis, pursuant to Article 214 TFEU, which requires action by the European Union in the form of humanitarian aid operations. The objectives pursued by the European Union in providing humanitarian aid in particular reflect the requirement to alleviate human suffering in acute emergencies.
- (3) As EU law currently stands, it is possible, in particular, as set out in Article 214(3) TFEU in conjunction with the regulation concerning humanitarian aid (Regulation (EC) No 1257/96), to provide financial assistance to non-governmental organisations and international bodies working to rescue refugees in distress at sea. In addition, the provision provides for the establishment of a Union maritime rescue service and coordinating measures by the European Union through the ordinary legislative procedure pursuant to Article 214(3) TFEU in conjunction with Article 294 TFEU. The principle of subsidiarity laid down in Article 5(3) of the Treaty on European Union (TEU) in particular does not rule out legislation of this kind. The principle of proportionality must be observed in accordance with Article 5(4) TEU.

B. Background and points at issue

- (4) Council Decision (CFSP) 2020/472 on a European Union military operation in the Mediterranean of 25 March 2020 launched a new EU mission, 'EUNAVFOR MED IRINI'. The operation is to use airborne, satellite and maritime assets to monitor arms smuggling to Libya and enforce the arms embargo established by United Nations Security Council Resolutions 1970 (2011), 2292 (2016) and 2473 (2019). The deployment of assets at sea, in

particular, attracted heavy criticism from some Member States. The vessels will not now be deployed in the central Mediterranean, but further east and therefore away from the refugee routes.¹ However, against this background, the question arises as to the extent to which the European Union has a duty to rescue refugees in distress at sea even during a military operation.

- (5) Meanwhile, refugees continue to try to reach the territory of the European Union via the central Mediterranean route, driven by war, persecution, human rights violations and hunger.² An estimated 20 000 people have lost their lives on this route in the past six years.³ This migration route across the Mediterranean thus accounts for more deaths than any other such route.⁴ Yet it remains the most frequently used migration route into the European Union. According to the UN, already in 2020 more than 28 000 people have tried to reach the European Union in this way.⁵ Although the absolute number of refugees is currently falling, the percentage of people reported dead or missing continues to rise.⁶ This is due in particular to a significant decline in the willingness of neighbouring countries to take in refugees and, hence, to deploy government rescue vessels. The European Union, too, has done very little to date in the area of maritime rescue. So far, emergency aid in the form of rescue operations has tended to be provided by non-profit associations in the form of civilian maritime rescue.⁷ However, these associations too have seen their financial support cut recently. Their operations have increasingly resulted in the imposition of civil and criminal law penalties and have been severely hampered.⁸ Opposition to maritime rescue is often justified with the argument that such operations have a pull effect; in other words, confidence in potential rescue becomes a reason to take this route to the European Union. However, various studies have shown that this pull effect is a myth.⁹ In

¹ See also *Süddeutsche Zeitung*, ‘Neue Marinemission soll Libyen-Waffenembargo überwachen’ of 17.2.2020, available online at: <https://www.sueddeutsche.de/politik/eu-neue-eu-marinemission-soll-libyen-waffenembargo-ueberwachen-dpa.urn-newsml-dpa-com-20090101-200217-99-942496>, last accessed on 10 September 2020; *tagesschau.de*, ‘Neue EU-Marinemission im Mittelmeer’, 17.2.2020, available online at: <https://www.tagesschau.de/ausland/eu-libyen-sophia-105.html>, last accessed on 10 September 2020.

² On various reasons for fleeing, see <https://www.uno-fluechtlingshilfe.de/informieren/fluchtursachen/>, last accessed on 10 September 2020.

³ See <https://sea-watch.org/5-jahre/>, last accessed on 10 September 2020; on casualty figures, see also <https://www.uno-fluechtlingshilfe.de/hilfe-weltweit/mittelmeer/>, last accessed on 10 September 2020.

⁴ International Organization for Migration, *Fatal Journeys Volume 3 Part I: Improving Data on Missing Migrants*, p. 6 and <https://www.uno-fluechtlingshilfe.de/hilfe-weltweit/mittelmeer/>, last accessed on 10 September 2020.

⁵ See <https://www.uno-fluechtlingshilfe.de/hilfe-weltweit/mittelmeer/>, last accessed on 10 September 2020.

⁶ See International Organization for Migration, *Fatal Journeys Volume 3 Part I: Improving Data on Missing Migrants*, p. 6; Blanke/Johr, in: *Die Öffentliche Verwaltung* 2019, 929 (929).

⁷ See, for example, Sea-Watch e.V., <https://sea-watch.org/>, last accessed on 10 September 2020; SOS Méditerranée, <https://sosmediterranee.org/>, last accessed on 10 September 2020.

⁸ See, for example, <https://www.proasyl.de/news/sie-nennen-es-verhaltenskodex-eu-will-zivile-seenotrettungsorganisationen-an-die-kette-legen/>, last accessed on 10 September 2020; Schmid, ‘Zwischen Kriminalisierung und Regulierung’, *sui generis* 2018, p. 285; and Matz-Lück, ‘Seenotrettung als völkerrechtliche Pflicht’, *Verfassungsblog*, 18 August 2018.

⁹ Cusumano/Villa, *Policy Brief 2019/22*, European University Institute and Migration Policy Centre, November 2019, available at <https://cadmus.eui.eu/handle/1814/65024>; Steinhilper/Gruijters, *Border*

view of the continuing humanitarian crisis on the migration route in the central Mediterranean, the question has now been raised as to whether and under what conditions the European Union can legally establish a maritime rescue service or take coordinating measures.

C. Legal appraisal

- (6) Vessels deployed by the European Union in the Mediterranean have an obligation under international law and Union law to help refugees in distress (I.). An analysis of the wording, structure, genesis and purpose of Article 214 TFEU then points up further possible measures that the European Union can take in order to rescue refugees at sea (II.).

I. Obligation under international law and Union law to render assistance at sea

- (7) The Member States of the European Union and the European Union itself are obliged under both international and Union law to provide maritime rescue services as part of any deployment of vessels in the Mediterranean, regardless of the primary purpose of that deployment.

1. Obligation under international law

- (8) The duty to render assistance at sea is codified as an expression of a basic humanitarian duty¹⁰ in Article 98(1) of the United Nations Convention on the Law of the Sea (UNCLOS)¹¹, which has been ratified by both the Member States and the European Union. This obligation is also laid down in Chapter V Regulations 10 and 33(1)(1) of the International Convention for the Safety of Life at Sea (SOLAS)¹² and in paragraph 2.1.10 of the International Convention on Maritime Search and Rescue (SAR Convention)¹³. In addition, it is one of the principles of customary international law.¹⁴ In keeping with this principle, every State must require the master of a vessel flying its flag to render assistance to anyone in distress at sea if he or she can

Criminologies blog post, University of Oxford, 8 March 2017, available at <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/03/border-deaths>, last accessed on 10 September 2020; *Blaming the Rescuers*, available at <https://blamingtherescuers.org/>, last accessed on 10 September 2020; see also the reference to Frontex, *Annual Risk Analysis 2017*, p. 20, available at <https://frontex.europa.eu/media-centre/news-release/frontex-publishes-risk-analysis-for-2017-CpJiC8>, last accessed on 10 September 2020.

¹⁰ German Institute for Human Rights (Deutsches Institut für Menschenrechte), *Seenotrettung und Flüchtlingsschutz*, p. 8.

¹¹ United Nations Convention on the Law of the Sea of 10 December 1982.

¹² International Convention for the Safety of Life at Sea of 1 November 1974.

¹³ International Convention on Maritime Search and Rescue of 1 November 1979.

¹⁴ Blanke/Johr, in: *Die Öffentliche Verwaltung* 2019, 929 (931); Matz-Lück, 'Seenotrettung als völkerrechtliche Pflicht', *Verfassungsblog*, 18 August 2018.

do so without endangering the vessel, its passengers or its crew. This duty to render assistance at sea applies not only on the high seas, but to the entire maritime area.¹⁵

- (9) A definition of distress can be found in Annex Chapter I(1.3.13) of the SAR Convention, which states that this is precipitated by a situation in which there is a reasonable certainty that a vessel or person is threatened by grave and imminent danger or requires immediate assistance.¹⁶ This definition is also consistent with that laid down in customary international law.¹⁷ It does not matter whether the distress is the result of human error or whether the vessel rendering assistance had a specific rescue mission.¹⁸
- (10) Article 98(2) UNCLOS also obliges coastal States which are party to the Convention to promote the establishment, operation and maintenance of an adequate search and rescue service to ensure safety at sea. Where necessary, they must also make reciprocal regional arrangements with neighbouring States for this purpose. This means that the parties to the Convention also have an obligation to take preventive action.¹⁹

2. Obligation under Union law

- (11) Under Union law, a duty to render assistance at sea is laid down in Article 9(1) of the regulation establishing rules for the surveillance of the external sea borders (Regulation (EU) No 656/2014, the External Sea Borders Regulation)²⁰. Article 9(1) stipulates that ‘Member States shall observe their obligation to render assistance to any vessel or person in distress at sea and, during a sea operation, they shall ensure that their participating units comply with that obligation, in accordance with international law and respect for fundamental rights. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.’
- (12) Under Article 9(2)(e) of the External Sea Borders Regulation, a vessel or the persons on board will be considered to be in a phase of distress if it or they are in danger and in need of immediate

¹⁵ German Institute for Human Rights (Deutsches Institut für Menschenrechte), *Seenotrettung und Flüchtlingsschutz*, p. 8.

¹⁶ Referred to as the ‘distress phase’.

¹⁷ Blanke/Johr, in: *Die Öffentliche Verwaltung* 2019, 929, 930.

¹⁸ Kolossa, ‘Rettungsschiffe: Gibt es ein Recht auf sicheren Hafen?’, in: *Legal Tribune Online*, 14 August 2018.

¹⁹ German Institute for Human Rights (Deutsches Institut für Menschenrechte), *Seenotrettung und Flüchtlingsschutz*, p. 8.

²⁰ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 189, 27.6.2014, p. 93).

assistance or if such a situation is sufficiently probable as inquiries point to the existence of such a situation or the operating efficiency of a vessel is impaired to a certain extent.

3. Scope of the obligation

- (13) In the light of the criteria under international and Union law for assuming distress at sea, migrant boats are regularly in distress in view of their usually inadequate equipment and overcrowding on board.²¹ Whether or not such risks have been consciously taken has no bearing on the obligation.²² So both the European Union and the Member States have a duty to render assistance at sea in the course of an operation involving their own vessels. In the event of a joint operation to secure borders by EU missions or Frontex, the vessels deployed are jointly obliged to provide rescue services and must also be equipped accordingly.²³ At all events, this obligation also applies in the context of the operation to enforce the arms embargo against Libya. This is because the different purpose of the operation does not invalidate the duty to render assistance at sea, which applies to all vessels without exception.
- (14) The duty to render assistance at sea covers the specific act of rescuing people in distress. However, the scope of this obligation has not been determined conclusively. There are no explicit provisions specifying whether, for example, it is sufficient to render assistance in the form of the provision on the spot of food and emergency medical assistance. In particular, neither international law nor Union law implies an obligation to allow persons rescued to disembark in a port of the flag State.²⁴ Chapter V Regulation 33 of the SOLAS Convention merely provides for the obligation to cooperate in the search for a suitable safe port of call for disembarkation.²⁵ Paragraphs 1.3.2 and 3.1.9 of the Annex to the SAR Convention also merely provide that the States concerned must render assistance and transport the passengers to a safe place. A safe place is simply somewhere where the lives of the survivors are no longer in danger and their basic needs are met.²⁶ Even the principle under customary international law of proceeding to a port of refuge only applies if there is an imminent and unavoidable threat to the lives of those in distress at sea.²⁷ As a result, it only applies if and insofar as the rescue vessel

²¹ Blanke/Johr, in: *Die Öffentliche Verwaltung* 2019, 929, 930 f.

²² Kolossa, 'Rettungsschiffe: Gibt es ein Recht auf sicheren Hafen?', in: *Legal Tribune Online*, 14 August 2018.

²³ German Institute for Human Rights (Deutsches Institut für Menschenrechte), *Seenotrettung und Flüchtlingsschutz*, p. 9.

²⁴ On customary international law, see also Von Brevern/Bopp, in: *Heidelberg Journal of International Law (HJIL)* 2002, 841 (8).

²⁵ Kolossa, 'Rettungsschiffe: Gibt es ein Recht auf sicheren Hafen?', in: *Legal Tribune Online*, 14 August 2018.

²⁶ For further information on this criterion, see Blanke/Johr, in: *Die Öffentliche Verwaltung* 2019, 929 (935); Kolossa, 'Rettungsschiffe: Gibt es ein Recht auf sicheren Hafen?', in: *Legal Tribune Online*, 14 August 2018; see also the *Tampa* case and corresponding analysis by Von Brevern/Bopp, in: *Heidelberg Journal of International Law (HJIL)* 2002, 841 (844 ff.).

²⁷ See, for example, Lenk, in: *Heidelberg Journal of International Law (HJIL)* 2019, 713 (717 ff.).

itself is in distress and no other form of assistance can be provided.²⁸ What is more, the principle does not apply absolutely, as the coastal State can put forward security interests as an argument on the basis of the principle of the sovereignty of States under international law.²⁹ The rules on disembarkation under Union law in Article 10 of the External Sea Borders Regulation are also vague, since they provide for several disembarkation options depending on the location of the interception.³⁰ They merely stipulate that, in accordance with the principle of non-refoulement enshrined in Article 33(1) of the Geneva Convention relating to the Status of Refugees,³¹ Article 3 of the Convention against Torture,³² Article 3 of the European Convention on Human Rights (ECHR) and as *jus cogens* of customary international law,³³ refugees may not be repatriated to States where they are threatened with torture and other serious human rights violations or where they are in turn threatened with repatriation to States where they will be persecuted for the reasons set out in the Geneva Convention relating to the Status of Refugees.³⁴

II. Legal bases for maritime rescue operations

- (15) Maritime rescue operations cannot rely on Articles 77, 78, 196 and 222 TFEU as a legal basis; nor is the subsidiary competence of Article 352 TFEU pertinent.
- (16) The European Union could, however, rely on Article 214 TFEU. This is clear from the wording, structure, genesis and purpose of this provision. It also meets the specific requirements for a legal framework for humanitarian aid under secondary legislation. Accordingly, the European Union can both establish a maritime rescue service and take coordinating measures.

1. The TFEU as a legal basis

- (17) Articles 77, 78, 196, 222 and 352 TFEU cannot be relied on for the establishment of maritime rescue operations.

²⁸ Blanke/Johr, in: *Die Öffentliche Verwaltung* 2019, 929 (938).

²⁹ On the relationship between the right of access to a port of refuge and the principle of sovereignty, see Lenk, in: *Heidelberg Journal of International Law (HJIL)* 2019, 713 (718); Blanke/Johr, in: *Die Öffentliche Verwaltung* 2019, 929 (938); Matz-Lück, 'Seenotrettung als völkerrechtliche Pflicht', *Verfassungsblog*, 18 August 2018.

³⁰ However, in practice the host Member State regularly has an obligation of disembarkation in its territory; see Blanke/Johr, in: *Die Öffentliche Verwaltung* 2019, 929 (939).

³¹ Convention Relating to the Status of Refugees of 28 July 1951, which entered into force on 22 April 1954.

³² United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which entered into force on 26 June 1987.

³³ Blanke/Johr, in: *Die Öffentliche Verwaltung* 2019, 929 (934).

³⁴ See Blanke/Johr, in: *Die Öffentliche Verwaltung* 2019, 929 (934); Matz-Lück, 'Seenotrettung als völkerrechtliche Pflicht', *Verfassungsblog*, 18 August 2018.

a) Article 77 TFEU

(18) Article 77 TFEU confers on the European Union competence in the area of management policy, more precisely checks on persons and border management systems at external borders.³⁵ The aim is to safeguard the free movement of EU citizens. Maritime rescue operations, on the other hand, are not directly linked to border management and are therefore not covered by Article 77 TFEU. At best, maritime rescue could be deemed a measure accompanying a border management operation under Regulation (EU) No 2016/1624 (the FRONTEX Regulation)³⁶, but it could not be established independently on that basis.

b) Article 78 TFEU

(19) Article 78 TFEU establishes the competence to develop a uniform asylum and refugee policy. The aim of this provision is to establish a Common European Asylum System (CEAS)³⁷ and, to that end, it lists, in (a) to (g), various measures that are covered by this competence. Maritime rescue precedes such an asylum policy as it does not directly concern the distribution of asylum seekers within the European Union and the granting of asylum status. In addition, it is acknowledged that Article 78 TFEU does not, in principle, authorise operational measures.³⁸

c) Article 196 TFEU

(20) Article 196 TFEU establishes the Union's competence to support, coordinate and complement action in relation to civil protection.³⁹ However, this provision is intended more to support civil protection measures by the Member States.⁴⁰ This is not pertinent to maritime rescue efforts, as the refugees come not from Member States but from third countries.

³⁵ Rosenau/Petrus, in: Vedder/Heintschel von Heinegg, 2nd edition, 2018, Article 77 TFEU, para. 4 ff.

³⁶ See Article 8(1)(d) to (f), Article 14(2)(e) and Article 34(3) of Regulation (EU) No 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) No 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (OJ L 251, 16.9.2016, p. 1).

³⁷ Weiss, in: Streinz, 3rd edition, 2018, Article 78 TFEU, para. 1 and 5 ff.

³⁸ Thym, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 78 TFEU, paras 21 and 37.

³⁹ Glombik, in: *Verwaltungsrundschau* 2019, 159 (161); Vedder, in: Vedder/Heintschel von Heinegg, 2nd edition, 2018, Article 196 TFEU, para. 1.

⁴⁰ Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 8; As an exception, see the measures vis-à-vis third countries according to Calliess, in: Calliess/Ruffert, 5th edition, 2016, Article 196 TFEU, para. 4.

d) Article 222 TFEU

(21) Article 222 TFEU establishes the competence to act in solidarity in the event of terrorism and disasters.⁴¹ This provision too relates to Union support for Member States or to support between Member States,⁴² so it is likewise not applicable to maritime rescue of third-country nationals. This support must also be provided within the territory of the requesting Member State. This is not the case with maritime rescue, which often does not take place within the coastal waters of a Member State and therefore not within its territory⁴³.

e) Article 352 TFEU

(22) Article 352 TFEU lays down a flexibility clause. This is a supplementary competence clause which partly circumvents the principle of the conferral of powers⁴⁴ by referring to existing competences and objectives of the European Union. However, any exclusive connection to the objectives of the Union under Article 3(1) TEU is ruled out.⁴⁵ Further connection factors outside Articles 2 and 3 TEU are thus already out of the question. Moreover, this provision is not pertinent from the outset because competence is established under Article 214 TFEU, as will be demonstrated.

2. Scope of Article 214 TFEU

(23) The question arises as to whether a maritime rescue operation as a European Union measure can be based on Article 214 TFEU. This is the key provision of the chapter on ‘Humanitarian Aid’. It reads as follows:

‘1. The Union’s operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union. Such operations shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union’s measures and those of the Member States shall complement and reinforce each other.

2. Humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination.

⁴¹ For details, see Ohler, in: Streinz, 3rd edition, 2018, Article 222 TFEU, para. 3 ff.

⁴² Ohler, in: Streinz, 3rd edition, 2018, Article 222 TFEU, para. 5 ff.

⁴³ See Article 2(1) of the 1982 Convention on the Law of the Sea.

⁴⁴ According to Rossi, in: Calliess/Ruffert, 5th edition, 2016, Article 352 TFEU, para. 14.

⁴⁵ 41. Declaration on Article 352 of the Treaty on the Functioning of the European Union.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures defining the framework within which the Union's humanitarian aid operations shall be implemented.

4. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in paragraph 1 and in Article 21 of the Treaty on European Union.

The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements.

5. In order to establish a framework for joint contributions from young Europeans to the humanitarian aid operations of the Union, a European Voluntary Humanitarian Aid Corps shall be set up. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall determine the rules and procedures for the operation of the Corps.

6. The Commission may take any useful initiative to promote coordination between actions of the Union and those of the Member States, in order to enhance the efficiency and complementarity of Union and national humanitarian aid measures.

7. The Union shall ensure that its humanitarian aid operations are coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system.'

a) Wording of Article 214(1) TFEU

(24) The wording of Article 214(1) TFEU suggests that the movements of refugees in overcrowded boats on the migration route in the Mediterranean are the consequence of a disaster, within the meaning of the provision, that make humanitarian aid essential. However, a uniform definition of the individual terms cannot be found either in the literature or in the case-law of the ECJ.

aa) Interpretation of the term 'disaster'

(25) First of all, it is necessary to examine whether the expression 'natural or man-made disasters' covers the groups of refugees who get into difficulties on the Mediterranean route to the European Union.

- (26) The expression ‘natural or man-made disasters’ is extremely broad, as it covers all events that have serious consequences for those affected and especially the civilian population.⁴⁶ The distinction drawn between natural and man-made disasters shows, in particular, that the cause of the disaster is less significant and that the focus is rather on the impact of the event. The German and French language versions are similar in this respect (DE: ‘Naturkatastrophe und vom Menschen verursachte Katastrophen’; FR: ‘catastrophes naturelles ou d’origine humaine’). This means that the term is formulated very broadly in every respect.
- (27) The grammatical interpretation can also be based on the definition in the European Consensus on Humanitarian Aid, which, as a joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the European Commission,⁴⁷ reflects the will of the legislator and formulates in detail the Union’s objectives, principles and guidelines with regard to humanitarian aid.⁴⁸ This means that the term can be defined with reference to the European Consensus. The joint statement employs a different term, ‘humanitarian crisis’, in its conditions for application. This is the umbrella term for natural and man-made disasters⁴⁹ and, accordingly, has the same meaning as the two terms in Article 214(1) TFEU. It broadens the notion of disaster to incorporate the fact that a humanitarian crisis always has serious consequences that are determined by a variety of factors. In addition, the Consensus already points out that one result of humanitarian crises is large numbers of displaced persons, both refugees and internally displaced persons.⁵⁰ This makes it clear that humanitarian crises and therefore the term ‘disaster’ should also cover disasters that lead to movements of refugees.
- (28) Another definition of the term ‘disaster’ can be found in the Civil Protection Decision. However, this decision was adopted on the basis of Article 196(2) TFEU⁵¹, so it must be seen in the context of the specific provision on civil protection. It comes up with its own definition of the term ‘disaster’: any situation which has or may have a severe impact on people, the environment or property, including cultural heritage.⁵² As examples of the disasters covered, the decision refers to the consequences of acts of terrorism, technological, radiological or

⁴⁶ See also Bartelt, in: Schwarze/Becker/Hatje/Schoo, 4th edition, 2019, Article 214 TFEU, para. 2.

⁴⁷ European Consensus on Humanitarian Aid, 2008/C 25/1, OJ C 25/1, 20.1.2008.

⁴⁸ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 6.

⁴⁹ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 8.

⁵⁰ European Consensus on Humanitarian Aid, 2008/C 25/1, OJ C 25/1, 20.1.2008, para. 2.

⁵¹ Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism (OJ L 347, 20.12.2013, p. 924).

⁵² Article 4(1) of Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism (OJ L 347, 20.12.2013, p. 924).

environmental disasters, marine pollution and acute health emergencies.⁵³ As regards the term ‘disaster’, a proviso is entered to the effect that not every form of significant harm to a person that is caused by humans is covered by the term ‘disaster’ within the meaning of Article 196 TFEU. Instead, a distinction is made here between a disaster within the meaning of this provision and events justifying humanitarian aid by the Union. These include genocide and mass murder, pogroms and expulsions.⁵⁴ Since Article 214 TFEU is specifically intended to cover the provision of humanitarian aid, the proviso simply does not apply, as the purpose of the aid, as will be demonstrated, goes beyond civil protection and is independent of it.

- (29) Refugees in distress at sea are covered by the term ‘man-made disaster’. This is because the reasons for fleeing usually fall under the definition of ‘disaster’. The term specifically covers the consequences of war and armed conflict.⁵⁵ Migration flows can regularly be traced back to the need to flee wars and armed conflicts.⁵⁶ In accordance with the term ‘disaster’, other reasons for fleeing also include emergencies that create humanitarian needs.⁵⁷ These very reasons force those affected to flee and to accept the very real risk inherent in boarding overcrowded and poorly equipped boats that regularly get into distress. The distress of refugees at sea is therefore always the consequence of events in third countries. These flows of people are therefore covered by the term ‘man-made disaster’.⁵⁸
- (30) The actual distress of refugees at sea is also covered by the term ‘disaster’. The distress itself also creates humanitarian needs, specifically the need to initiate life-saving measures. Accordingly, both points of reference, namely the reason for fleeing and the distress at sea as it is occurring, meet the criteria to be covered by the term ‘disaster’ within the meaning of Article 214(1) TFEU.

⁵³ Article 1(2) of Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism (OJ L 347, 20.12.2013, p. 924).

⁵⁴ Nettesheim, in: Grabitz/Hilf/Nettesheim, TFEU, 70th supplement, October 2020, Article 196 TFEU, para. 14.

⁵⁵ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 9.

⁵⁶ According to <https://www.uno-fluechtlingshilfe.de/informieren/fluchtursachen/>, last accessed on 10 September 2020; also then Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 11.

⁵⁷ See also Schmalenbach, in: Calliess/Ruffert, 5th edition, 2016, Article 214 TFEU, para. 2.

⁵⁸ See, for example, the assistance with dealing with the refugee crisis in Syria and the provision of humanitarian aid to the countries that have taken in refugees (Lebanon, Jordan and Turkey) in: *Report from the Commission to the European Parliament and the Council – Annual Report of the European Union’s humanitarian aid and civil protection policies and their implementation in 2015*, COM(2016) 751 final of 1 December 2016, p. 7 ff.; see also Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 11.

bb) Material scope: interpretation of the term ‘Union’s operations in the field of humanitarian aid’

(31) The term ‘Union’s operations in the field of humanitarian aid’ in Article 214 TFEU is to be interpreted broadly in view of the objectives set and is intended primarily to cover measures to alleviate the acute needs of those affected by natural or man-made disasters by providing them with assistance, relief and protection on the spot.⁵⁹ The German and French language versions are equally broad in this regard (DE: ‘Maßnahmen der Union im Bereich der humanitären Hilfe’; FR: ‘actions de l’Union dans le domaine de l’aide humanitaire’). Humanitarian aid therefore serves to avert acute emergencies.⁶⁰ Various measures are covered, as can be seen from the broad term ‘Union’s operations’. This makes it clear that the focus is on the suitability of a measure to achieve the objectives and that the primary thrust of the operation can justify a range of measures.⁶¹ In particular, the wording is not limited to purely financial measures. On the basis of the wording, therefore, both operational and financial measures can be envisaged, which are geared in each case to the specific humanitarian needs of those affected.

cc) Human scope: interpretation of the term ‘people in third countries’

(32) The human scope of the provision is characterised by the fact that assistance, relief and protection is to be granted to the inhabitants of third countries. This means that all refugees from third countries are covered by this scope. The English version of the provision suggests that those in need of protection must remain in the third country concerned and that the humanitarian aid must be provided within the territory of that third country. However, a comparison with other language versions reveals that this could be an editorial mistake, as the others all refer to the origin of those affected from third countries (DE: ‘Einwohner [...] von Drittländern’; FR: ‘aux populations des pays tiers’; ES: ‘a las poblaciones de los terceros países’; IT: ‘alle popolazioni dei paesi terzi’). The purpose of the provision will also and in particular show that the whereabouts of the person seeking protection when the assistance is provided is irrelevant.

⁵⁹ Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 21; Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 21.

⁶⁰Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 20.

⁶¹ See also Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 21.

b) Structure of Article 214 TFEU

- (33) The term ‘disaster’ also appears in Article 196 TFEU (‘natural disasters’ / ‘man-made disasters’). Even if it were to be assumed that the term in Article 196 TFEU is to be interpreted narrowly⁶² and the distress of refugees at sea is not covered by the term, this does not rule out a broader interpretation of the term in relation to Article 214 TFEU.
- (34) A different assessment of the term ‘disaster’ in relation to civil protection and humanitarian aid is suggested by the positioning of the provisions governing civil protection, on the one hand, and humanitarian aid, on the other. In the case of humanitarian aid, the provision is a stand-alone chapter.⁶³ Article 196 TFEU is in Part Three of the TFEU, which governs Union policies and internal actions. Article 214 TFEU, on the other hand, is in Part Five of the TFEU, which concerns the Union’s external action. An interpretation of this provision must therefore take particular account of the general objectives of the Union’s external action.
- (35) Under Article 21(2)(b) TEU, the objectives of foreign policy in particular include the promotion of democracy, human rights and the rule of law. The mere mention of human rights implies that an individual who is affected by a natural or man-made disaster is entitled to protection and dignity. At the same time, the foreign policy objective under Article 21(2)(g) TEU requires the Union to assist populations, countries and regions confronting natural or man-made disasters.⁶⁴ As the core provision on humanitarian aid, which forms a stand-alone chapter,⁶⁵ the provision must therefore be interpreted broadly, primarily reflecting this general objective of the Union’s external action.

c) Genesis of Article 214 TFEU

- (36) Article 214 TFEU has no predecessor. In fact, prior to the Treaty of Lisbon, humanitarian aid in third countries was provided in the context of development cooperation, as set out in Article 208 TFEU and Article 209 TFEU (ex Article 179 of the Treaty establishing the European Community, ECT), or on the basis of association agreements, as referred to in

⁶² See, for example, the analysis by the German Bundestag, *Möglichkeiten für eine staatliche zivile Seenotrettung der Europäischen Union*, PE 6 – 3000 – 094/19 of 18 November 2019; Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 22, which also, however, identifies a difference in the fact that humanitarian aid focuses on the *consequences* of a disaster; For a comparison, see Nettesheim, in: Grabitz/Hilf/Nettesheim, 70th supplement, 2020, Article 196 TFEU, para. 14; on the civil protection decision based on Article 196(2) TFEU, see also under C.II.2.a)aa) with regard to the wording.

⁶³ Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 7.

⁶⁴ See also Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 9.

⁶⁵ Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 5.

Article 217 TFEU (ex Article 310 ECT).⁶⁶ This meant, however, that the provision of humanitarian aid was tied to the status of the third country as a developing country and aid could only be granted to such countries.

- (37) A dedicated legal basis for humanitarian aid was first drawn up in Article III-321 of the Treaty establishing a Constitution for Europe.⁶⁷ Its wording is virtually identical to that of Article 214 TFEU⁶⁸ and it was intended to provide a basis for the provision of humanitarian aid beyond this limitation concerning the origin of the recipients. It is already clear from this that the genesis of this provision always focused primarily on the extension of the scope of humanitarian aid to other situations and other third countries. EU competence in the area of humanitarian aid was therefore to be broadened beyond the existing competences, in order to supplement the competence of the Member States themselves. Accordingly, the genesis already points to the extension of the scope of the provision to cover other and unforeseen humanitarian emergencies.⁶⁹

d) Purpose of Article 214 TFEU

- (38) The main objective of humanitarian aid finds expression in the trinity of ‘assistance and relief and protection’.⁷⁰ The European Union’s specific mission is therefore to cover the humanitarian needs resulting from emergencies.⁷¹ A primary concern is the objective of mitigating the consequences of a disaster for the population.⁷² This means that the person in need is the focus of the aid to be provided.⁷³ The mission thus even goes beyond protection to guarantee survival and implies protection of the dignity of those affected by a disaster.⁷⁴

⁶⁶ Schmalenbach, in: Calliess/Ruffert, 5th edition, 2016, Article 214 TFEU, para. 1; Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 4.

⁶⁷ Treaty establishing a Constitution for Europe, as signed in Rome on 29 October 2004 and published in the Official Journal of the European Union (C series, No 310) on 16 December 2004.

⁶⁸ On minor changes, see Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 4 f.

⁶⁹ See also Schmalenbach, in: Calliess/Ruffert, 5th edition, 2016, Article 214 TFEU, para. 2.

⁷⁰ Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 12; Schmalenbach, in: Calliess/Ruffert, 5th edition, 2016, Article 214 TFEU, para. 4.

⁷⁰ Schmalenbach, in: Calliess/Ruffert, 5th edition, 2016, Article 214 TFEU, para. 2; Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 12.

⁷¹ Schmalenbach, in: Calliess/Ruffert, 5th edition, 2016, Article 214 TFEU, para. 2; Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 20.

⁷² Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 22.

⁷³ Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 9.

⁷⁴ See, in particular, European Consensus on Humanitarian Aid, 2008/C 25/1, OJ C 25/1, 20.1.2008, para. 8; Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 12.

- (39) Humanitarian aid must therefore be distinguished from civil protection within the meaning of Article 196 TFEU. The main difference is that, unlike civil protection, humanitarian aid is not designed to prevent or address the consequences of a natural or man-made disaster as such.⁷⁵ In addition, humanitarian aid must be distinguished from European Union instruments for development cooperation and post-crisis management within the framework of the common foreign and security policy, which target long-term economic or political rebuilding.⁷⁶
- (40) A maritime rescue mission in the Mediterranean is very much a form of assistance in acute emergencies, which is explicitly envisaged as humanitarian aid. Only rescue from distress at sea can safeguard and protect the basic needs of the individual. The legislative act already adopted on the basis of Article 214(3) TFEU is also consistent with this. The Humanitarian Aid Regulation⁷⁷ itself, in Article 2(e) of the chapter on the objectives and general principles of humanitarian aid, stipulates that the actions carried out in the context of humanitarian aid are intended, among other things, ‘to cope with the consequences of population movements (refugees, displaced people and returnees) caused by natural and man-made disasters’. The purpose thus covers the very act of protecting refugees in distress at sea on the migration route. This is also reflected in the fact that humanitarian aid to address the problems caused by movements of refugees has already repeatedly been granted on the basis of Article 214 TFEU and the relevant regulation.⁷⁸
- (41) The purpose of averting acute emergencies also argues in favour of a broad interpretation of the term ‘operation’ itself. If the specific humanitarian aid serves to provide ‘assistance and relief and protection’, operations of any nature are covered by the provision.⁷⁹ These include both direct relief efforts to save lives and measures to prepare humanitarian aid and to ensure that it is provided effectively.⁸⁰ A restriction of the scope to financial measures is certainly not to be inferred from the provision. Measures within the meaning of Article 214 TFEU may therefore be both operational and financial in nature.⁸¹

⁷⁵ See also Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 14.

⁷⁶ Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 20; Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 23.

⁷⁷ Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid (OJ L 163, 2.7.1996, p. 1).

⁷⁸ For the cases of Libya, Yemen and Japan, see Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, paras 22 and 27.

⁷⁹ See Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU, para. 12.

⁸⁰ Schmalenbach, in: Calliess/Ruffert, 5th edition, 2016, Article 214 TFEU, para. 3.

⁸¹ See also Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 5.

e) Interim conclusion

(42) The interpretation of Article 214 TFEU shows that refugees who, fleeing for whatever reason, embark on the migration route in the Mediterranean and get into difficulties at sea on this route are covered by the already broad term ‘disaster’. What is particularly relevant for the purposes of humanitarian aid is whether the consequences of a man-made or natural disaster require humanitarian aid from the Union. At the same time, distress at sea, which occurs regularly, already constitutes a disaster of this nature. It is irrelevant, however, whether the refugees are in the territory of a third country when assistance is provided. The actions that the Union takes may be both operational and financial.

3. Conditions governing and limits of maritime rescue operations

(43) Humanitarian aid under Article 214 TFEU lays down a number of conditions governing the organisation of maritime rescue operations. The options include measures to finance a maritime rescue operation and operational measures in connection with maritime rescue; these may be stand-alone or coordinating measures.

a) Conditions regarding Article 214 TFEU

(44) Article 214 TFEU lays down a number of conditions governing the exercise of competence and substantive requirements which must be met by maritime rescue measures that rely on this legal basis.

aa) Conditions governing the exercise of competence

(45) Article 214(3) TFEU serves as a legal basis for the establishment of a framework under secondary law for the provision of humanitarian aid.⁸² The ordinary legislative procedure pursuant to Article 294 TFEU applies.

(46) This competence is exercised as a parallel competence of the Union and the Member States. It must be consistent with the principle of subsidiarity as set out in Article 5(3) TEU and the principle of proportionality as set out in Article 5(4) TEU.

(1) Parallel competence of the Union and the Member States

(47) The legislative competence of the Union is in addition to the competence of the Member States, which may also act in this area, such that it is designed as a parallel competence within the

⁸² See Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 2.

meaning of Article 4(4) TFEU.⁸³⁸⁴ If both the European Union and the Member States take action, coordination must take place pursuant to Article 214(6) TFEU.⁸⁵ Accordingly, the Union's measures and those of the Member States should complement and reinforce each other, as stipulated in Article 214(1), third sentence, TFEU. This parallel competence relates not only to legislative power, but also to external action, as made clear in Article 214(4), subparagraph 2.⁸⁶

(2) Exercise of competence in compliance with the principles of subsidiarity and proportionality

- (48) The principles of subsidiarity and proportionality may in this sense impose a limit on the Union's legislative power.
- (49) If the Union takes action, the principle of subsidiarity as set out in Article 5(3) TEU will apply to the parallel competence pursuant to Article 4(4) TFEU.⁸⁷ Compliance with the principle of subsidiarity is verified in two stages. Firstly, a negative conclusion must be drawn as to whether the objectives of the proposed measures could adequately be achieved by the Member States at central, regional or local level. After that, a positive answer must be given to the question of whether the measures could be better achieved at Union level owing to their scale or impact.⁸⁸
- (50) As regards the negative conclusion, it is clear that it would not be possible to carry out a maritime rescue operation adequately at Member State level on the migration route in the Mediterranean in view of the objective of the rescue.⁸⁹ In particular, individual Member States do not have the objective capabilities required to carry out such a comprehensive maritime rescue. Individual Member States have neither the equipment required nor the financial means to source such equipment.
- (51) As regards the positive answer, European action must offer added value.⁹⁰ In accordance with Article 5(3) TEU, this is assessed on the basis of whether the measures could be realised better at Union level owing to their scale or impact, and it is sufficient that one of these conditions is

⁸³ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 3.

⁸⁴ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 3; Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 32, 4.

⁸⁵ Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 32.

⁸⁶ Schmalenbach, in: Calliess/Ruffert, 5th edition, 2016, Article 214 TFEU, para. 7.

⁸⁷ Calliess, in: Calliess/Ruffert, 5th edition, 2016, Article 5 TEU, para. 27.

⁸⁸ Calliess, in: Calliess/Ruffert, 5th edition, 2016, Article 5 TEU, para. 30.

⁸⁹ On this criterion, see Calliess, in: Calliess/Ruffert, 5th edition, 2016, Article 5 TEU, para. 30.

⁹⁰ Langguth, in: Lenz/Borchardt, *EU-Verträge*, 6th edition, 2012, Article 5 TEU, para. 35.

met.⁹¹ The measure must constitute an improvement over action by the Member States.⁹² This must be assumed to be true for a maritime rescue operation carried out by the Union. Implementation at Union level could be on a significantly greater scale and therefore more effective, both operationally and financially, in particular as regards the scale of the individual measures.

- (52) Finally, the principle of proportionality within the meaning of Article 5(4) TEU must be taken into account when taking a further measure in the context of a maritime rescue operation. In this respect, the measures themselves must be appropriate, necessary and, in the narrower sense, proportionate.⁹³

bb) Substantive law requirements

Under substantive law, for the establishment of humanitarian aid operations based on Article 214 TFEU, humanitarian aid must be declared to be the sole objective of the measure, the third country's consent must be obtained, and international law and universal human rights must be upheld.

(1) Humanitarian aid as the sole objective of the measure

- (53) In the case of a measure based on Article 214 TFEU, the humanitarian objective must not be only one of several objectives pursued. Instead, the sole purpose of the humanitarian aid must be to prevent or alleviate the suffering of the victims of humanitarian crises.⁹⁴ In particular, this objective must not be subordinate to political, economic, military or other objectives. Although this is not evident from the wording of Article 214(2) TFEU, it is explicitly stated in the European Consensus on Humanitarian Aid⁹⁵ and recognised as a criterion by the literature as an overriding principle of independence.⁹⁶ This means that humanitarian aid in the context of a maritime rescue operation cannot be provided as a 'secondary aspect' of a primarily political mission.⁹⁷

⁹¹ Kadelbach, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 5 TEU, para. 39.

⁹² Kadelbach, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 5 TEU, para. 40c.

⁹³ Calliess, in: Calliess/Ruffert, 5th edition, 2016, Article 5 TEU, para. 44.

⁹⁴ European Consensus on Humanitarian Aid, 2008/C 25/1, OJ C 25/1, 20.1.2008, para. 14.

⁹⁵ European Consensus on Humanitarian Aid, 2008/C 25/1, OJ C 25/1, 20.1.2008, para. 14.

⁹⁶ Hoffmeister, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 214 TFEU; para. 20; Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 31; Schmalenbach, in: Calliess/Ruffert, *TEU/TFEU*, Article 214 TFEU, para. 10.

⁹⁷ However, on the Union's obligation under international and Union law to perform a maritime rescue operation during a political mission, see under C.I.

(2) Consent of the third country

- (54) In the context of humanitarian aid, the consent of the third country is required in principle.⁹⁸ As a rule, however, movements of refugees cannot be traced back to one particular third country. It is often the case that groups of refugees in distress at sea come from several third countries. What is more, their point of departure is often not clearly identifiable.
- (55) With regard to the requirement of consent, however, the provision must undergo teleological reduction. A teleological reduction is also recognised in Union law in favour of individual persons.⁹⁹ Since it is not possible to obtain the consent of a particular third country, the existence or otherwise of such consent is irrelevant. It is intrinsic to the purpose of the provision of Article 214 TFEU on humanitarian aid that consent cannot be requested in cases where it is already not clear which third country is competent in this respect. Similarly, a third country cannot refuse humanitarian aid arbitrarily, provided that the offer of humanitarian aid is made in accordance with the principles of impartiality, neutrality and non-discrimination.¹⁰⁰ At all events, in view of the serious humanitarian emergency in the Mediterranean, the consent of those third countries in which the conditions prompting flight prevail can be assumed as a rule.

(3) Upholding international law and fundamental human rights

- (56) Pursuant to Article 214(2) TFEU, humanitarian aid operations by the European Union must be conducted in accordance with the principles of international law. This provision is more specific than the requirement to uphold international law laid down in Article 21(2)(b) TEU.¹⁰¹
- (57) In this regard, the obligation to render assistance at sea, which is already considered a rule of customary international law, must also be considered within the context of the Union's actions. Article 214(2) TFEU has constitutive importance beyond the existing commitment of the

⁹⁸ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 17 with reference to Resolution A/RES/46/182 and territorial sovereignty within the meaning of the UN Charter.

⁹⁹ On the admissibility of a teleological reduction in Union law, see, for example, Lenaerts/Gutiérrez-Fons, *Columbia Journal of European Law*, volume 20 (2014), 3 (36); Konrad, *Rechtfortbildung durch den EuGH: Eine rechtsmethodische Untersuchung ausgehend von der deutschen und französischen Methodenlehre*, p. 181 ff.; Germelmann, in: Danner/Theobald, *Energierecht, Internationaler Investitionsschutz im Energierecht, Energiecharta-Prozess und Energiecharta-Vertrag*, 2019, para. 141; Schleissing, *Möglichkeiten und Grenzen vergaberechtlicher In-House-Geschäfte*, 2011, p. 222; in addition, the Opinions of various Advocates General: Advocate General La Pergola, Opinions of 19 February 1998, Case C-360/96 (*Municipality of Arnhem*) para. 21 ff.; Advocate General Alber, Opinions of 18 March 1999, Case C-108/98 (*RI.San*), para. 46 ff.; Advocate General Trstenjak, Opinions of 8 September 2009, Case C-215/08 (*Friz GmbH v Carsten von der Heyden*) para. 98.

¹⁰⁰ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 17.

¹⁰¹ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 15.

European Union to uphold customary international law¹⁰² for those cases in which the Union does not provide humanitarian aid itself but rather through non-governmental or international organisations, as the European Union must therefore ensure that these organisations too uphold the principles of international law.¹⁰³

- (58) The European Consensus on Humanitarian Aid requires the European Union in particular to respect and promote the humanitarian principles of humanity, neutrality, impartiality and independence. The principle of humanity means that ‘human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population’.¹⁰⁴ Accordingly, humanitarian aid is a central expression of the principle of humanity under international law.¹⁰⁵ The Consensus also states that the European Union ‘will advocate strongly and consistently for the respect of International Law, including International Humanitarian Law [...], Human Rights Law and Refugee Law’.¹⁰⁶
- (59) It follows from this review of the provisions of the European Consensus that humanitarian aid measures must be consistent with the European Union’s obligations under international law and in particular with human rights.

b) Measures to finance a maritime rescue operation

- (60) The European Union is not currently carrying out humanitarian aid operations itself, but is merely financing them.¹⁰⁷ Responsibility for humanitarian aid and civil protection abroad lies with the European Commission’s Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO), formerly the European Community Humanitarian Office. As regards secondary legislation, Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid¹⁰⁸ provides the framework for humanitarian aid operations. This states that the Commission is responsible for allocating, mobilising and implementing humanitarian aid (Article 11 of Regulation (EC) No 1257/96). The decisions taken in this

¹⁰² See, in particular, Damm, *Die Europäische Union im universellen Völkergewohnheitsrecht*, 2016.

¹⁰³ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 15; Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 26.

¹⁰⁴ European Consensus on Humanitarian Aid, 2008/C 25/1, OJ C 25/1, 20.1.2008, para. 10 f.

¹⁰⁵ Bungenberg, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th edition, 2015, Article 214 TFEU, para. 27.

¹⁰⁶ European Consensus on Humanitarian Aid, 2008/C 25/1, OJ C 25/1, 20.1.2008, para. 16.

¹⁰⁷ Glombik, in: *Verwaltungsrechtschau* 2019, 159 (162); Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 20.

¹⁰⁸ Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid (OJ L 163, 2.7.1996, p. 1).

context by the Commission constitute implementing acts in accordance with Article 291(2) TFEU.¹⁰⁹

aa) Purposes

(61) Article 3 of Regulation (EC) No 1257/96 sets out the possible uses for humanitarian aid provided by the Union. These include the purchase and delivery of any product or equipment needed to carry out humanitarian operations; the costs for auxiliary personnel; the construction of housing or shelter for victims; the storage, transport and distribution of aid; any other action designed to facilitate or secure unrestricted access to aid recipients and any other expenditure directly linked to the conduct of humanitarian operations. Article 4 of Regulation (EC) No 1257/96 extends the possible uses to include measures to enhance the coordination of EU action with that of the Member States, other donor countries, international humanitarian organisations and institutions, non-governmental organisations and organisations representing them. In this respect, missions in the Mediterranean to rescue refugees in distress at sea can be financially supported by the Union as regards equipment required, human resources and funds needed to coordinate the rescue measures, provided that they are consistent with the criteria set for granting support.

bb) Terms for granting financial support

(62) Pursuant to Article 6 of Regulation (EC) No 1257/96, humanitarian aid operations financed by the Union may be implemented either at the request of international or non-governmental agencies or organisations from a Member State or a recipient third country or on the initiative of the Commission. Article 7 of Regulation (EC) No 1257/96 then establishes criteria that the non-governmental organisation must meet. It states that the organisation must be a non-profit-making autonomous organisation under the laws in force in the Member State concerned. The organisation must also have its main headquarters in a Member State of the Union. Article 7 of Regulation (EC) No 1257/96 also specifies the factors that must be taken into account when deciding whether to grant Union funding, including technical and logistical capacity, experience in the field of humanitarian aid, and the ability and readiness to work with other agencies. Pursuant to Articles 8 and 9 of Regulation (EC) No 1257/96, the Union may also finance humanitarian operations by international agencies and organisations and those by the Commission or by the Member States' specialised agencies.

¹⁰⁹ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 20.

(63) A central requirement for financing humanitarian activities by non-governmental organisations and international organisations is the conclusion of a Framework Partnership Agreement (FPA) pursuant to Article 16(2) of Regulation (EC) No 1257/96.¹¹⁰ This agreement sets out the specific rules and conditions governing the financing of humanitarian operations.¹¹¹ The Commission is assisted by a committee which, in accordance with Article 17(1) of Regulation (EC) No 1257/96, is composed of representatives of the Member States and chaired by the representative of the Commission. Under Article 16 of Regulation (EC) No 1257/96, the Commission has certain reporting obligations vis-à-vis the committee. Decisions on emergency investments of up to EUR 10 million are taken by the Commission alone, pursuant to Article 13 of Regulation (EC) No 1257/96.

c) Measures to establish a maritime rescue operation

(64) The fact that, in accordance with the law as it stands, the Union currently merely provides financial support to non-governmental organisations in the field of humanitarian aid does not preclude the Union from taking other action on the basis of Article 214 TFEU. In particular, it is conceivable that Parliament and the Council might establish the conditions for Union intervention at secondary legislation level using the ordinary legislative procedure in accordance with Article 214(3) TFEU. With regard to the exercise of competence and the specific choice of measures, the Union legislator has broad discretionary powers.¹¹²

aa) Independent measures

(65) Firstly, it would be possible for the European Union itself to conduct a maritime rescue operation. This would require the definition of a framework in a legislative act adopted pursuant to Article 214(3) TFEU. Accordingly, the European Union would need to acquire the vessels and equipment needed to conduct maritime rescue operations and would have to decide to conduct such an operation for the sole purpose of maritime rescue in the Mediterranean in accordance with the conditions set out. Lastly, this would require funding from the budget.

bb) Coordinating and support measures

(66) It is also conceivable that the European Union could simply provide the Member States with coordination and support. However, this would require the Member States to establish a mission like Operation Mare Nostrum. The provision makes explicit allowance for such coordinating

¹¹⁰ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 22.

¹¹¹ Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 22.

¹¹² Bungenberg, in: von der Groeben/Schwarze/Hatje, 7th edition, 2015, Article 214 TFEU, para. 21.

action as, under Article 214(6) TFEU, the Commission may take any useful initiative to promote coordination between actions of the Union and those of the Member States, in order to enhance the efficiency and complementarity of Union and national humanitarian aid measures. Accordingly, the coordination of separate rescue missions initiated by the Member States in the Mediterranean is possible.

- (67) There is also scope for similar cooperation with international organisations, as Article 214(4) TFEU states that the Union can conclude with third countries and competent international organisations any agreement that helps to achieve the objectives referred to in Article 214(1) TFEU. However, the cooperation partner must be subject to international law,¹¹³ so cooperation with NGOs is ruled out.
- (68) A system for coordinating aid provided by several Member States and organisations could, for example, be implemented within the framework of support by the Maritime Rescue Coordination Centres (MRCC). These centres provide a point of contact in connection with maritime emergencies and accidents. They are each responsible for a specific geographical area as a search and rescue region of responsibility (SRR or SAR region), within which they provide assistance to anyone in distress at sea. The establishment of such centres serves, in particular, to meet the obligation incumbent on coastal States, as set out in Article 98(2) UNCLOS¹¹⁴ and in accordance with the Convention on Maritime Search and Rescue,¹¹⁵ to promote the establishment, operation and maintenance of an adequate and effective search and rescue service.¹¹⁶ On that basis, support services for individual coastal States are also conceivable.

d) Coalition of willing parties

- (69) If not all Member States show a willingness to participate in humanitarian aid efforts with regard to measures to finance or conduct a maritime rescue operation, enhanced cooperation under Article 20 TEU is an option. In this respect, the first condition governing enhanced cooperation is met, as humanitarian aid is not an exclusive competence of the European Union, but rather a parallel competence.¹¹⁷ In addition, the conditions laid down in Articles 326 to 334 TFEU would have to be met, a minimum of nine Member States would have to participate and the Council would have to decide to authorise enhanced cooperation.¹¹⁸ However, pursuant

¹¹³ See Streinz/Kruis, in: Streinz, 3rd edition, 2018, Article 214 TFEU, para. 24.

¹¹⁴ United Nations Convention on the Law of the Sea of 10 December 1982.

¹¹⁵ International Convention on Maritime Search and Rescue of 1 November 1979.

¹¹⁶ See also Lenk, in: *Heidelberg Journal of International Law (HJIL)* 2019, 713 (716).

¹¹⁷ See Schmalenbach, in: Calliess/Ruffert, 5th edition, 2016, Article 214 TFEU, para. 7.

¹¹⁸ On the conditions, see Blanke, in: Grabitz/Hilf/Nettesheim, 70th supplement, October 2020, Article 20 TEU, para. 31 ff.; Ruffert, in: Calliess/Ruffert, 5th edition, 2016, Article 20 TEU, para. 14 ff.

to Article 20(2), first sentence, TEU, enhanced cooperation may only replace Union-wide measures as a last resort.¹¹⁹

(70) Accordingly, the individual Member States may decide either to take financial measures to fund organisations that perform maritime rescue or to conduct a maritime rescue operation.

¹¹⁹ In this respect, see Streinz, in: Streinz, Article 20 TEU, para. 13; Ruffert, in: Calliess/Ruffert, 5th edition, 2016, Article 20 TEU, para. 21.