

THE WATERY FATE OF ASYLUM SEEKERS IN THE MEDITERRANEAN SEA:
SEARCHING RESPONSIBILITIES AND RESCUING RIGHTS
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Although several branches of international law impose a number of obligations on States wherever they may act and attribute clear rights to individuals regardless of status and location, their effective implementation is being hurdled by the manner in which border surveillance is being carried out, particularly at sea. In recent times the Mediterranean has become the theatre of the humanitarian tragedy of 'boat people' fleeing persecution and other human rights abuses at home. However, the portrayal of escapees as a threat to public order and stability has been used to dilute responsibilities in their regard. The discourse in EU Member States of destination has served to confound all categories of unwanted immigrants, be they asylum seekers, illegal entrants or terrorists, thereby inverting the risk equation as far as refugees are concerned: instead of focusing on the protection owed to people whose life and security is threatened, the issue is displayed as those people embodying a threat to national security. Attention is accordingly reverting from humanitarianism into migration control; and the emphasis located not so much in what it is owed to protection seekers found at sea, but instead on deterrent strategies of diversion and containment. To wit, while responsibilities shrink, the scope of controlling powers expands into the high seas and the territory of States of origin and transit. Meanwhile, lives are lost at sea.

Against this background, the European Commission has suggested the drafting of 'common guidelines' to devise a regional solution for those found in the Mediterranean.¹ Yet, negotiations are on a halt precisely because of the *refugee factor*. States fear that solving the question of concrete definition of obligations and allocation of responsibilities may constitute a major pulling stimulus for both genuine protection seekers and opportunists to try to come to us.² Leaving both obligations and responsibilities unclear, rights obscure too.

In this Wine & Discussion session I would thus like to deal with the matter of identifying obligations and responsibilities pertaining to EU Member States intercepting migrants at sea. In so doing, I will proceed in three steps: first describing the facts, then the content of obligations and finally identifying responsibility in each case.

(1) Three sets of actions that are being undertaken in the belief that they conform to applicable law merit attention: interception at own territorial waters, interception in the high seas and interception within the territorial waters of an African neighbor. Examples from other constituencies that have experimented with similar interception programs, such as the US and Australia, may come to enrich the description.

(2) Having identified the factual setup, three sets of rules become particularly relevant to the case: international maritime law, international refugee law and human rights. In this connection, the content of the obligations of search and rescue and that of *non-refoulement* (under both refugee law and human rights) will need to be elucidated, as they constitute the keystone of subsequent protection. We shall also need to discuss the range of concomitant positive obligations ensuing therefore. Search and rescue obligations have recently been completed by a concurrent duty of intergovernmental co-operation for the delivery of rescuees to a 'place of

¹ European Commission, Staff Working Document, *Study on the international law instruments in relation to illegal immigration by sea*, SEC(2007) 691 final, 15.05.2007. A working group was established in the summer of 2007 for the purpose of developing general guidelines on the application of the law of the sea and the prohibition of *refoulement*. But, results are still to be achieved.

² European Union Committee of the House of Lords, 'FRONTEX: the EU external borders agency,' 9th Report of Session 2007-2008, §115: 'The way in which we interpret burden sharing is that we do not think we should be moving people around. We think that would create an enormous pull factor that would compound the problem rather than resolve it.'

safety', possibly causing disembarkation. On the other hand, very literate doctrine considers that full respect of the obligation of *non-refoulement* comprises previous status determination, to make sure that non-removable aliens are not returned. This translates in the necessity of providing access to full qualification procedures subject to judicial review as appropriate. Interrogations may arise as for *where* such access should be provided and which guarantees the procedure should afford.

(3) Once we have defined *in abstracto* the content of the obligations that may be potentially engaged, crucial will be to determine whether *in concreto* intercepting activities may actually result in triggering State responsibility. As responsibility necessitates a previous exercise of jurisdiction, the first thing to analyze is whether each of these actions entails 'authority and control' in a degree susceptible of engaging State responsibility. EU Member States usually make a reading of their human rights' and refugee law obligations as having solely territorial relevance. They sustain accordingly that actions undertaken beyond strict territorial confines do not disclose accompanying responsibilities for eventual breaches of individual rights. Even within geographical dominium EU Member States invoke legal fictions to disenfranchise refugees of their entitlement to protection by, for instance, distinguishing between 'physical' presence and 'legal' presence or creating 'border zones' where only diminished procedural guarantees apply. Hence it is of primordial importance to establish the correctness of this construction. In tracing States' jurisdiction, recourse will be made to international jurisprudential accounts. Following, especially, the elaborated dicta of the European Court of Human Rights it will become plain whether international instruments of humanitarian content are applicable to extraterritorial interdiction activities and whether they entail jurisdiction and eventually responsibility on the part of the intercepting State for the obligations previously identified.