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INTERNATIONAL LAW AND PRACTICE

The Principle of *Non-Refoulement* And the De-Territorialization of Border Control at Sea

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Abstract
Destination states of irregular migration aim to prevent arrivals by controlling their borders outside their territory, specifically on the high seas. This practice may best be described as the de-territorialization of border control at sea. The de-territorialization impacts the applicable legal framework, in particular the safeguards to which individuals submitted to the control activities are entitled. This article posits that the principle of *non-refoulement* is a fundamental yardstick for the de-territorialization of border control and applies wherever competent state authorities perform border control measures. The argument develops in four steps. After outlining the content of the principle of *non-refoulement*, this article defines maritime borders and elucidates their functional nature. It then outlines how the principle of *non-refoulement* applies at sea and translates into a 'principle of non-rejection at the maritime frontier'. The article finally highlights the principle's legal and practical consequences in the context of de-territorialized border control.

Key words
de-territorialization; functional jurisdiction; irregular migration; maritime border; non-refoulement

1. INTRODUCTION

Migratory flows by sea are not a new phenomenon and, since the Indochinese crisis[1] in the 1970s, they are well known under the expression 'boat people'. In the past, sea-borne migratory flows consisted of isolated episodes, of emergency waves related to specific historical events.[2] For the last twenty years arrivals by sea have become

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1 We refer to the Indochinese crisis in relation to the movement of refugees coming from the former French Indochina in consequence of armed conflict situations, as in Vietnam, and the emergence of the dictatorial regime, as in Cambodia. A. Lakshmana Chetty, 'Resolution of the Problem of Boat People: The Case of A Global Initiative', (2001) 1 ISIL *Yearbook of International Humanitarian and Refugee Law* 144.

2 We refer again to the above mentioned Indochinese crisis (*Opening Statement by the United Nations High Commissioner for Refugees, in Consultative Meeting with Interested Governments on Refugees and Displaced Persons in South East Asia*, Geneva, 11–12 December 1978, available at <www.unhcr.org>), but also to the two Haitian crises (see, inter alia, S. H. Legomsky, 'The USA and the Caribbean Interdiction Program', (2006) 18 *International Journal of Refugee Law* 677) and the Albanian crisis in the late Nineties (A. de Guttry and F. Pagani (eds.), *La Crisi Albanese del 1997* (1999)).

a regular phenomenon, in particular along the coasts of the Mediterranean Sea and of Australia.[3] This phenomenon has varied according to the seasons, and has been influenced by specific events, which have increased the number of arrivals for a period of time.[4] The sea has then become a regular route for migration and it is undoubtedly one of the most dangerous ones. In the year 2011 alone, it is estimated that 1,500 people have died trying to cross the Mediterranean;[5] according to Fortress Europe, over 18,535 people have died attempting these crossings since 1988.[6]

In dealing with this human tragedy, destination states have adopted comparable policies aimed at preventing the arrival of irregular migrants by performing border control outside their territory. States of destination have commonly used measures such as (joint) patrolling, interception of irregular migrants[7] on the high seas and in the territorial waters of third states,[8] and redirection of intercepted migrants to the coasts of third states. These practices are part of 'de-territorialized border control'.

By 'de-territorialization', we mean 'the detachment of regulatory authority from a specific territory'.[9] It might seem paradoxical to talk about 'de-territorialized borders', considering that borders traditionally define states' territories.[10] However, the current practice of extra-territorial border control, i.e. controls performed (directly or indirectly) by a state outside its own territory,[11] shows a progressive shift from a territory-based regime to a function-based regime with no '*a priori* territorial

3 For a comment on Australian policy and recent practice, see S. Taylor and B. Rafferty-Brown, 'Waiting for Life to Begin: The Plight of Asylum Seekers Caught by Australia's Indonesian Solution', (2010) 22 *International Journal of Refugee Law* 558; T. Wood and J. McAdam, 'Australian Policy All at Sea: Analysis of *Plaintiff M70/2011 v. Minister for Immigration and Citizenship* and the Australia–Malaysia Arrangement', (2012) 61 ICLQ 274.

4 For instance, the so-called Arab Spring in 2011 heightened the number of departures from Libya and Tunisia; see Frontex, 'FRAN Quarterly, Issue 3, July–September 2011', at 12, available at <www.frontex.europa.eu/publications>.

5 Council of Europe, Parliamentary Assembly, 'Lives Lost in the Mediterranean Sea: Who is Responsible', Resolution 1872 (2012), 24 April 2012; UNCHR, 'Mediterranean Takes Record as Most Deadly Stretch of Water for Refugees and Migrants in 2011', Briefing Notes, 31 January 2012.

6 Available at <www.fortresseurope.blogspot.it/p/la-strage.html>.

7 The UNHCR defines 'interception' as 'one of the measures employed by States to i. prevent embarkation of persons on an international journey; ii. prevent further onward international travel by persons who have commenced their journey; iii. or assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law; where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner'; UNCHR ExCom, Conclusion No. 97 (LIV) 2003.

8 The analysis of the patrolling activities in the territorial waters of third states (on the basis of an agreement) will be excluded from the scope of the present article because, even if they give rise to interesting legal issues (e.g. the complicity of the intervening state with the territorial state for human rights violations, alleged violations of the right to seek asylum and the right to emigrate), it is not relevant in order to assess the application of the principle of *non-refoulement* in the context of migration by sea. In those instances, the migrants have not yet left the territory of the state of origin or residence; thus, they are still submitted to its jurisdiction. In those instances, violations of the right to emigrate might be perpetrated; see C. Harvey and R. P. Barnidge Jr., 'Human Rights, Free Movement, and the Right to Leave in International Law', (2007) 19 *International Journal of Refugee Law* 1; S. Juss, 'Free Movement and the World Order', (2004) 16 *International Journal of Refugee Law* 289.

9 C. Brölmann, 'Deterritorialization in International law: Moving Away from the Divide Between National and International Law', in J. Mijman and A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (2007), at 86.

10 See below section 3.1.1.

11 On the issue, see inter alia, A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operation at Sea', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010) 229; E. Guild and D. Bigo, 'The Transformation of European Border Control', ibid., at 257, where the

limitation'.[12] Border control does not only consist of checking measures performed at the points of territorial access, but it includes a range of activities, which are not performed at the borders but which are functional to their control. Border control has been detached from the territorial border.

This detachment has consequences on the applicable legal framework, in particular in relation to the safeguards to which the individuals submitted to the control activities are entitled. For instance, the aforementioned activities aimed at contrasting irregular migration by sea have been highly criticized by scholars,[13] practitioners,[14] and civil society,[15] because they challenge the fundamental rights of the intercepted irregular migrants, in particular the principle of *non-refoulement*. The principle of *non-refoulement* protects individuals against being sent to a country where they fear torture and other inhuman and degrading treatments, persecution on the basis of the grounds listed in the 1951 Geneva Convention on the Status of Refugees (hereinafter the 1951 Refugee Convention),[16] or serious human rights violations. The principle of *non-refoulement* is an important limit to states' discretion concerning their right to refuse entry into or to expel persons from their territory.

This principle of *non-refoulement* is then an important element of the legal regime applicable to states' border management and is a fundamental yardstick for the deterritorialization of border control. In order to assess the fundamental role that the principle of *non-refoulement* plays in shaping the management of irregular migration and border control at sea, its content will first be discussed (section 2). The territorial scope of the principle is still debated both in literature and in practice.[17] This article

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authors refer to a policy of 'remote control'; J. Rijpma and M. Cremona, *The Extra-Territorialisation of EU Migration Policies and the Rule of Law* (EUI Law Working Paper, No. 2007/01), 1–24.

12 See Brölmann, *supra* note 9, at 97.

13 See, inter alia, R. Barnes, 'Refugee Law at Sea', (2004) 53 ICLQ 47; B. Frelick, '"Abundantly Clear": *Refoulement*', (2004–5) 19 *Georgetown Immigration Law Journal* 245; Legomsky, *supra* note 2; Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes', (2002) 14 *International Journal of Refugee Law* 329.

14 UNHCR ExCom, *supra* note 7.

15 Many articles in newspapers and books, as well as many documentaries have denounced in the last years the violence and the abuses intercepted migrants endure once forcibly redirected to the country of origin or transit. See, inter alia, W. Wheeler and A. Oghanna, 'After Liberation, Nowhere to Run', *New York Times Sunday Review*, 30 October 2011, available at <www.nytimes.com/2011/10/30/opinion/sunday/libyas-forgotten-refugees.html?pagewanted=all>; the blog *Fortress Europe*, available at <www.fortresseurope.blogspot.nl>; F. Gatti, *Bilal. Viaggiare, Lavorare, Morire da Clandestini* (2008).

16 189 UNTS No. 150 137; the 1951 Refugee Convention originally applied only to refugees generated in Europe because of events which occurred before 1 January 1951. The 1967 *Protocol Relating to the Status of Refugees* (606 UNTS No. 8791) eliminated those limits of time and place. Reference here to the 1951 Refugee Convention is intended as amended by the 1967 Protocol.

17 See, inter alia, J. Allain, 'The *Jus Cogens* Nature of *Non-Refoulement*', (2001) 13 *International Journal of Refugee Law* 533; T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011), at 45; G. S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*', (2011) 23 *International Journal of Refugee Law* 443; J. C. Hathaway, *The Rights of Refugees under International Law* (2005), at 279; E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion', in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (2003), at 87; G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', (2005) 17 *International Journal of Refugee Law* 542; S. Trevisanut, 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection', (2008) 12 *Max Planck Yearbook of United Nations Law* 210; 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*, Geneva, 26 January 2007.

supports its application wherever competent state authorities perform measures which pertain to border control (section 3).

The analysis in this article is based on the idea that a new approach to police activities at sea is much needed in relation to irregular migration. In fact, to migrate is not an illicit activity. The smugglers of the migrants are the ones carrying out an illicit activity at sea.[18] Migrants perpetrate an illicit act once they irregularly trespass or attempt to trespass an international border. Consequently, the measures that coastal states take at sea in order to prevent and control migrants' arrival qualify as border control actions and the relevant legal framework then applies.

The legal framework of border control at sea however, differs from the framework applying to land borders because of the specificities of maritime frontiers. This article first defines maritime borders, highlighting their functional nature (section 3.1.), in order to then support the application of the principle of *non-refoulement* at sea, in its meaning of 'principle of non-rejection at the maritime frontier' (section 3.2.). Particular attention will be given to the decision of the European Court of Human Rights (hereinafter, ECtHR) in the case of *Hirsi Jamaa and others* v. *Italy* (hereinafter *Hirsi* case).[19] Some concluding remarks will be drawn on the legal and practical consequences of applying the principle of *non-refoulement* in shaping the de-territorialization of border control at sea (section 4).

2. THE CONTENT OF THE PRINCIPLE OF *NON-REFOULEMENT*

The principle of *non-refoulement* is firstly expressed in Article 33(1) of the 1951 Refugee which states that:

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

At the drafting Committee of the 1951 Refugee Convention, the *non-refoulement* clause was described as 'an exceptional limitation of the sovereign right of States to turn back aliens to the frontiers of their country of origin'.[20] It is now considered the

18 See the Protocol against Smuggling of Migrants by Land, Sea and Air to the UN Convention against Transnational Organized Crime (UNGA Res. 55/25, 15 November 2000). For a comment, see inter alia, T. Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), at 157.

19 ECtHR, *Case of Hirsi Jamaa and others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012. For comments, see inter alia, M. Giuffrè, 'Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others v. Italy* (2012)', (2012) 61 ICLQ 728; M. den Heijer, 'Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case', (2013) 25 *International Journal of Refugee Law* 265; I. Papanicolopulu, 'European Convention of Human Rights – Article 3 – torture or degrading treatment – forcible repatriation of asylum seekers – collective expulsion – right to a remedy', (2013) 107 AJIL 417; E. Papastavridis, 'European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?', in M. Fitzmaurice and P. Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (2012) 117; M. Tondini, 'The Legality of Intercepting Boat People Under Search and Rescue and Border Control Operations: With Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the Hirsi Case', (2012) 18 *Journal of International Maritime Law* 59.

20 Gammeltoft-Hansen, *supra* note 17, at 14.

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core of asylum-seekers' protection.[21] It guarantees that refugees are not submitted again to the persecution which has caused their departure. Moreover, it responds to the refugees' need to enter the asylum country, even if it does not explicitly guarantee access to the territory of the destination state or admission to the procedures granting refugee status. Actually, some authors have tried to support the existence of an additional obligation aimed at binding states to admit individuals applying for protection into their own territory[22] but, for the time being, states practice cannot confirm these attempts.[23]

Noll gave a definition of the principle which highlights its practical implications: '*Non-refoulement* … could be described as a *right to transgress an administrative border*'.[24] Starting from this understanding, it is important to address the question concerning the application *ratione personae* of such a 'right to transgress'.

Article 33 of the 1951 Refugee Convention applies to the so-called 'statutory refugees', i.e. the individuals embraced by the definition provided in Article 1 of the same convention, as modified by the 1967 Protocol relating to the Status of Refugees (the 1967 Protocol):[25]

> [the term refugee shall apply to any person who] owing to *well-founded fear of being persecuted* for reason of race, religion, nationality, membership of a particular social group or opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The cornerstone of this definition is the concept of 'well-founded fear of persecution'. The meaning of 'persecution' has been lengthily debated by scholars aiming to enlarge the scope of Article 1.[26] State practice is not homogenous in that respect,

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21 Ibid., at 44; Lauterpacht and Bethlehem, *supra* note 17, at 90.

22 Salerno affirms that the principle of *non-refoulement* entails the individual right of entry and stay in the territory for the time needed in order to have his/her status ascertained ('nel caso degli asilanti, il principio di *non refoulement* si congiunge con il diritto dell'individuo ad entrare e permanere nel territorio dello Stato per quanto necessario all'espletamento della procedura corredata delle necessarie garanzie giurisdizionali'); see F. Salerno, 'L'Obbligo Internazionale di non Refoulement dei Richiedenti Asilo', (2010) 4 *Diritti Umani e Diritto Internazionale* 487, at 502. This approach has been partly confirmed by the ECtHR in the *Hirsi* case (*supra* note 19).

23 Not considered here are issues related to the application of the principle of *non-refoulement* in situations of expulsion from the territory of the hosting state after the decision of the competent authorities to not admit the individual to the relevant procedures, or after the refusal of granting refugee status; these situations encompass other legal problems and consequences apart from the phenomenon of sea-borne asylum seekers. On the principle of *non-refoulement* in general and on expulsion situations, see G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2007), at 257; Hathaway, *supra* note 17, at 370; F. Lenzerini, *Asilo e Diritti Umani, L'Evoluzione del Diritto d'Asilo nel Diritto Internazionale* (2009), at 335.

24 Noll, *supra* note 17, at 548 (emphasis added).

25 *Protocol relating to the Status of Refugees*, *supra* note 16; see UNHCR, *supra* note 17, at 2 (emphasis added).

26 On the concept of persecution, see, inter alia, M. Bettati, *L'Asile Politique en Question. Un Statut pour les Réfugiés* (1985), at 10; J.- Y. Carlier, 'Et Genève Sera … La Définition du Réfugié: Bilan et Perspectives', in V. Chetail (ed.), *La Convention de Genève du 8 Juillet 1951 Relative au Statut des Réfugiés 50 ans Après: Bilan et Perspectives* (2001) 63, at 67; J. Fitzpatrick, 'Revitalizing the 1951 Convention', (1996) 9 *Harvard Human Rights Journal* 229, at 239; L. M. Ramos, 'A New Standard for Evaluating Claims of Economic Persecution Under the 1951 Convention Relating to the Status of Refugees', (2011) 44 *Vanderbilt Journal of Transnational Law* 499; K. Röhl, 'Fleeing Violence and Poverty: *Non-Refoulement* Obligation under the European Convention of Human Rights', UNHCR Working-Paper No. 111, January 2005, at 4; V. Türk and F. Nicholson, 'Refugee Protection in International Law: An Overall Perspective', in Feller, Türk, and Nicholson (eds.), *supra* note 17, 3, at 38;

even if it has consistently revealed a dominant trend of offering some form of protection to a "person whose life or freedom would be at risk as a result of an armed conflict or generalized violence if they were returned involuntarily to their countries of origin".[27]

The so-called '*de facto* refugees'[28] are not deprived of protection and enjoy the application of the principle of *non-refoulement* as provided by the complementary protection[29] of human rights law.

The definition of refugee also includes a spatial requirement, i.e. the refugee must be 'outside the country of his nationality ..., not having a nationality ... outside the country of his former habitual residence'. Consequently, Article 33 of the 1951 Refugee Convention only applies to individuals who have crossed an international border and it cannot come into play as long as a person is within the territorial jurisdiction of her/his state of nationality or residence.[30] We can then deduce that Article 33 does not apply in the territorial waters[31] and contiguous zone[32] of the state of nationality or of habitual residence, but does apply in the territorial waters and the contiguous zone of the state of transit.

Moreover, concerning the *ratione loci* application of Article 33, the provision does not indicate any territorial limitation.[33] Some authors consequently argue that Article 33 applies wherever a state exercises its jurisdiction, even extraterritorially.[34] This approach is also embedded in the purpose of Article 33 which prevents the return *to* a specific territory, and not *from* a specific territory. Despite some criticisms,[35] this interpretation of the principle of *non-refoulement* is confirmed by the practice of

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UNHCR, *Handbook on Procedure and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugee* (1992), para. 51.

27 See Goodwin-Gill and McAdam, *supra* note 23, at 289. Lauterpacht and Bethlehem have argued that the notion of threat contemplated in Art. 33(1) may be 'broader than simply the risk of persecution, ... to the extent that a threat to life or freedom that may arise other than in consequence of persecution', thus enlarging the scope of Art. 33 to refugees not included in the treaty definition of Art. 1; Lauterpacht and Bethlehem, *supra* note 17, at 124.

28 '[P]ersons not recognized as refugees within the meaning of Article 1 of the [Refugee] Convention [and who are] unable or unwilling for political, racial, religious or other valid reasons to return to their countries of origin', see Council of Europe Parliamentary Assembly, Recommendation No. 773 (1976) on the Situation of de facto Refugees, para. 1.

29 For a historical overview of the 'complementary protection', see Goodwin-Gill and McAdam, *supra* note 23, at 286.

30 K. Wouters, *International Legal Standards for the Protection from Refoulement* (2009) at 49.

31 Art. 2 of United Nations Convention on the Law of Sea (21 ILM 1276, hereinafter LOSC): '1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil. 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law'.

32 Art. 33 LOSC: '1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea'.

33 Many articles of the 1951 Refugee Convention actually contain a territorial criterion concerning their scope of application (e.g. the legal presence or stay of the refugee in the host state; the physical presence of the refugee in the host state).

34 See Goodwin-Gill and McAdam, *supra* note 23, at 246; Hathaway, *supra* note 17, at 160; Trevisanut, *supra* note 17, at 210.

35 Some authors consider that the extraterritorial application of the principle of *non-refoulement* entails the recognition of a de facto right of admission in the destination state and such a consequence was explicitly excluded from the 1951 Geneva Convention (for a comment, see Gammeltoft-Hansen, *supra* note 17, at 63–4).

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states and of some international judicial bodies in the interpretation of the principle as provided by human rights treaties.

Violations of human rights are often, even mostly, the root cause of migration flows, turning individuals into refugees, asylum-seekers, and displaced persons. Independently of the causes of their departure, the Universal Declaration of Human Rights (hereinafter UDHR)[36] states that '[e]veryone has the right to leave any country, including his own, and to return to his country' (Article 13(2))[37] and '[e]veryone has the right to seek and enjoy in other countries asylum from persecution' (Article 14(1)). Pursuant to these two rights, everyone is entitled to flee a harmful situation he/she is experiencing or risks experiencing, but once outside the borders of his/her own country, no formal right guarantees his/her entry into another.

The preamble of the 1951 Geneva Convention recalled the UDHR; the 1967 Declaration on Territorial Asylum (hereinafter 1967 DTA)[38] reaffirms the content of its Article 14, clarifying that the individual does not possess a subjective right of asylum, but that he/she is merely entitled to request the status of refugee and the required state has a discretionary power to accept or refuse the request.[39] Notwithstanding the discretion states enjoy, to prevent an individual from asking for protection can imply a breach of Article 14 UDHR in its meaning of 'right to request', which is safeguarded by the principle of *non-refoulement*.

The *non-refoulement* principle in human rights law is backed by Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT),[40] which prohibits the removal of individuals to states where they risk being submitted to torture or other inhuman or degrading treatment, as recalled by Article 7 of the 1966 International Covenant on Civil and Political Rights (hereinafter 1966 ICCPR).[41] The Committee against Torture clearly affirmed the extra-territorial application of the principle of *non-refoulement*, as provided by the CAT, in the *JHA* v. *Spain (Marine I)* case.[42]

At a regional level, protection against *refoulement* is also guaranteed by Article 3 of the 1950 European Convention on the Protection of Human Rights and Fundamental

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But, as already mentioned, the practice of both states and international bodies does not confirm such a conclusion, even when the principle of *non-refoulement* was applied extraterritorially.

36 A/RES/217(III) of 10 December 1948. The UDHR is not formally binding in nature, but most of the norms contained have progressively acquired the status of customary law and, consequently, bind the members of the international community.

37 A. de Zayas, 'Migration and Human Rights', (1994) 62 *Nordic Journal of International Law* 243, at 245; A. Grahl-Madsen, 'Article 13', in A. Eide et al. (eds.), *The Universal Declaration of Human Rights: A Commentary* (1992), at 212.

38 A/RES/2312(XXII) of 14 December 1967.

39 'Asylum is viewed as an "act of grace by States" and the refusal of States to accept an obligation to grant asylum is "amply evidenced" by the history of international conventions and other instruments', Pallis, *supra* note 13, at 341. See also Harvey and Barnidge, *supra* note 8.

40 A/RES/39/46 of 10 December 1984.

41 A/RES/XXI/2200 of 16 December 1966.

42 Committee against Torture, *JHA v. Spain (Marine I)*, No. 323/2007, 21 November 2008, para. 8.2. This case concerned the interdiction programme carried out by Spain along the coasts of Mauritania; for a comment, see K. Wouters and M. Den Heijer, 'The *Marine I* Case: A Comment', (2009) 21 *International Journal of Refugee Law* 31.

Freedoms (hereinafter ECHR),[43] Article 22(8) of the 1969 American Convention on Human Rights (hereinafter ACHR),[44] and Article 5 of the 1981 African Convention on the Protection of Human and Peoples' Rights (hereinafter Banjul Charter).[45] Moreover, in the field of international humanitarian law, Article 45 of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War[46] sets out that '[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs'.

The 1966 ICCPR also provides the obligation not to extradite, deport, expel, or return an individual to a country where there are well-founded suspicions concerning a risk of irreparable harm to the right to life guaranteed by Article 6. The right to life is also guaranteed by Article 2 of the ECHR, Article 4 of the ACHR, and Article 4 of the Banjul Charter.

In light of the several international instruments and of states' practice, the *non-refoulement* rule is unanimously considered today as a customary norm both of human rights and humanitarian law.[47] However, a complete agreement has not been reached yet concerning its precise content, in particular in relation to its territorial scope. Its application at sea remains particularly debated because of the functional nature of the powers states can exercise at sea and the often contested exercise of jurisdiction by the intervening states. This particular aspect has been discussed and decided for the first time by an international judicial body,[48] i.e. the ECtHR, in the aforementioned *Hirsi* case.[49]

The applicants (eleven Somali nationals and thirteen Eritrean nationals) were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were 35 nautical miles south of the Italian island of Lampedusa, they were intercepted by three ships from the Italian authorities. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli on the basis of

43 213 UNTS No. 2886.
44 1144 UNTS No. 17995.
45 58 ILM (1982) 21.
46 75 UNTS No. 287.
47 See Allain, *supra* note 17, at 533; D. W. Greig, 'The Protection of Refugees and Customary International Law', (1983) 8 *Australian Yearbook of International Law* 106; Lauterpacht and Bethlehem, *supra* note 17, at 87; P. Mathew, 'Sovereignty and the Right to Seek Asylum: The Case of the Cambodian Asylum-Seekers in Australia', (1994) 15 *Australian Yearbook of International Law* 35; Salerno, *supra* note 22, at 502; Trevisanut, *supra* note 17, at 215.
48 The extraterritorial application of the principle of *non-refoulement* was submitted to judicial scrutiny in front of the US Supreme Court in the famous case *Sale v. Haitian Centres Council, Inc.* (21 June 1993, 32 ILM (1993) 1039). This case concerned the interception and redirection of Haitian migrants on the high seas by the US Coast Guard in the late Eighties. The Supreme Court excluded the application of Art. 33 of the 1951 Refugee Convention beyond the territory of the state. It reached this conclusion on the basis of a restrictive interpretation of the term 'return' in Art. 33(1) invoking that the French word '*refouler*' encompasses terms as 'repulse', 'repel', 'drive back', and 'expel'. But the term 'repulse' itself encompasses the terms 'reject' and 'repel', actions not necessarily requiring prior entry into the territory. Consequently, to refuse to apply the principle of *non-refoulement* on the high seas seems to be unjustified. This case law has so far remained isolated. See I. Castrogiovanni, 'Sul *Refoulement* dei Profughi Haitiani Intercettati in Acque Internazionali', (1994) 77 *Rivista di Diritto Internazionale* 478; Legomsky, *supra* note 2; Trevisanut, *supra* note 17, at 243.
49 See ECtHR, *Case of Hirsi Jamaa and others v. Italy*, *supra* note 19.

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the 2008 Treaty of Friendship between Italy and Libya.[50] The applicants alleged a violation of Article 3 of the ECHR (prohibition of torture), Article 4 of Protocol No. 4 (prohibition of collective expulsion) and Article 13 (right to an effective remedy).

Concerning specifically the principle of *non-refoulement*, the *Hirsi* case has the merit to clarify both its territorial scope and content. Leaving aside for a moment the territorial scope, the ECtHR reaffirmed that the behaviour of the victim does not matter in order to enjoy the application of the principle, and thus confirmed the approach previously adopted in the *Saadi* v. *Italy* case.[51] The Court also affirmed that the principle of *non-refoulement* entails some positive obligations, such as the identification of the persons, even outside the territory, and the need 'to find out about the treatment to which the applicants would be exposed after their return';[52] moreover, 'the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees'.[53] In the view of the Court, these positive obligations apply even if the intercepted migrants failed to ask for asylum.[54] It is worth noticing how the Court focused its reasoning and the application of Article 3 of the ECHR on asylum seekers and refugees. It clearly avoids making a general statement on the application of such obligations to all intercepted migrants. This might undermine the 'absolute character of the rights secured by Article 3'.[55]

3. THE PRINCIPLE OF *NON-REFOULEMENT* AT SEA, OR THE PRINCIPLE OF NON-REJECTION AT THE MARITIME FRONTIER

The question of the application of the principle of *non-refoulement* at sea arises when coastal states' authorities perform migration control at sea. They prevent the irregular crossing of the territorial border by de-territorializing border control. The de-territorialized border becomes a maritime frontier (a). The functional nature of the maritime frontier justifies the application of the principle of *non-refoulement* at sea, in its meaning of non-rejection at the frontier (b).

50 Trattato di Amicizia, Partenariato e Cooperazione [Treaty of Friendship, Partnership and Co-operation between Italy and Libya], in Gazzetta Ufficiale della Repubblica Italiana [Official Journal of the Italian Republic] No. 40 of 18 February 2009. The Treaty does not explicitly provide for pushback operations, but it reaffirms the co-operation in relation to the fight against irregular migration, which also includes the organization of joint patrols and which was created in the former agreements concluded by the two countries in 2000 and 2007. The legal basis and thus the legality of the pushback operations raises many criticisms. See, inter alia, F. De Vittor, 'Soccorso in Mare e Rimpatri in Libia: Tra Diritto del Mare e Tutela Internazionale dei Diritti dell'uomo', (2009) 92 *Rivista di Diritto Internazionale* 806; M. Giuffrè, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?', (2012) 24 *International Journal of Refugee Law* 692, at 703; N. Ronzitti, 'Il Trattato Italia–Libia di Amicizia, Partenariato e Cooperazione', Istituto di Affari Internazionali (IAI), Contributi di Istituti di Ricerca Specializzati No. 108, January 2009; A. Terrasi, 'I Respingimenti in Mare di Migranti alla Luce della Convenzione Europea dei Diritti Umani', (2009) 3 *Diritti Umani e Diritto Internazionale* 591; S. Trevisanut, 'La Collaborazione Italia – Libia in Materia di Contrasto all'Immigrazione Clandestina Via Mare: Profili di Diritto del Mare', (2009) 3 *Diritti Umani e Diritto Internazionale* 609.

51 ECtHR, *Saadi v. Italy*, Application No. 37201/06, Judgment 28 February 2008.

52 ECtHR, *Case of Hirsi Jamaa and others v. Italy*, *supra* note 19, para. 133

53 Ibid., para. 157.

54 Ibid.

55 Ibid., para. 122.

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3.1. The maritime frontier: A definition

3.1.1. The frontier in international law

The concept of frontier has multiple dimensions (historical, political, and economical) and its content varies on the basis of these dimensions, taken into consideration at a certain moment in time. The frontier is comprised of the junction of three sociological phenomena: the territory, the nation, and the state.[56] The frontier is an essential stabilizing element of a state.[57]

Historically, the concept of frontier dates back to the Ancient Roman notion of *limes*. The *limes* was not a fixed and tangible frontier, but it was a 'strategic' border, that is the last front of the Imperial legions. Therefore the *limes* moved forward or retreated depending on the successes or failures on the battlefield. With the end of the Carolingian Empire the frontier became a legal object because of increasing delimitation problems. The frontier became the border. In the thirteenth century, borders gained importance in managing joint problems with neighbouring states – 'fences make good neighbours'. The need of an international management of borders emerged.[58] The border, or frontier, became a means of peace and order[59] between powers. Because of this role, the frontier could not be a 'fluid' *limes* anymore, but needed stability. This necessity is expressed by Article 62(2) of the Vienna Convention of the Law of Treaties (hereinafter 1969 VCLT)[60] which sets out that: '[a] fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (*a*) if the treaty establishes a boundary'.

Other than being stable, frontiers in international law are also objective. Delimitation treaties are binding *erga omnes*. Their stability has in some cases jeopardized the respect of fundamental principles.[61] Moreover, the 1978 Vienna Convention on Succession of States in Respect of Treaties[62] provides that '[a] succession of States does not as such affect: *(a)* a boundary established by a treaty; or (*b*) obligations

56 C. Blumann, 'Frontières et Limites', in Société Française pour le Droit International, *Colloque de Poitiers*, *La Frontière* (1980) 1, at 3. The author highlights how the notion of a frontier gained an affective dimension, and was not perceived any more as merely a utilitarian link with the nation-state, from the Renaissance; ibid., at 4.

57 Ibid. See also P. de Lapradelle, *La Frontière* (1928), at 57: 'Travaillant à la formation de l'unité nationale, les gouvernements se sont aperçus de la valeur absolue que représentait pour leur fin politique le sol national, et ils ont consacré cette utilité en construisant une théorie du domaine ou du territoire'.

58 See De Lapradelle, *supra* note 56, at 230; G. Distefano, *Les Compétences Territoriales*, in V. Chetail and P. Haggenmacher (eds.), *Vattel's International Law in a XXIst Century Perspective* (2011) 211, at 232; V. Prescott, and G. D. Triggs, *International Frontiers and Boundaries, Law, Politics and Geography* (2008), at 56.

59 'Cette ligne [la frontière] est inéluctable, elle correspond à la structure atomistique de la société internationale. Souvent critiquée par les prophètes et les poètes qui y voient un point de rupture entre les hommes, elle constitue au contraire un extraordinaire facteur d'ordre et de paix sociale', Blumann, *supra* note 56, at 8. See also E. de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle* (1758), Vol. I, at 137. The frontier plays a role of peacekeeping or peacebuilding in modern and contemporary times. The Security Council of the League of Nations, for example, emphasized the peacemaking function of border delimitation in the Balkans in 1924 (*Question de la Frontière entre l'Albanie et le Royaume des Serbes, Croates et Slovènes, Vingtième Séance, 3 Octobre 1924*, Société des Nations – Journal Officiel, October 1924, 1378). Another example is the *Eritrea–Ethiopia Boundary Commission* created by the Peace Treaty of Algiers in 2000, which has played a fundamental role in the peace process.

60 1155 UNTS No. 18232.

61 For instance, the fundamental principle of self-determination of people was not applied in post-colonial Africa in order to maintain the traced borders; see Blumann, *supra* note 56, at 13.

62 1946 UNTS No. 3356.

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and rights established by a treaty and relating to the regime of a boundary' (Article 11). This provision, which codifies a customary rule,[63] transposes in the field of states' succession the respect for territorial integrity of sovereign states embedded in Article 2(4) of the UN Charter.[64] The stability of the frontier is a matter of general international law.[65]

The frontier limits the exercise of territorial sovereignty; it exists in the space in which state's policies concerning the management of the territory take place. The frontier and its management consequently express in legal terms the values on which the territorial state or community (e.g., the European Union) builds its own identity.

Migration control is an important part of the management of borders. Frontiers are the dividing line between the territorial community and the 'others'. Migration control requests a tight and concrete supervision of the territory, which is challenged at sea for two reasons: a practical one, due to the impervious marine environment; a legal one, due to the limited sovereignty states enjoy at sea. Moreover, there are no fixed checkpoints at maritime borders, but the border is the place where the control is carried out by the competent authorities. This fluidity of the maritime frontier derives from the functional nature of states' jurisdiction at sea.

3.1.2. The functional frontier at sea

Coastal states' sovereignty on land is the basis for their sovereignty in adjacent maritime zones. This relation between the territory and the sea has been consistently affirmed in international case law since the *Grisbadarna* arbitral award of 1909.[66] In the *Fisheries* case, the International Court of Justice (hereinafter ICJ) stated '[i]t is the land which confers upon the coastal State a right to the waters off its coasts'[67] and it affirmed the principle according to which 'the land dominates the sea' in the *North Sea Continental Shelf* cases.[68]

The relationship between land and sea is not only 'physical', but has a primarily political, economic, and social nature.[69] The coastal state extends its interests and their protection on the adjacent maritime zones. This extension of the coastal state jurisdiction and the consequent obligations for the other maritime states was recognized by the Second Commission of the 1930 Hague Conference for the codification

63 M. Márquez Carrasco, 'Régimes de Frontières et Autres Régimes Territoriaux Face à la Succession d'Etats', in P. M. Eisemann and M. Koskenniemi (eds.), *La Succession d'Etats: La Codification à l'Épreuve des Faits* (2000) 493, at 494.

64 Art. 2.4 UN Charter: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

65 See Márquez Carrasco, *supra* note 63, at 510.

66 Permanent Court of Arbitration, *Norway v. Sweden*, Judgment of 23 October 1909, *Recueil des Sentences Arbitrales*, vol. XI, at 159: '[d'après les] principes fondamentaux du droit des gens, tant ancien que moderne, . . . le territoire maritime est une dépendance nécessaire d'un territoire terrestre'.

67 *England v. Norway*, Judgment 18 December 1951, International Court of Justice, ICJ Rep. 1951, at 133.

68 *Germany v. Denmark*, *Germany v. Netherlands*, Judgment 20 February 1969, International Court of Justice, ICJ Rep. 1969, para. 96, at 51.

69 C. Schmitt, *Land and Sea*, translation (1997), at 25.

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of international law[70] and then codified in the United Nations Convention on the Law of the Sea (hereinafter LOSC).[71]

The 'irradiation' of sovereignty on the sea generates two different kinds of maritime borders. First, there is the border drawn on a map, the delimitation. This border aims at delimiting the physical area in which the coastal state is entitled to exercise its sovereignty pursuant to the legal regime of the different maritime zones. The further the zone is away from the shore, the more limited are the powers the coastal state can exercise. These powers are tools for conserving and protecting those interests international law recognizes as fundamental in the considered maritime zone. They are functional to the protection of those interests, which may include migratory matters.[72]

Second, there is a functional maritime frontier; this one 'moves' following the nature of the considered behaviour, the subject carrying out the behaviour and the maritime zone in which the behaviour took place. Concerning migration control, the border materializes where the competent authorities perform their activities of border control. When Italian authorities intercept a vessel transporting irregular migrants on the high seas and decide to redirect it,[73] they are exercising powers (whose legality may be challenged[74]) which pertain to border control prerogatives. As recalled above, to migrate is not per se an illicit activity. Any measure aiming at preventing the illegal entry of migrants has its legal basis in border control policies and international border co-operation, such as the aforementioned Treaty of Friendship between Italy and Libya[75] or the EU integrated border management (IBM).[76] Such legal basis, i.e. such legislative jurisdiction,[77] limits and determines the content of the enforcement jurisdiction of the intervening state, i.e. its power 'to take executive action in pursuance of or consequent on the making of decisions or rules'.[78]

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70 H. Miller, 'The Hague Codification Conference', (1930) 24 AJIL 674.

71 21 ILM 1276.

72 '[T]he extent of the territorial jurisdiction does not coincide with the territory of the State. Typically, it acquires a functional nature when it extends to the contiguous zone [Art. 33 LOSC], where the coastal state can exercise jurisdiction in relation to … immigration matters'; M. Gavouneli, *Functional Jurisdiction in the Law of the Sea* (2007), at 10.

73 It does not matter here whether the interception measure started as a search and rescue operation. The relevant facts to be taken into consideration are that the rescued persons were irregular migrants and that they were redirected to the country of origin or an unsafe territory.

74 See the operations performed on the basis of the aforementioned Treaty of Friendship between Italy and Libya (*supra* note 51).

75 Ibid.

76 On the IBM, see inter alia, S. Carrera, *Towards a Common European Border Service?* (CEPS Working Document, No. 331, June 2010), 1–39; L. Corrado, 'Negotiating the EU External Borders', in S. Carrera and T. Balzacq (eds.), *Security versus Freedom: A Challenge for Europe's Future* (2006) 183; V. Mitsilegas, 'Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance', in A. Baldaccini, E. Guild and H. Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (2007), 359.

77 We mean by legislative jurisdiction 'the jurisdiction to prescribe rules'; see E. Papastavridis, 'Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas', (2010) 25 *International Journal of Marine and Coastal Law* 569, at 575–7.

78 I. Brownlie, *Principles of Public International Law* (2003), at 297. See also, inter alia, V. Lowe and C. Staker, 'Jurisdiction', in M. Evans (ed.), *International Law* (2010), 313; B. Simma and A. T. Müller, 'Exercise and Limits of Jurisdiction', in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 134.

When states prevent irregular entries by performing activities outside their territory, they bring with them the border and part of its legal regime. The partiality of the border's legal regime is due to its de-territorialization. The elements of this legal regime, which are closely linked with the territory, cannot apply. Conversely, the elements which are linked to the persons submitted to the control do apply.

The principle of *non-refoulement* applies in relation to the person submitted to the measure of interception and/or redirection and in consideration of the territory where this person is returned or sent. It binds the actions of states even when they de-territorialize the control of their borders. It is a fundamental element of the legal framework of this police activity.

In light of this reasoning, the ECtHR in the *Hirsi* case did not need to invoke 'territorial' arguments in order to assess the Italian jurisdiction and consequently the application of the principle of *non-refoulement* to the applicants. Surprisingly, the Court recalled the Italian code of navigation, which provides that Italian military vessels ought to be considered as being a part of Italian territory.[79] So, as the applicants were taken aboard Italian vessels, they were under Italian jurisdiction. This is quite an outdated position, which is not reflected in contemporary international law.[80] The behaviour of the Court triggers some doubts about how it would have decided the case had the applicants not been taken on board of the Italian vessels. The invocation of territorial arguments is unfortunate.

3.2. The content of the principle of non-rejection at the maritime frontier

The application of the principle of *non-refoulement* at the frontier, in its meaning of 'non-rejection at the frontier', is mostly accepted today.[81] It can be deduced from the combined application of the provisions guaranteeing the principle at stake and Article 31(1) of the 1951 Refugee Convention.[82] The latter provision affirms that

79 See ECtHR, *Case of Hirsi Jamaa and others v. Italy*, *supra* note 19, para. 78.

80 Pursuant to Art. 92 LOSC, 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be *subject to its exclusive jurisdiction on the high seas*' (emphasis added). Contemporary international law does not use any territorial fiction; jurisdiction on vessels is exclusively based on the nationality link. For a deeper analysis pertaining to the application of human rights instruments at sea, see S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts too?', (2012) 25 LJIL 857, at 874–6; S. Cacciaguidi-Fahy, 'The Law of the Sea and Human Rights', (2007) 19 *Sri Lanka Journal of International Law* 85; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), at 160 ff.; B. H. Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea', in J. Charney, D.K. Anton, and M.E. O'Connell (eds.), *Politics, Values and Functions, International Law in the 21st Century, Essays in Honor of Professor Louis Henkin* (1997), 377–404; Papastavridis, *supra* note 19; P. Tavernier, 'La Cour Européenne des Droits de l'Homme et la Mer', in *La Mer et son Droit, Mélanges Offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (2003) 575–89; T. Treves, 'Human Rights and the Law of the Sea', (2010) 28 *Berkeley Journal of International Law* 1–14; B. Vukas, 'Droit de la Mer et Droits de l'Homme', in G. Cataldi (ed.), *La Mediterranée et le Droit de la Mer à l'Aube du 21e Siècle* (2002), 85–95.

81 See Lauterpacht and Bethlehem, *supra* note 17, 87–179.

82 Art. 31: 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'. See Hathaway, *supra* note 17, at 386; the author asserts, commenting on Art. 31, that '[p]erhaps the most important innovation of the 1951 Refugee Convention is its commitment to the protection of refugees who travel to a State party without authorization'.

the unlawful entry of asylum seekers does not exclude them from the scope of application of the protection. To avoid the irregular crossing of a border is almost impossible for a person fleeing from a situation of persecution or generalized danger. During the Indochinese crisis,[83] the Executive Committee (hereinafter ExCom) of the United Nations High Commissioner for Refugees (hereinafter UNHCR) affirmed:

> It is therefore *imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment* .... In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should *always* admit them at least on a temporary basis .... In all cases the fundamental principle of *non-refoulement – including non rejection at the frontier – must be scrupulously observed.*[84]

The non-rejection at the frontier was included in the principle of *non-refoulement* in instruments subsequent to the 1951 Refugee Convention, as the 1967 DTA[85] and the 1967 OAU Convention on Refugees,[86] which have appeared particularly important for the interpretation of the same Convention.[87] Since 1977,[88] the ExCom has brought forward this argument and restated it in relation to migration by sea in 1979:

> It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.[89]

Moreover, scholars and international bodies have often pointed out that to deny the application of the principle of *non-refoulement* at the borders would be illogical. The asylum seekers who entered the territory of the destination state (even illegally) would actually enjoy a higher protection than those who present themselves (even legally) at the borders[90], wherever such borders are.

The application of the principle of *non-refoulement* to police activities at sea implies that, at least, the intervening state shall not preclude asylum seekers from seeking asylum elsewhere and, thus, force them back to their country of origin or to an unsafe third country. The intervening state consequently has the minimum obligation to identify those among the migrants on board of the intercepted vessel who are entitled to ask for protection. This conclusion has been confirmed by the interpretation given by the ECtHR in the already mentioned *Hirsi* case.[91] However, to simply repel vessels to the high seas, without a forced diversion, does not necessarily imply a violation

83 See *supra* note 1.
84 UNHCR ExCom, Conclusion No. 22 (XXXII) 1981; reaffirmed during the crisis in former Yugoslavia, in UNHCR ExCom, Conclusion No. 74 (XLV) 1994, para. (r) (emphasis added).
85 See *supra* note 38.
86 *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1001 UNTS No. 14691.
87 See Lauterpacht and Bethlehem, *supra* note 17, at 113; P. Weis, *The Refugee Convention, 1951, The Travaux Préparatoires Analysed* (1995), at 342.
88 UNHCR ExCom, Conclusion No. 6 (XXVIII) 1979, para. (c): 'the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State'.
89 UNHCR ExCom, Conclusion No. 15 (XXX), para. (c).
90 A. Fischer-Lescano, T. Löhr, and T. Tohidipur, 'Border Control at Sea: Requirements under International Human Rights and Refugee Law', (2009) 21 *International Journal of Refugee Law* 256; Gammeltoft-Hansen, *supra* note 17, at 45–6, 61.
91 See *supra* note 19.

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of the principle of *non-refoulement*.[92] The intervening state shall however make sure that repelling them does not put their life in danger. Such behaviour would be in contrast with the duty to render assistance at sea.[93]

4. Concluding remarks on the de-territorialization of border control

The practical consequences of the application of the principle of *non-refoulement* at sea have been detailed in a leaflet edited by the UNHCR and the International Maritime Organization (IMO).[94] This document invites shipmasters – for cases in which people rescued at sea claim asylum – to

> alert the closest RCC (Rescue Co-ordination Centre); [to] contact the UNHCR; [to] not ask for disembarkation in the country of origin or from which the individuals fled; [to] not share personal information regarding the asylum-seekers with the authorities of that country, or with others who might convey this information to those authorities.

It is regrettable that similar invitations are not repeated in the document concerning actions that governments have to take. However, such an obligation already exists on the basis of the 1951 Refugee Convention and the aforementioned human rights instruments, which apply at sea. The law of the sea and human rights law complement each other and support the application of international protection obligations at sea, first of all of the principle of *non-refoulement*.

The de-territorialization of border control does not unfold in a legal vacuum. On the contrary, the exercise of migration management and border control outside the territory comes with guarantees for the people submitted to the measures. Among these guarantees, the principle of *non-refoulement* plays a fundamental role in shaping not only the legal framework, but also the operative dimension of de-territorialized border control at sea.

92 See Trevisanut, *supra* note 17, at 244.

93 On the duty to render assistance in relation to migratory flows, see E. Papastavridis, 'Interception of Human beings on the High Seas: A Contemporary Analysis under International Law', (2009) 36 *Syracuse Journal of International Law and Commerce* 145; V. Moreno Lax, 'The EU Regime on Interdiction, Search and Rescue, and Disembarkation: The Frontex Guidelines for Intervention at Sea', (2010) 25 *International Journal of Marine and Coastal Law* 621; S. Trevisanut, 'Search and Rescue Operations in the Mediterranean: Cooperation or Conflict Factor?', (2010) 25 *International Journal of Marine and Coastal Law* 523.

94 UNHCR, IMO, *Rescue at Sea, A Guide to Principles and Practice as Applied to Migrants and Refugees* (2007).

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