Study

Maritime rescue by non-governmental actors

in the legal no-man's-land between the Libyan coastguard's pull-back operations and the principle of *non-refoulement*

Maritime rescue by non-governmental actors
in the legal no-man's-land between the Libyan coastguard's pull-back operations and the principle of *non-refoulement*

File reference:	WD 2 - 3000 - 014/20
Completion date:	3 March 2020 (also date of last access to online sources)
Research section:	WD 2: Foreign Affairs, International Law, Economic Cooperation and Development, Defence, Human Rights and Humanitarian Aid

Table of contents

1. Introduction and subject of the study

Maritime rescue in the Mediterranean is conducted within a complex legal framework in which national and international maritime and refugee law, human rights conventions and national penal and immigration law overlap.

The **human rights implications of maritime rescue** become clear when we consider, for example, the issue of the *refoulement*[1] of shipwrecked refugees to Libya and to the Libyan reception camps, conditions in which have been the subject of press reports.[2]

In the past few years, discussion has focused increasingly on EU cooperation[3] with the Libyan coastguard and the Libyan Maritime Rescue Coordination Centre (MRCC) as well as on the issue of the co-responsibility of individual EU Member States[4] for the conditions in Libyan reception camps, where human rights are being violated.[5] The Commissioner for Human Rights of the

---

1 Cases in which the return of shipwrecked refugees from Libya is initiated by the Libyan authorities are referred to as pull-back operations, whereas cases in which refugees are actively driven back by governmental vessels of EU Member States are termed push-back operations.

2 *Die Zeit* online, 2 August 2018, '*Es gibt dort keine Menschlichkeit*', at https://www.zeit.de/politik/ausland/2018-08/libyen-migranten-eu-human-rights-watch-interview (in German).

3 See the European Council Conclusions of 19 October 2017, section I(4): "As concerns the Central Mediterranean route, the European Council […] reiterates the importance of working with the Libyan authorities", https://www.consilium.europa.eu/media/21620/19-euco-final-conclusions-en.pdf.

A critical appraisal is presented in a study conducted for the Heinrich Böll Foundation by Anuscheh Farahat and Nora Markard and entitled 'Places of Safety in the Mediterranean: The EU´s Policy of Outsourcing Responsibility' (Brussels, February 2020, pp. 40ff, accessible at https://eu.boell.org/en/2020/02/18/places-safety-mediterranean-eus-policy-outsourcing-responsibility).
See also the opinion of the German Institute for Human Rights (DIMR), '*Seenotrettung und Flüchtlingsschutz*', second edition, 30. August 2018, pp. 13-14 (in German).
Mention should also be made of the complaint lodged against the EU with the International Criminal Court (ICC); see https://www.dw.com/en/eu-sued-by-human-rights-lawyers-over-migrant-deaths/a-49017259

4 On this point, see Giuseppe Pascale, 'Is Italy internationally responsible for the gross human rights violations against migrants in Libya?', in *Questions of International Law* (QIL), 2019, pp. 35-58, accessible at http://www.qil-qdi.org/wp-content/uploads/2019/03/03_Externalizing-migration-control_PASCALE_FIN_mod.pdf.
Giulia Ciliberto, 'Libya´s Pull-Backs of Boat Migrants: Can Italy be held accountable for violations of International Law?', in *The Italian Law Journal* , No. 4 (2018), pp. 489-530, http://theitalianlawjournal.it/data/uploads/4-italj-2-2018/489-ciliberto.pdf.

5 The relevant area of international law is the law governing the responsibility of states; cf. the Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts, UN General Assembly Resolution 66/100 of 9 December 2011, accessible at https://undocs.org/en/%20A/RES/66/100.

Council of Europe, for example, has called for a review of cooperation between the EU and Libya.[6]

> "Member states should urgently review all their co-operation activities and practices with the Libyan Coast Guard and other relevant entities, and identify which of these impact, directly or indirectly, on the return of persons intercepted at sea to Libya or other human rights violations. Such activities should be suspended until clear guarantees of full human rights compliance are in place (…)."

Numerous maritime rescue operations, moreover – such as the *Vos Thalassa* case[7] adjudicated by an Italian investigation tribunal in Trapani, Sicily[8] – have highlighted the **legal and ethical dilemmas** facing private maritime rescuers and captains of merchant vessels. Often equipped with limited rescue facilities and generally under pressure to meet commercial deadlines, merchant ships operate in a legal 'grey area'[9] between the obligation to save lives, instructions from national maritime rescue coordination centres, refusals to allow the disembarkation of refugees in European ports and the threat of *refoulement* to Libya, against which rescued persons are increasingly rebelling.

IMO Maritime Safety Committee Resolution MSC.167(78) of 20 May 2004[10] describes the legal no-man's land through which masters of vessels have to navigate in maritime rescue operations:

---

6 Council of Europe (ed.), *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*", June 2019, section 4.2, recommendations 31 and 32, at https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87.

7 In the *Vos Thalassa* case, a supply vessel sailing under the Italian flag, the *Vos Thalassa*, picked up 66 shipwrecked persons to the south of Sicily, in the Libyan SAR zone, in July 2018; the rescued persons had been fleeing from Libya. After the crew of the supply vessel had been instructed by the Libyan coastguard to change course and hand over the rescued persons to the Libyan coastguard, the shipwrecked persons who had been taken on board, whose conduct was the subject of criminal proceedings before the investigation tribunal, evidently put up violent resistance against the return of the tugboat to Libya and forced the crew to stay on their course for Italy, where the Italian authorities initially refused to let the vessel put into port.

On the *Vos Thalassa*, see the report in the *Daily Telegraph* of 10 July 2010 – 'Italy intensifies campaign against migrants by refusing access to merchant vessel involved in rescue' – at https://www.telegraph.co.uk/news/2018/07/10/italy-intensifies-campaign-against-migrants-refusing-access/.

8 Tribunale di Trapani – Ufficio del giudice per le indagini preliminari – decision of 23 May 2019, at https://www.asylumlawdatabase.eu/en/case-law/italy-tribunal-trapani-office-judge-preliminary-investigations-piero-grillo.

9 See, for example, Alexander Haneke, '*Grauzonen im Mittelmeer*', in the *Frankfurter Allgemeine Zeitung* of 2 July 2019, p. 2, accessible at https://www.faz.net/aktuell/politik/ausland/sea-watch-und-das-seerecht-grauzonen-im-mittelmeer-16263583.html (in German).

10 Resolution MSC.167(78) of the IMO Maritime Safety Committee: Guidelines on the Treatment of Persons Rescued at Sea, adopted on 20 May 2004; accessible at http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf

> "Shipmasters have certain duties that must be carried out in order to provide for safety of life at sea, preserve the integrity of global SAR services of which they are part, and to comply with humanitarian and legal obligations" (paragraph 5.1).

In the present study, which draws upon the overview of 13 February 2018,[11] the Research Services address both practical issues and questions of legal dogma that arise in the no-man's land between **international maritime law and the protection of human rights**.

One of the questions arising for masters of vessels is whether and to what extent they are required to follow instructions from the Libyan Maritime Rescue Coordination Centre and the Libyan coastguard if this inevitably entails the return of rescued shipwreck survivors to Libya.[12] This dilemma raises diverse legal questions, which we shall examine in the present study. In terms of legal dogma, the main issue is the **normative order of priority of conflicting obligations imposed on private maritime rescuers** by various national and international legal provisions. There is a need to clarify not only how binding any such obligations are, for example whether they stem from the 'hard law' of international treaties or the 'soft law' of international organisations, but also who they are addressed to, in other words governments only or non-governmental actors too.

As well as the precept of **delivering shipwreck survivors to a place of safety**, we shall also focus on the way in which the **principle of *non-refoulement* 'superimposes' overriding human- and refugee-rights provisions on international maritime law.** In addition, constitutional and penal provisions can steer the actions of both state authorities and non-governmental actors in the no-man's-land between the law of the sea and human rights.

2. Maritime rescue coordination centres

2.1. Establishment of a Libyan maritime rescue coordination centre

In July 2017, Libya notified the coordinates of its search and rescue region (SAR region) and the contact details of its maritime rescue coordination centre (MRCC) to the International Maritime Organization (IMO). Presumably because of technical deficiencies in the establishment of the Libyan MRCC, the notification was initially withdrawn again – possibly on the recommendation

---

11 WD 2 - 3000 - 013/18 of 13 February 2018, *Maritime rescue in the Mediterranean. Rights and obligations of vessels under the SAR Convention and manifestations of the principle of non-refoulement on the high seas*, accessible at http://lawsdocbox.com/Immigration/76262964-Research-services-overview.html

12 This issue is also the subject of a new study by Anuscheh Farahat and Nora Markard, entitled *Places of Safety in the Mediterranean: The EU´s Policy of Outsourcing Responsibility*, conducted on behalf of the Heinrich Böll Foundation (Brussels, February 2020, particularly pp. 36ff.), accessible at https://eu.boell.org/en/2020/02/18/places-safety-mediterranean-eus-policy-outsourcing-responsibility. The study concludes that ships' masters must make a value judgement and give priority to delivering shipwrecked persons to a place of safety over any other obligations, the fulfilment of which might involve returning those persons to Libya.

of the IMO – but was resubmitted in December 2017.[13] The IMO communicated the relevant information to all parties to the SAR Convention,[14] including Germany, in June 2018.[15] The contact details of the Libyan MRCC are held on the *Search and Rescue Contacts* website maintained by the Canadian Coast Guard in Halifax.[16] According to information from the Federal Government, the Libyan maritime rescue coordination centre will not become fully operational until some time during the course of 2020. An operations centre of the Libyan coastguard in Tripoli has been serving as the contact body with the regional MRCC in Rome, which has so far been coordinating maritime rescue operations in the Libyan SAR region and will evidently continue to play a coordinating role, that is to say will communicate relevant information to the Libyan authorities, until the Libyan MRCC is fully operational.[17]

The SAR team takes operational measures in the fields of planning, organisation, training, information exchange and coordination with a view to controlling and optimising maritime rescue missions. The coordination of maritime rescue activities is **not necessarily the preserve of a particular MRCC**. As IMO Resolution MSC.167(78) of 20 May 2004 (Annex 34, paragraph 6.4) vom 20. Mai 2004 (Anlage 34, Ziff. 6.4) points out,

> "Normally, any SAR co-ordination that takes place between an assisting ship and any coastal State(s) should be handled via the responsible RCC. States may delegate to their respective RCCs the authority to handle such co-ordination on a 24-hour basis, or may task other national authorities to promptly assist the RCC with these duties."[18]

---

13 See the previous overview WD 2 - 3000 - 103/18 of 13 July 2018, *Einrichtung von SAR-Zonen und Seenotrettungsleitstellen*, at https://www.bundestag.de/resource/blob/565680/314bc300770c6f5a3fe3b19b869f17f3/wd-2-103-18-pdf-data.pdf, as well as Farahat and Markard, *ibid.,* pp. 24 and 41.

14 International Convention on Maritime Search and Rescue (SAR Convention) of 27 April 1979, at http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-(SAR).aspx.

15 '*La Libia ha dichiarato la sua zona SAR: lo conferma l'IMO*', *Vita* article of 28 June 2018, accessible at http://www.vita.it/it/article/2018/06/28/la-libia-ha-dichiarato-la-sua-zona-sar-lo-conferma-limo/147392/. Bundestag printed paper 19/4301 of 13 September 2018: Federal Government reply to a Minor Interpellation from the group of The Left Party on refugees returned to Libya by the Italian vessel *Asso Ventotto*, p. 4, question 12, at http://dip21.bundestag.de/dip21/btd/19/043/1904301.pdf (in German).

16 https://sarcontacts.info/srrs/ly_srr/.

17 Bundestag printed paper 19/2021 of 4 May 2018: Federal Government reply to a Minor Interpellation from the group of The Left Party on the armed attack of 15 March 2018 on maritime rescuers in the Mediterranean, questions 6 and 15, at https://dip21.bundestag.de/dip21/btd/19/020/1902021.pdf, and Bundestag printed paper 19/5387 of 30 October 2018: Federal Government reply to a Minor Interpellation from the group of The Left Party, question 21, at http://dipbt.bundestag.de/doc/btd/19/053/1905387.pdf (both in German).

18 IMO Maritime Safety Committee Resolution MSC.167(78): Guidelines on the Treatment of Persons Rescued at Sea, adopted on 20 May 2004, document MSC 78/26/Add.2, at http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf.

The Federal Government has taken note of the establishment of the Libyan SAR region, which means that the Libyan Maritime Rescue Coordination Centre and the Libyan coastguard constitute the competent rescue coordination bodies under the SAR Convention for ships sailing under the German flag.[19] As part of its defined remit, the control centre of the Libyan coastguard can coordinate maritime rescue operations within the specified search area and can designate an on-scene coordinator.[20]

2.2. Binding nature of instructions from an MRCC

Just like the **duty to render assistance at sea**,[21] the **duty to follow the instructions** of a national MRCC is enshrined in both international and domestic law. In the view of the Federal Government and of the relevant literature on international law, ships participating in maritime rescue operations within an SAR region must comply with the instructions of the competent rescue coordination centre. The International Convention of 1974 for the Safety of Life at Sea (SOLAS Convention),[22] lays down in Chapter V, Regulation 33(2), that

> "(…) the search and rescue service concerned, after consultation, so far as may be possible, (…) has the right to requisition one or more of those ships as (…) the search and rescue service considers best able to render assistance, and it shall be the duty of the master (…) of the ship (…) requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress."

Paragraph 5.1.7 of the Guidelines on the Treatment of Persons Rescued at Sea adopted by the IMO Maritime Safety Committee in Resolution MSC.167(78) of 20 May 2004, on the other hand, stipulates that shipmasters *should* comply with any relevant requirements of the Government

---

19 See Stefan Talmon, 'Private Seenotrettung und das Völkerrecht', in *Juristen Zeitung* (JZ), 2019, pp. 802-809, at p. 803, accessible at https://www.mohrsiebeck.com/artikel/private-seenotrettung-und-das-voelkerrecht-101628jz-2019-0293.

20 See point 5.7.2 of the Annex to the SAR Convention.

21 The relevant provision in international law is Article 98 of the UN Convention on the Law of the Sea, although it only applies to States Parties to the Convention and puts the onus on them to legislate to that effect. Another applicable provision is Chapter V, Regulation 33, of the SOLAS Convention, but its direct applicability to non-governmental actors is disputed (for details of this discussion, see Martin Ratcovich, *International Law and the Rescue of Refugees at Sea*, Stockholm University, 2019, p. 88, https://www.diva-portal.org/smash/get/diva2:1323140/FULLTEXT02.pdf.
In statutory law, section 2(1) of the German Maritime Shipping Safety Ordinance of 27 July 1993 (Federal Law Gazette I, p. 1417), prescribes that "The master (…) of a German-registered ship which is at sea and capable of rendering assistance, on receiving a report of persons in distress at sea, shall proceed with all speed to their aid". Breaches of this duty of assistance constitute criminal offences under section 323c of the German Criminal Code or regularory offences under section 10(1)(1) of the said Ordinance.

22 International Convention for the Safety of Life at Sea of 1 November 1974, http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx.

responsible for the SAR region where the survivors were recovered. This guideline makes no reference to the binding effect of instructions issued by an MRCC.

For vessels sailing under the German flag, on the other hand, a **duty of compliance** arises quite explicitly from the second sentence of section 2(1) of the German **Maritime Shipping Safety Ordinance**:[23]

> "Orders given by agencies that identify themselves to the master of the ship or to another person responsible for safety as the authorities assigned to coordinate search and rescue services in maritime emergencies under Chapter 2 of the Annex to the International Convention on Maritime Search and Rescue of 6 November 1979 (Federal Law Gazette II, 1982, p. 485) shall be obeyed."

2.3. Penalties and enforcement of MRCC instructions

Contraventions of section 2 of the Maritime Shipping Safety Ordinance by masters of German vessels constitute a **regulatory offence** within the meaning of that Ordinance.[24] Section 15(2) of the Maritime Shipping (Federal Responsibilities) Act[25] provides for fines of up to EUR 50,000, which may be levied by the competent authority, the Federal Waterways and Shipping Agency (GDWS) in Kiel. The relatively high level of the potential fine is intended not only to reinforce the authority of other countries' maritime rescue coordination centres but surely first and foremost to lend emphasis to the priority of maritime rescue over other commercial obligations of merchant ships.[26]

On the other hand, the **Libyan national coastguard** has **no legal powers to forcibly compel the master of a ship sailing under a foreign flag to comply** with an instruction given by the Libyan

---

23 The Maritime Shipping Safety Ordinance (*Verordnung über die Sicherung der Seefahrt*) of 27 July 1993, Federal Law Gazette I, 1993, p. 1417, as amended by the Ordinance of 31 August 2017, Federal Law Gazette I, 2015, p. 1474, accessible at https://www.gesetze-im-internet.de/seefsichv_1993/SeeFSichV_1993.pdf (in German).

24 Under section 10 of the Maritime Shipping Safety Ordinance, "Anyone who intentionally or negligently contravenes the provision laid down in the second sentence of section 2(1) of this Ordinance by failing to to obey an order referred to in that provision or by not meeting, or not meeting in the prescribed manner, a requirement referred to in that provision commits a regulatory offence within the meaning of section 15(1)(2) of the Maritime Shipping (Federal Responsibilities) Act".

25 Maritime Shipping (Federal Responsibilities) Act (*Gesetz über die Aufgaben des Bundes auf dem Gebiet der Seeschifffahrt – Seeaufgabengesetz*) of 24 May 1965, accessible at https://www.gesetze-im-internet.de/bseeschg/BJNR208330965.html (in German).

26 Cf. Farahat and Markard, *ibid.*, p. 46: "What the legislator had in mind were not NGO vessels acting against MRCC orders with the goal of rescuing persons in distress, but rather private commercial vessels not willing to proceed to rescue persons in distress [on] the high seas, out of fear of risking damage to their ship or suffering financial loss."

MRCC if he disregards it.[27] The reason for this is that it would be a matter of penalising the conduct of private individuals on the high seas, in other words in stateless territory. Ships sailing under the German flag are subject, under the flag-state principle, to the law of Germany, not to Libyan law. The establishment of an SAR region has no effect on national maritime borders. Neither the UN Convention of 1982 on the Law of the Sea (UNCLOS) nor the SAR Convention of 1979 grants powers of enforcement to a country's national coastguard in areas that are within that country's SAR region but outside its territorial waters.

2.4. Legal oversight of national maritime rescue coordination centres

The SAR Convention **does not provide for any kind of legal and professional oversight of national maritime rescue coordination centres by the IMO**. Although the IMO may issue human-rights-based guidelines and recommendations to restrict the actions of national MRCCs (see subsection 4.1 below), the SAR provides no means of 'withdrawing' a notified SAR region, as it were, from a state party to the SAR Convention, even if that party is failing to comply with human-rights requirements and guidelines. The IMO, moreover, possesses **no rights of intervention** that would enable it to prevail upon national MRCCs to act in a particular way. As national authorities, MRCCs are **subject only to the authority of their respective SAR states parties**.[28] If the overseeing state party happens to be a failing state, national legal oversight is effectively rendered meaningless, and international law has no means of stepping into the breach.

2.5. Legal remedies against instructions from a national maritime rescue coordination centre

If the instructions of a national MRCC are regarded as **acts of a public authority**, they may, in principle, be challenged before the European Court of Human Rights (ECtHR) in Strasbourg, provided that the defendant state is a party to the European Human Rights Convention. In May 2018, the Global Legal Action Network (GLAN) and the Association for Juridical Studies on Immigra-

---

27 See the Federal Government reply to a Minor Interpellation from the parliamentary group of The Left Party in Bundestag printed paper 19/2021 of 4 May 2018, p. 10 (question 20).
See also overview WD 2 - 3000 - 075/17 of 25 August 2017, entitled *Rechtsfragen bei Seenotrettungseinsätzen innerhalb einer libyschen SAR-Zone im Mittelmeer*, pp. 5ff., at https://www.bundestag.de/resource/blob/525660/e43d2ccfb3b60ecb334f9276ae0f6f6c/wd-2-075-17-pdf-data.pdf (in German).

28 The German MRCC in Bremen, for example, is operated by the **German Maritime Search and Rescue Association** (DGzRS). The Federal Ministry of Transport, Building and Housing commissioned the DGzRS to coordinate search and rescue activities in German territorial waters. The Association, founded in Kiel in 1865, is established as an *altrechtlicher Verein*, a special legal status for associations founded before 1900, and is under the supervisory authority of the Ministry.

tion (ASGI) filed an application with the ECtHR on behalf of 17 shipwrecked persons.[29] Their complaint concerns a maritime rescue operation conducted in the Libyan SAR region on 6 November 2017. The legal issue under examination is whether and to what extent an instruction from a national MRCC may suffice to subject shipwrecked persons on the high seas to the effective control and jurisdiction of the relevant state.[30]

3. Delivery to a place of safety

The amendment of the SOLAS and SAR Conventions in 2004[31] placed states under an obligation in international law to take rescued persons to a '**place of safety**'.[32] The term 'place of safety' is not defined in the SAR Convention but was fleshed out in IMO Maritime Safety Committee Resolution MSC.167(78) of 20 May 2004 (Annex 34, paragraph 6.12) as follows:

> "A place of safety (as referred to in the Annex to the 1979 SAR Convention, paragraph 1.3.2) is a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.

---

29 *The Guardian* of 8 May 2018, 'Italy's deal with Libya to 'pull back' migrants faces legal challenge', at https://www.theguardian.com/world/2018/may/08/italy-deal-with-libya-pull-back-migrants-faces-legal-challenge-human-rights-violations; Sea Watch, 'Legal action against Italy over its coordination of Libyan Coast Guard pull-backs resulting in migrant deaths and abuse', 8 May 2018, at https://sea-watch.org/en/legal-action-against-italy-over-its-coordination-of-libyan-coast-guard/.

30 An opinion delivered by the German Institute for Human Rights, entitled *Seenotrettung und Flüchtlingsschutz* (second edition, 30 August 2018, p. 12, footnote 58), argues that the European Human Rights Convention is applicable.
See also Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strasbourg?', in *European Journal of Migration and Law* , Vol. 20 (2018), pp. 396-426, accessible at https://brill.com/view/journals/emil/20/4/article-p396_3.xml.
Moritz Baumgärtel, 'High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan 'Pullback' Policies to the European Court of Human Rights', in *EJIL:Talk!*, 14. Mai 2018, https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys-involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights/.

31 The background to the amendment of the Conventions was Australia's refusal in August 2001 to admit rescued boat people who were on board the Norwegian cargo ship *MV Tampa*.

32 Cf. SOLAS Convention of 1974, as amended, Chapter V, Regulation 33(1.1); Annex to the SAR Convention of 1979, as amended, paragraph 3.1.9.
In commentaries on the UN Convention on the Law of the Sea (UNCLOS) of 1982, delivery to a place of safety is regarded as part of the obligation to render assistance within the meaning of Article 98(1)(a) of the Convention; see, for example, Douglas Guilfoyle on Article 98 UNCLOS in Alexander Proelss (ed.), United Nations Convention on the Law of the Sea. A Commentary, Munich 2017, point 10.

For detailed treatments, see: Farahat and Markard, *ibid.*, pp 14ff..
Martin Ratcovich, International Law and the Rescue of Refugees at Sea, Stockholm University, 2019, p. 211ff., accessible at https://www.diva-portal.org/smash/get/diva2:1323140/FULLTEXT02.pdf.
Talmon, *ibid.*. pp. 802-809, at p. 804.
Hermann-Josef Blanke and Manoël Johr, 'Rechtliche Vorkehrungen für die zivile Seenotrettung im Mittelmeer', in *Die öffentliche Verwaltung* (DÖV), 2019, pp. 929-940, at pp. 935-936).

> Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination."[33]

A 'place of safety', then, must primarily be a location where the survival of rescued persons can be ensured – through the satisfaction of their basic human needs, though not necessarily through the guaranteed protection of their human rights.[34] The IMO Resolution of 20 May 2004 makes it clear that the particular circumstances of the case must be taken into account when it comes to delivering rescued persons to a place of safety; selection of a place of safety may involve consideration of a variety of important factors (paragraph 6.15). It need not necessarily be a port.

While the guidelines of the UN High Commissioner for Refugees, which are not legally binding, are evidently based on an assumption that delivery to a place of safety can generally be ensured only by means of disembarkation on land,[35] the amendments to the SOLAS and SAR Agreements **do not impose an obligation on states parties to consent to the disembarkation of rescued persons in one of their ports**.[36] Nevertheless, the IMO Resolution of 20 May 2004 states that "Flag and coastal States *should* have effective arrangements in place for timely assistance to shipmasters in relieving them of persons recovered by ships at sea. (…) Responsible State authorities should make every effort to expedite arrangements to disembark survivors from the ship".[37]

To lighten the burden on the master of a rerscue vessel, responsibility for identifying a 'place of safety' for rescued persons is assigned to the national maritime rescue coordination centres. **The responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government** responsible for the SAR region in which the survivors were recovered.[38] A state may therefore **infringe its obligations under international law** if it instructs merchant ships

---

33 Cf. Resolution MSC.167(78) of the IMO Maritime Safety Committee: Guidelines on the Treatment of Persons Rescued at Sea, adopted on 20 May 2004: http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf, paragraph 6.12.

34 Talmon, *ibid.*

35 *The Treatment of Persons Rescued at Sea: Conclusions and Recommendations. Report of the Office of the UN High Commissioner for Refugees to the UN General Assembly*, UN Doc. A/AC.259/17 of 11 April 2008, paragraph 15 with footnote 3, at https://undocs.org/pdf?symbol=en/A/AC.259/17.

36 Representing a wealth of literature, Richard Barnes, 'Refugee Law at Sea', in *International & Comparative Law Quarterly* (ICLQ), Vol. 53 (2004), pp. 47-77, at p. 63, accessible at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/E3CA40E44BA1E91D34404D14079D1810/S0020589300067440a.pdf/refugee_law_at_sea.pdf.

37 Resolution MSC.167(78) of the IMO Maritime Safety Committee: Guidelines on the Treatment of Persons Rescued at Sea, adopted on 20 May 2004, http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf, paragraphs 3.1 and 6.9.

38 *ibid.*, paragraph 2.5.

through its national MRCC to take rescued survivors to a place that does not meet the IMO criteria.[39]

The predominant view in the literature on international law – which is not shared in Libya, needless to say – is that Libya is not a 'place of safety' within the meaning of international maritime law.[40] This assessment was also endorsed by UNHCR in the report setting out its position on returns to Libya:

> "In light of the volatile security situation in general and the particular protection risks for third-country nationals (including detention in substandard conditions, and reports of serious abuses against asylum-seekers, refugees and migrants), UNHCR does not consider that Libya meets the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea."[41]

The obligations arising from the SAR and SOLAS Conventions **are addressed to states parties**.[42] The IMO Resolution of 20 May 2004, however, also relates to masters of ships, stating that they "should seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized".[43] It is clear from the wording, however, that this is **not a legally binding rule**.

The bottom line is that **no legal obligation which is addressed directly to non-governmental actors** to deliver shipwrecked persons to a place of safety and which **overrides the shipmaster's legal duty** to obey the orders of the competent national MRCC (see subsection 2.2 above) can be the inferred from international maritime law. The master of a ship entrusted with responsibility for a maritime rescue operation does undoubtedly enjoy a certain **degree of discretion at sea**. The SOLAS Convention contains the following provision in Chapter V, Regulation 34(3):

---

39 See, for example, Farahat and Markard, *ibid.*, p. 36.

40 Blanke and Johr, *ibid.*, p. 935, with further references in footnote 71;
Nele Matz-Lück, 'Seenotrettung als völkerrechtliche Pflicht: Aktuelle Herausforderungen der Massenmigrationsbewegungen über das Mittelmeer', in *VerfBlog* of 18 August 2018, at https://verfassungsblog.de/seenotrettung-als-voelkerrechtliche-pflicht-aktuelle-herausforderungen-der-massenmigrationsbewegungen-ueber-das-mittelmeer/;
Farahat and Markard, *ibid.*, pp. 22ff, at p. 27;
Opinion of the German Institute for Human Rights, entitled *Seenotrettung und Flüchtlingsschutz*, of 31 July 2018, p. 11; Talmon, *ibid.*

41 UNHCR Position on Returns to Libya, September 2018, paragraph 42, accessible at https://www.refworld.org/docid/5b8d02314.html.

42 This point is emphasised by Talman, *ibid.*, pp. 802-809, at p. 803.

43 Cf. Resolution MSC.167(78) of the IMO Maritime Safety Committee: Guidelines on the Treatment of Persons Rescued at Sea, at http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf, paragraph 5.1.6.

> "The owner, the charterer (…) or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgement, is necessary for safe navigation and protection of the marine environment."

The master's discretion does not extend, however, to the selection of a 'place of safety' for the rescued persons. Nor can it be inferred from the provision that the master of a ship is free to disregard instructions from the MRCC relating to the place of disembarkation, provided that his compliance does not interfere with safe navigation. The potential conflict between a master's duty to obey the instructions of an MRCC and his ethical reservations regarding the human-rights implications of the choice of a 'place of safety' for the rescued persons is **precisely what the aforementioned provision does not resolve**.[44]

For want of a clear obligation in international maritime law for masters of ships to deliver rescued persons to a place of safety and for want of appropriate powers of discretion allowing them to ignore instructions to the contrary from a national MRCC, the ethical and legal 'dilemma' therefore **cannot be resolved by establishing an order of precedence between norms of international maritime law**.

On the contrary, it will be necessary to examine whether the master of a ship has other obligations, such as his **duty to respect and defend human rights**, that **outrank or supplant** his duty under international maritime law to obey instructions of an MRCC.

4. Human and refugee rights overriding the SAR regime

4.1. Consideration of human-rights principles, especiallythe principle of *non-refoulement*

The states parties to the SAR Convention have established the principle that matters relating to human and refugee rights are **outside the sphere of competence of the IMO**.[45] Nevertheless, the resolutions and guidelines of the IMO, though not legally binding on parties to the SAR Convention, have made it clear that "international protection principles as set out in international instruments should be followed".[46] The IMO explicitly asks for **consideration of the principle of *non-refoulement***:

---

44 Such resolution is, however, attempted by Farahat and Markard, *ibid*., pp. 37-38.

45 IMO Assembly, 23rd session, Progress Report to the Assembly, IMO Doc. A 23/23 of 15 July 2003, paragraphs 39-40, at https://www.transportstyrelsen.se/contentassets/1963dd17478448a9a07091cc0b9f6b43/23-23.pdf.

46 *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, IMO Doc. FAL.3/Circ.194 of 22 January 2009, paragraph 2.5, accessible at http://www.imo.org/en/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/FAL.3-Circ.194.pdf.

> "The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea."[47]

Let it suffice at this point to refer to the importance, the origins (treaty and customary law) and the reception and ongoing development of the *non-refoulement* principle.[48] The practical expressions and the scope of this principle, especially as regards its **extraterritorial application on the high seas** or its implications for the **participation of private individuals and entities** in maritime rescue operations, on the other hand, must be reappraised time and again. As far as the application of the principle of *non-refoulement* on the high seas is concrerned, developments such as the *Hirsi* judgment of the European Court of Human Rights[49] have evidently spawned a reassessment process over the past decade.[50] An opinion delivered by the UN High Commissioner for

47 Resolution MSC.167(78) of the IMO Maritime Safety Committee: Guidelines on the Treatment of Persons Rescued at Sea, paragraph 6.17.

48 For more details, see:
Andreas v. Arnauld, in *Völkerrecht*. Müller, Heidelberg, fourth edition, 2019, point 791 (in German);
Gilbert Gornig, *Das Refoulement-Verbot im Völkerrecht*. Braumüller, Vienna, 1987.
Bianca Hofmann, *Grundlagen und Auswirkungen des völkerrechtlichen Refoulement-Verbots*, Potsdam University Human Rights Centre, https://publishup.uni-potsdam.de/opus4-bp/frontdoor/deliver/index/docId/4857/file/SGM03.pdf;
Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention*. Beck, Munich, sixth edition, 2016, section 20, points 75ff.

49 ECtHR judgment of 23 February 2012 in *Hirsi Jamaa and Others v. Italy*, at https://hudoc.echr.coe.int/eng?i=001-109231#{%22itemid%22:[%22001-109231%22]}.
See also Maarten Den Heijer, 'Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case', in *International Journal of Refugee Law*, Vol. 25, Issue 2 (2013) pp. 265-290, accessible at https://academic.oup.com/ijrl/article/25/2/265/1510318.

50 In 2008, the Federal Government still regarded the applicability of the Geneva Refugee Convention outside the sovereign territory of states parties as 'contentious' (cf. Federal Government reply to a Minor Interpellation from the püarliamentary group of Alliance 90/The Greens, Bundestag printed paper 16/9204 of 15 May 2008, p. 5, question 1, at http://dipbt.bundestag.de/doc/btd/16/092/1609204.pdf (in German).

On state practice before the *Hirsi* judgment, see Sicco Rah, *Asylsuchende und Migranten auf See*. Springer, Berlin and Heidelberg, 2009, pp. 177-178, accessible at https://link.springer.com/book/10.1007%2F978-3-540-92931-4.
See also Killian S. O´Brien, 'Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem', in Goettingen Journal of International Law Vol. 3, No. 2 (2011), pp. 715-732, at http://www.gojil.eu/issues/32/32_article_obrien.pdf.

Refugees, though not binding in international law, indicates that the principle of *non-refoulement* is **not subject to any geographical limits**.[51]

The principle of *non-refoulement* relates to the return or deportation of refugees across a national border into the area under the control of the persecuting state. The principle is thus a product of the law governing deportation and requires the deporting state to refrain from any measures to terminate a person's residence which would put that person at risk. In terms of legal dogma, the principle **makes the deporting state accountable** for placing a deportee in a situation in which a real danger of torture or inhuman treatment exists. The risk of torture itself, on the other hand, exists in the persecuting state, which is where accountability lies for any actual violation of human rights. The responsibility of the deporting state for the potential consequences of its action, by contrast, derives solely from its **duty to safeguard fundamental rights,** because it has failed to protect individuals from violations of their human rights perpetrated by third parties, whether they be private entities or other states.

With regard to Libya, this means that the delivery of refugees to their own country by the Libyan coastguard **does not constitute a Libyan breach of the *non-refoulement* obligation**.[52]
This does not preclude examining whether **pull-back operations on the part of the Libyan coastguard** might be violations of the **human right to leave one's country** that is enshrined in Article 12(2) of the International Covenant on Civil and Political Rights.[53] Under that provision, everyone is free "to leave any country, including his own". Libya acceded to the Covenant in 1970.

---

51 UNHCR, Advisory Opinion of 26 January 2007 on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, of 26 January 2007, p. 13, paragraph 28, accessible at https://www.unhcr.org/4d9486929.pdf.
On the extraterritorial application of the *non-refoulement* obligation, see also Blanke and Johr, *ibid.,* pp. 929-940, at p. 935.
Mariagiulia Giuffré, 'State Responsibilities Beyond Borders: What Legal Basis for Italy´s Push-backs to Libya', in *International Journal of Refugee Law*, Vo. 24, No. 4 (2013), pp. 692-734, at p. 719, accessible at https://www.researchgate.net/publication/273024753_State_Responsibility_Beyond_Borders_What_Legal_Basis_for_Italy's_Push-backs_to_Libya.

52 A different view is expressed in the opinion of the German Institute for Human Rights (DIMR), entitled *Seenotrettung und Flüchtlingsschutz* (second edition, 30 August 2018, p. 13).

53 For comprehensive treatments of this point, see:
Ratcovich, *op. cit.*, pp. 165ff.;
Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', in *European Journal of International Law* 2016, Vol. 27, Issue 3, August 2016, pp. 591-616, at pp. 594ff., accessible at https://academic.oup.com/ejil/article/27/3/591/2197244.

4.2. Primacy of international over national law

International law may **conflict** with a national provision requiring masters of privately owned ships to take particular action[54] and may even supplant ordinary national law (primacy of application) if the relevant rule of international law has been incorporated into German law by virtue of Article 25 of the Basic Law and is **directly addressed to private individuals or entities**.[55]

Article 25 of the Basic Law prescribes direct applicability of the general rules of international law in the German legal order as follows: "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."

Being 'inhabitants of the federal territory' does not depend on people's place of residence; the term refers to everyone who is subject to German law.[56] 'The general rules of international law', according to the settled case law of the Federal Constitutional Court[57] and the unanimous view in legal literature, means **universal customary international law**. It is common ground that this includes the *non-refoulement* obligation.[58] A distinction must be made in this context between **rules of international law focused on states and those focused on third parties**.[59] Foremost among the rules of international law that are focused on individuals are the human rights that apply by dint of customary international law, such as the prohibitions of slavery and torture, and the individually focused prohibitions enshrined in international criminal law, such as those targeting crimes against humanityand war crimes.[60] It is striking that all of these prohibitions, with-

54 The relevant regulation is the Maritime Shipping Safety Ordinance, which has the status of a statutory instrument. Statutory instruments, like acts of parliament, comprise general abstract regulations; they are not, however, subject to formal legislative processes but are enacted by the authorised organs of the executive branch (cf. Article 80(1) of the Basic Law).

55 Christian Koenig and Doris König on Article 25 of the Basic Law (in German), in Hermann Mangoldt, Friedrich Klein and Christian Starck (eds), *Grundgesetz. Kommentar*, Vol. 2. Beck, Munich, seventh edition, 2018, point 5.

56 Christian Hillgruber on Article 25 of the Basic Law (in German), in Bruno Schmidt-Bleibtreu, Hans Hofmann and Hans-Günter Henneke (eds), *Grundgesetz. Kommentar*. Heymanns, Cologne, fourteenth edition, 2018, point 18 with references.

57 Cf., for example Decisions of the Federal Constitutional Court (BVerfGE), Vol. 15, pp. 25ff., at p. 34; Vol. 16, pp. 27ff, at p. 33; Vol. 23, pp. 288ff., at p. 317; Vol. 31, pp. 145ff, at p. 177 (all in German).

58 This also applies in the context of international maritime law; cf. Yoshifumi Tanaka, *The International Law of the Sea*, third edition, Cambridge, 2019, p. 215.

59 Hillgruber, *ibid.*, points 4ff;
Wolff Heintschel von Heinegg on Article 25 of the Basic Law (in German), in Volker Epping and Christian Hillgruber (eds), *Grundgesetz*. third edition, Beck, Munich, 2020, points 19 and 33-34.

60 Koenig and König, *ibid.,* point 68;
Heintschel von Heinegg, *ibid.*, point 33.

out exception, have been matched by corresponding provisions in the national Criminal Code.

4.3. Binding effect of the *non-refoulement* obligation on non-governmental actors

The issue of the so-called **horizontal effect, or individual focus,** of the *non-refoulement* obligation, in other words the question whether it also binds non-governmental actors, such as masters of merchant ships, remains largely unresolved. There has been a *de facto* extension of the *non-refoulement* obligation to private operators **in a legally non-binding form**. The IMO Guidelines of 20 May 2004, for instance, 'recommend' that shipmasters should avoid disembarking rescued asylum-seekers in territories where persecution and other dangers threaten them.[61]

From a legal point of view, the Federal Government considers that non-governmental actors are *not*, in principle, bound by the *non-refoulemen*t principle or by the Convention against Torture:[62]

> "Under Article 3 of the UN Convention against Torture, no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. The Convention against Torture binds only States Parties. As the UN Convention against Torture is concluded between states, it does not bind non-governmental actors.
> Whether a violation of Artricle 3 of the UN Convention against Torture has occurred can only be assessed in awareness and consideration of the circumstances of aspecific case."[63]

The overwhelming view expressed in **literature on international law** is likewise that **the *non-refoulement* obligation applies only to states**.[64] Article 33(1) of the Geneva Refugee Convention states that "No contracting state shall expel or return a refugee". There would be no basis in human-rights conventions (the European Human Rights Convention or the UN Convention against

---

61 Vgl. *Guidelines on the Treatment of Persons rescued at Sea*, Annex 34, Resolution MSC 167/78, paragraph 6.17, http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf: "The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea." See also paragraph 5.6: "[Ship masters should] seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized."

62 Reply given by State Secretary Andreas Michaelis, Bundestag printed paper 19/3762 of 10 August 2018, p. 41, question 54, accessible at https://dip21.bundestag.de/dip21/btd/19/037/1903762.pdf (in German).

63 Federal Government reply to a Minor Interpellation from the parliamentary group of The Left Party on the consequences of obstructing private maritime rescue operations, in Bundestag printed paper 19/4164 of 5 September 2018, p. 7, question 16, accessible at http://dipbt.bundestag.de/doc/btd/19/041/1904164.pdf (in German).

64 James Pugash, 'The Dilemma of the Sea Refugee: Rescue without Refuge', in *Harvard International Law Journal* (HILJ), 1977, pp. 577-604, at pp. 599-600);
Guy S. Goodwin-Gill, The Refugee in International Law, second edition, Oxford, 1996, p. 138;
Talmon, *ibid.*, p. 805.
Blanke and Johr, *ibid.,* p. 935, with further references in footnote 65;
Matz-Lück, *ibid.*

Torture) or in the Geneva Refugee Convention for positing any obligations on private individuals or entities.

Occasional attempts have been made to argue for a horizontal effect of the *non-refoulement* obligation.[65] In this context, it is not enough merely to try to raise the *non-refoulement* obligation in customary law to the rank of a **peremptory norm** (*ius cogens* as defined in Article 53 of the Vienna Convention on the law of treaties),[66] as some commentators have done and as the investigation tribunal in Trapani recently did too,[67] for exclusively state-focused norms such as the prohibition of the threat or use of force between states and the principle of the sovereign equality of states are also part of *ius cogens* without having any horizontal effects on private individuals or entities.

The fundamental problem with the assumption that the *non-refoulement* obligation has horizontal effects actually lies in the fact that the **fulfilment of that obligation – particularly on the high seas –** poses certain difficulties:

In order to establish whether a *non-refoulement* obligation applies, the master of a merchant vessel must be aware of the background, in terms of how refugee and migration law relates to the specific case, which includes knowing the **migrant and/or refugee status of the shipwrecked persons**. Another vital factor when it comes to applying the *non-refoulement* principle is information on the **human-rights situation in the country** to which the survivors are to be returned. In the case of Libya, the *de facto* situation may be obvious, but it is less clear whether the *non-refoulement* obligation should apply in cases such as those of Tunisia or Morocco.[68] This illustrates the difficulty of **establishing the horizontal effect of *the non-refoulement* obligation as a legal principle and, *ipso facto*, universalising it**.

---

65 Cf. Inken von Gadow-Stephani, *Der Zugang zu Nothäfen und sonstigen Notliegeplätzen für Schiffe in Seenot*, Springer, Berlin and Heidelberg, 2006, p. 371, accessible at https://www.springer.com/de/book/9783540305187; the author argues that, in addition to flag sovereignty, the non-refoulement obligation also applies to private persons on board a ship.

66 *Ius cogens* within the meaning of Article 53 of the Vienna Convention on the law of treaties includes few legal principles of general international law which are acknowledged by the international community as norms accepted and recognised by the international community of states as a whole as norms from which no derogation is permitted – these include, for example, the obligation to refrain from the threat or use of force, the prohibition of genocide, elementary principles of international humanitarian law, the right of peoples to self-determination and the prohibitions of slavery and torture. These norms establish an *erga omnes* obligation towards all subjects of international law.
For more details, see:
Koenig and König, *ibid.*, point 22;
Andreas v. Arnauld, in *Völkerrecht*. Müller, Heidelberg, fourth edition, 2019, points 288ff.;
Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary*. Springer, Berlin and Heidelberg, 2012, Part V, Section 2, Article 53, point 81.

67 Blanke and Johr, *ibid.*, p. 935, with further references in footnote 59.
Tribunale di Trapani – Ufficio del giudice per le indagini preliminari, decision of 23 Mai 2019, p. 37: "(…) *il principio di non-refoulement ha ormai assunto rango consuetuniario e cogente*".

68 For an analysis of individual North African states, see Farahat and Markard, *ibid.*, pp. 18-31.

The local human-rights situation and the resulting danger to the returned refugees are not readily assessable in fact or in law by masters of merchant ships on the high seas, who are neither responsible nor qualified for such assessments. Reliable information will not be instantly available to them. The *non-refoulement* obligation binds only governmental bodies such as aliens authorities and administrative courts, because only they are in a position to gather, verify and assess the relevant information in an orderly procedure, which cannot be conducted on board a merchant ship on the high seas.

Besides, a horizontal effect of the *non-refoulement* obligation would raise the question as to what **legal consequences** an individual would face for not fulfilling the obligation, what **liability** it would entail towards the returned refugees and what scope there would be for individuals to **contest accusations**.

There is still **no settled case law** established by any international court that fleshes out the horizontal effect of a *non-refoulement* in a 'practical' form. It remains to be seen how this situation will develop.

It is possible that the wrong question is being asked about the horizontal effect of the *non-refoulement* obligation,[69] because responsibility for the legal 'dilemma' lies with the state alone. If we assume that the *non-refoulement* obligation is incumbent on state authorities alone, the real question then seems to be **whether states can permit or even order private rescuers by law to do something from which they themselves are prohibited under international law**.

Under Article 94(4) UNCLOS, the flag state is bound by international law to ensure, through national legislation or by other means, "that the master (…) [is] fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea".

So what can be done to ensure that masters of private rescue vessels are not legally compelled to deliver rescued shipwrecked persons to a place where their lives are endangered? In other words, what can be done to give the *non-refoulement* obligation precedence in domestic law over other conflicting legal obligations?

There seem to be **two conceivable options, which have not yet been highlighted, or have only been touched upon, in the discussion of this aspect of international law**. The first is to consider whether and to what extent states are prevented by international law or constitutional provisions from enacting, applying or enforcing rules which would result in shipmasters delivering rescued survivors to places where they are in danger (see subsection 5.1 below). The second is to examine whether national rules exist which impose penalties for delivering rescued persons to such places (see subsection 5.2).

69 This argument is presented forcefully in Farahat and Markard, *ibid*., p. 38, footnote 215.

5. Applicability of the non-refoulement obligation in national law

5.1. Constitutional law

Article 25 of the Basic Law, in its first sentence, enshrines the **primacy of customary international law over ordinary national law**. The implication for **German state institutions** is an obligation to **comply** with the general norms of international law, including the principle of non-refoulement, and to **refrain from infringing them**.[70]

Another effect of the first sentence of Article 25 is that **secondary federal legislation** ranking below the Basic Law **is supplanted in the event of a conflict of laws** or else must be interpreted, wherever possible, in conformity with international law.[71]

The obligation set out in section 2 of the Maritime Shipping Safety Ordinance to obey the instructions of an MRCC must therefore be **interpreted in conformity with international law in the light of the *non-refoulement* principle**. A master of a ship who refuses to return rescued survivors to Libya or to hand them over to the Libyan coastguard is therefore **not in breach of the duty of compliance** prescribed by section 2 of the Maritime Shipping Safety Ordinance, for the Ordinance, as federal legislation, gives way to the higher-ranking international law in the event of a conflict of norms.

The Federal Waterways and Shipping Agency (GDWS) in Kiel, which is the German MRCC, is also bound by the *non-refoulement* principle when it applies the rules of the Maritime Shipping Safety Ordinance and takes administrative measures to enforce them. If that authority were to serve the master of a ship with a penalty notice on account of a breach of section 2 of the Ordinance, such a notice would ultimately be contrary to international and constitutional law.

5.2. National criminal law

Another area to be considered relates to the **provisions of criminal law** that 'translate' the principle of *non-refoulement*, as it were, into national law.[72] Section 221 of the German Criminal Code penalises what it calls *Aussetzung* (**abandonment**) and is worded as follows:

> "Whoever places a person in a helpless situation or abandons a person in a helpless situation although that person is in their care or they are otherwise obliged to support that person, and thereby exposes a person to the danger of death or the risk of serious damage to health, incurs a penalty of imprisonment for a term of between three months and five years."

---

70 Hillgruber, *ibid.*, point 14.

71 *ibid.*, point 17, as well as Decisions of the Federal Constitutional Court (BVerfGE), Vol. 23 pp, 288ff., at p. 316, and Vol. 109, pp. 38ff., at p. 52 (all in German).

72 Blanke and Johr, *ibid.*, p. 936, also refer to penal norms in this context.

The prerequisite for criminal liability is that the victim has been placed or abandoned in a helpless situation in which his life or health is endangered, in other words where he is no longer able to protect himself against the danger or risk.[73] The constitutive element of placing or abandoning a person in a helpless situation depends on some kind of **change in the victim's external circumstances comprising a deterioration in his situation or an intensification of the danger facing him**, which must be due to the conduct of the perpetrator.[74]

The surrender of rescued shipwrecked persons by the master of a merchant ship to the Libyan coastguard for the purpose of their *refoulement* to Libya plainly meets the criteria for the offence of abandonment as defined in section 221 of the German Criminal Code. Awareness of the circumstances from which danger emanates is sufficient evidence of intent, i.e. of a subjective constitutive element of the offence.[75] Such awareness may be assumed in an extreme case such as that of Libya.

The 'abandonment' always takes place against the victim's will or without his consent. This means that the rescued survivors may resort to **self-defence within the meaning of section 32 of the German Criminal Code**, even using force if necessary, to avert the threat of abandonment, that is to say their *refoulement* to Libya.[76] The Italian investigation tribunal in the *Vos Thalassa* case proceeded from that premise.

6. Conclusion

Maritime rescue operations in the Mediterranean take place within a multi-layered legal framework of national and international provisions, some of which have only limited regulatory and steering power.

The SAR Convention of 1979 is the framework within which international maritime law governs the coordination of rescue operations on the high seas. The functioning of the SAR system, however, depends not only on the commitment and assistance of private maritime rescuers and mer-

---

73 Matthias Krüger, commentary on section 221 of the German Criminal Code, in *Leipziger Kommentar StGB*, edited by Gabriele Cirener, Henning Radtke, Ruth Rissing-van Saan, Thomas Rönnau and Wilhelm Schluckebier, Vol 7/1. Gruyter, Berlin, 2019, points 10 and 14 (in German).

74 *ibid.*, point 22.

75 *ibid.*, point 71; BGHSt 19, 352; BGHSt 36, 1 (15).

76 Section 32 of the German Criminal Code is worded as follows:
"(1) Whoever commits an act in self-defence does not act unlawfully.
(2) 'Self-defence' means any defensive action which is necessary to avert a present unlawful attack on oneself or another."

chant ships,[77] but first and foremost on the cooperation – in conformity with the rules – of states parties and their coastguards. The SAR system, in short, relies on the fulfilment of conditions, but the system itself can offer no legal guarantee of their fulfilment.

In this respect, problems have arisen through human-rights deficits in states parties to the SAR Convention such as Libya, which conducts so-called 'pull-back' operations to bring shipwreck survivors who had fled Libya back into the country, where they are exposed to the threat of human-rights violations. As these operations are conducted outside the jurisdiction of the European Court of Human Rights in Strasbourg and the International Tribunal for the Law of the Sea,[78] it is difficult to subject them to judicial review.

At best, international maritime law can only begin to cordon off 'weak spots' in the SAR system by means of legal provisions, far less eliminate them. The resolutions and guidelines of the International Maritime Organization (IMO), which are not binding in international law, have only limited potential as control mechanisms, especially as they generally address only states parties to the relevant maritime conventions, i.e. the SAR and SOLAS Conventions, and not private maritime rescuers or masters of merchant ships.

From their perspective, the Libyan coastguard's pull-back operations and the associated *refoulement* of refugees to Libya place them in an ethical and legal dilemma, given their obligation to obey the instructions of the Libyan maritime rescue coordination centre, and international maritime law cannot offer a satisfactory means of resolving that dilemma.

As soon as Libyan pull-back operations have a **legal point of contact** with the action of governmental or non-governmental actors who are subject to German law or to the European Human Rights Convention, such action **must also be measured against human-rights criteria**. In this respect, international maritime law, especially the SAR system, is **supplemented and overridden** by human-rights principles such as the *non-refoulement* obligation in customary international law.

Where this principle applies extraterritorially on the high seas, push-back operations by signatories of the European Human Rights Convention (ECHR) to countries where there is a danger of torture and inhuman treatment can be curbed by means of legal provisions. It is conceivable that the activities of the European maritime rescue coordination centres (MRCCs) could also be subjected to the ECHR regime. The *non-refoulement* obligation, however, does not have a horizontal effect on private shippers, nor does it apply to pull-back operations in which states return shipwreck survivors to their own country.

---

77 Paragraph 5.1 of Resolution MSC.167(78) of the IMO Maritime Safety Committee: Guidelines on the Treatment of Persons Rescued at Sea reads as follows: "SAR services throughout the world depend on ships at sea to assist persons in distress. It is impossible to arrange SAR services that depend totally upon dedicated shore-based rescue units to provide timely assistance to all persons in distress at sea."

78 Libya is a state party to neither the European Human Rights Convention nor the UN Convention on the Law of the Sea.

In accordance with Article 25 of the Basic Law, however, the German shipping authorities responsible for applying and enforcing the Maritime Shipping Safety Ordinance, for example by issuing penalty notices, must respect the primacy of the *non-refoulement* obligation, which would then override the duty of private maritime rescuers under section 2 of the Ordinance to obey the instructions of the Libyan MRCC in cases where such compliance would inevitably entail the return of the rescued persons to Libya and hence a breach of the *non-refoulement* obligation.

By participating in pull-back operations, private maritime rescuers and captains of merchant ships could be committing a criminal offence under section 221 of the German Criminal Code – a norm which not only establishes in national law the idea behind the *non-refoulement* principle but also, more significantly, is designed to influence the actions of private individuals and entities.

'Grey areas' or legal 'dilemmas' must not restrict or stifle the commitment of private rescue vessels, on which the international SAR system depends. The task for the legislature, then, is to provide maximum operational and legal certainty for masters of vessels sailing under the German flag.

***