

# The Rescue of Refugees at Sea: Exploring Status Determination, Transport and International Human Rights Law

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## Author Note

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## Abstract

This article examines various laws regarding the duty to rescue individuals at sea and how they are interpreted by different courts under International Human Law. Further, this article discusses what should be done with refugees who are rescued at sea. Although international law prohibits the return of refugees to a persecuting regime, it is unclear where they should be taken and how to establish the legitimacy of their claim for refugee status. Additionally, legal doctrine does not clearly delineate who has jurisdiction to enforce human rights law when individuals are rescued by foreign-flagged vessels in territorial or international waters.

*Keywords:* refugee, rescue at sea, maritime law, international law, United Nations Convention on the Law of the Sea, human rights, non-refoulement

## Introduction

From the time the modern refugee regime was codified in the early 1950s until the late 1970s, rescue at sea was not a major issue in refugee protection. The number of asylum seekers retrieved at sea were relatively small, and it was usually possible for them to have their claims processed in the rescuing ship's next port of call. Subsequently they would usually find protection in the country where the ship was registered, or in another country where the refugee had previous ties.

One of the most significant post-1950 refugee sea migrations occurred toward the end of the Vietnam War with the Vietnamese invasion of Cambodia in 1978 and the 1979 Chinese invasion of Vietnam. In September 1978, the flood of refugees by sea began with 1220 "boat

people” who left Vietnam on an old vessel and landed in Indonesia. By June 1979, 56,000 Vietnamese refugees were arriving in Malaysia, Thailand, Indonesia, and Hong Kong by boat every month (Thompson, 2010). Most of them left Vietnam in decrepit, leaky, overcrowded boats. The longest journey, to Hong Kong, was approximately 616 nautical miles.

The refugees were plagued by storms, water, and food shortages and, most seriously, pirates in the South China Sea and Gulf of Thailand. The pirates attacked many of the small boats raping and kidnapping women and stealing the refugees’ possessions. Merchant ships often refused to rescue them for fear that no country would allow them to unload the rescued individuals. Moreover, many port officials refused to allow boats with refugees to dock at their ports. The United Nations High Commission for Refugees estimates that between 200,000 and 400,000 Vietnamese refugees died at sea during this era (Thompson, 2010).

The continued arrival of more boat people and the refusal of Southeastern Asian countries to allow additional refugees unless European and North American countries promised to resettle them created a crisis within the Southeastern Asian countries. At a United Nations (UN) sponsored conference on refugees in Geneva in July 1979, the Western countries agreed to accept 260,000 refugees per year for resettlement, to facilitate the processing of refugees, and to contribute additional funds to refugee assistance. Between 1979 and 1982, during the height of the humanitarian crisis, twenty Western countries, led by the United States, Canada, Australia, and France, accepted 623,800 Indochinese refugees for resettlement, most of them were boat people from Vietnam (United Nations High Commissioner for Refugees).

The Indochinese migrant crisis after the Vietnam War was the first test of the 1951 Refugee Convention which defined who is considered to be a refugee, their rights and the legal obligations of Member states (United Nations Refugee Agency). The resolution of this crisis was achieved because the Members agreed that the dangers of mass migrations by sea was a global concern and could only be resolved through multinational collaboration.

The 2018 European Migrant Crisis presented the next significant challenge for the 1951 Refugee Convention. The crisis began in 2015 when a rising number of refugees and migrants traveled to the European Union (EU) to seek asylum. Most of the refugees traveled by sea across the Mediterranean Sea or on foot through Southeast Europe. In 2015, the United Nations High Commissioner for Refugees reported the top three nationalities of the over one million refugees traveling across the Mediterranean Sea were Syrian (49%), Afghan (21%), and Iraqi (8%) (Wright, 2015). The International Organization for Migration (IOM)



*The lifeless body of Adam Kurdi who died tragically on September 2, 2015. Photographed by Nilüfer Demir on the same date. See Endnote 1 for detail.*

reported that more than 3,771 migrants died crossing the Mediterranean in attempts to reach Europe in 2015 (a rate of more than 10 deaths per day), making it the deadliest year on record for such deaths. More than three-quarters of the deaths, 77%, occurred along the central Mediterranean route, which was typically used by people smugglers operating off the coast of Libya (Hume, 2016). One such tragic death was that of three-year-old Alan Kurdi, a Syrian boy of Kurdish descent who drowned on September 2, 2015 in the Mediterranean Sea. Endnote 1 provides essential detail and the Wikipedia web address for the fuller story of his passing.

This article will examine whether national vessels are obligated to rescue refugees in distress at sea and transport them to a safe territory for a status determination [See Endnote 2]. This article also assesses how the refugees' location when intercepted and the State's application of international human rights law effects its obligations. In light of the European Migrant Crisis, the scope of this paper will be confined to the application of applicable international human rights law as applied by the United States and the European Union (EU) [See Endnote 3].

### **International Law Prohibits Returning Refugees to Their Persecutors**

The principle of *non-refoulement*, which forbids the rendering of a true victim of persecution to his or her persecutor, is a key facet of international refugee law. This principle was officially enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees and is also contained in the 1967 Protocol Relating to the Status of Refugees. The United States (U.S.) and all EU States are members to the Status of Refugees Convention.

In addition to protecting individual refugees, the principle of non-refoulement prohibits the collective expulsion of groups of refugees, regardless of status, to territories where they would face a bona fide threat to their safety and security pursuant to international human rights law. Non-refoulement is codified in a number of international agreements including the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment [See Endnote 4]. These international agreements, however, do not create an obligation for States that rescue refugees extraterritorially and bring them to their State for a status determination hearing. Further, they do not specify the procedures that should be undertaken to prevent refoulement.

History may provide valuable guidance. The U.S. confronted these questions in 1994 when large numbers of Haitian Cuban refugees travelled in unsafe vessels hoping to gain asylum in the U.S. The United States did not want to allow fleeing refugees into the country because they could remain on U.S. soil for years awaiting status determination, even if their asylum applications were rejected, because Federal courts permit refugees to stay until their appeals are exhausted (Jehl, 1994). The United States sought to establish status determination processing centers in third party countries; however other Caribbean States refused to accept the refugees. As a compromise, Jamaica agreed to allow the United States to anchor ships in its territorial waters so American immigration officials could hold shipboard hearings to determine whether fleeing Haitian Cubans qualified for refugee status (Jehl, 1994). This solution satisfied two American goals. First, it prevented a large influx of migrants, who may ultimately be refused asylum, from reaching Florida coasts. Second, and most importantly, it decreased the loss of life at sea because refugees no longer needed to brave the 615 nautical miles between Haiti and Miami in makeshift vessels.

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## International Law Provides Refugees a Right to a Status Determination Hearing

Article 33(1) of the UN Convention Relating to the Status of Refugees provides migrants with the right to a status determination hearing (United Nations Convention Relating to Status of Refugees). While States bear the main responsibility for providing refugee status determination hearings (United National High Commissioner for Refugees), there is ambiguity regarding where the hearing should be held and who is responsible for providing the hearing when refugees are rescued beyond the rescuing State's territory. In practice, the obligation for providing the status determination hearing falls squarely on the rescuing State and comes into effect after the asylum seeker enters the rescuing State's territory (which could be a sovereign State vessel) and makes a claim for refugee status.

As a result, many States are reluctant to allow the disembarkment of refugees or individuals who may assert refugee status, who are rescued at sea. Moreover, the Status of Refugee Convention does not create an obligation for third party States to open their doors to rescued refugees. The intersection of maritime law and refugee law leaves States in a quandary. As discussed below, there is an obligation to assist refugees whose lives are in danger at sea; however no State is required to accept them when they are beyond the sovereign territory of the rescuing State. The result was demonstrated by the current Syrian Migrant Crisis. States were determined to deter and divert ships that may disembark asylum seekers on their shores.

### The Requirement to Provide Assistance at Sea

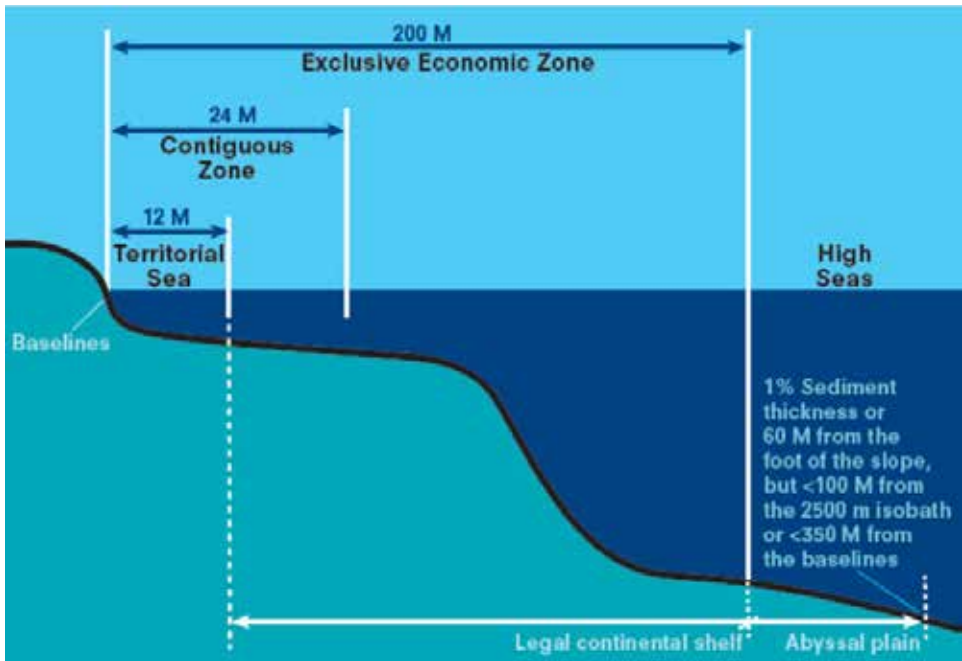
Unlike during the Vietnam War, today there are a number of international agreements that complement the Refugee Convention and require states to assist refugees in distress at sea. International maritime law codifies the obligation to render assistance in such instruments as the 1982 UN Convention on the Law of the Sea (UNCLOS) and the 1979 International Maritime Organization's (IMO) International Convention on Maritime Search and Rescue (SAR) [See Endnote 5]. These conventions require the master of every ship flying the flag of a Member State, in so far as he can do so without serious danger to the ship, the crew or the passengers to: 1) render assistance to any person found at sea in danger of being lost; 2) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; and, 3) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call (United Nations Convention on the Law of Seas, 1982).

The obligation to extend aid applies without regard to the nationality, status, or circumstances of the person or people in distress. Under SAR, ship owners, ships masters, coastal nations, and flag States (the States where ships are registered) have a responsibility to rescue distressed persons at sea and deliver them to a place of safety (International Convention on Maritime Search and Rescue, 1998). The U.S. extends this requirement extraterritorially. Additionally, it is codified by the U.S. military as a Department of Defense Directive making it binding law for U.S. armed forces (United States Department of Defense, 2006). Furthermore, SAR indicates that rescue operations are terminated when the individuals are delivered to a place of safety.

Although SAR establishes a clear obligation for member nations to rescue refugees at sea, it does not define a “place of safety” nor does it specify where the refugees should be taken after being rescued. SAR merely requires nations to “consider the need to avoid” disembarkation in territories where the lives and freedoms of those facing persecution would be threatened (International Convention on Maritime Search and Rescue, 2004). SAR also requires the rescuing vessel to bear the burden of caring for and protecting its new passengers. If the refugees are seeking asylum, the principle of non-refoulement and the refugee’s right to a status determination hearing severely limit the rescuing vessel’s options for disembarkation and disrupt its intended navigation course.

### The UN Convention on the Law of the Sea Defines Sovereign Authority Within Maritime Zones

As discussed below, the EU and the U.S.’ obligation to prevent refoulement and abide by the Refugee Convention is largely based upon whether they believe the conventions are binding extraterritorially. UNCLOS is the international agreement that resulted from the third UN Conference on the Law of the Sea, which was concluded in 1982. UNCLOS has been ratified by 166 States. An additional 14 UN member States have signed but have not ratified the convention. The United States has not ratified UNCLOS, however, its provisions are considered to be customary international law and the United States honors them.



#### *Maritime Zones of National Jurisdiction, 1982 Law of the Sea Convention*

As found at:

<http://www.reparationlaw.com/resources/unclos-United-Nations-convention-on-the-law-of-the-sea-of-10-december-1982/>

When examining a State's obligation to assist refugees at sea, it is important to understand how the location of the refugees when they are intercepted shapes these obligations. As seen in the figure that follows, UNCLOS divides the sea surrounding a State's coastline into four areas that affect sea migration: 1) the territorial sea, 2) the contiguous zone, 3) the exclusive economic zone (EEZ), and the 4) high seas (United Nations Conference on the Law of the Sea, 1982).

Intuitively, a State's sovereign authority decreases as you move further from its coastal baseline. Internal Waters are also defined by UNCLOS but they will not be included in this discussion because they consist of bays and inlet waters and it is seldom disputed that these waters are sovereign territory and once refugees reach Internal Waters States will be obligated to assist them in accordance with international law obligations.

### *Refugees Rescued in Territorial Waters Are Within the State's Sovereign Authority*

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. The Territorial Sea extends 12 nautical miles from the State's baseline, which is where the sea meets land at low tide (United Nation Conference on the Law of the Sea, 1982) [See Endnote 6]. States may enforce their laws in territorial waters unless it extends into another State's territorial waters [See Endnote 7]. A State's authority is strongest in its territorial waters. Therefore, if the State is a SAR member they have a duty to assist refugees rescued in territorial waters and the refugees will likely be considered to be within the State's jurisdiction for the enforcement of human rights law principles. The location of the refugees when they are discovered by a State's vessel is important because, as explored below, the extraterritorial application of a State's commitments to international agreements is not interpreted consistently among member nations.

Further, pursuant to UNCLOS, State ships have a right to innocent passage through territorial seas but they must navigate through territorial waters in a continuous and expeditious manner; and they cannot be submerged, nor may they conduct any intelligence gathering operations (United Nations Conference of the Law of the Sea, 1982). Although foreign vessels have a right of innocent passage, transiting ships should notify the host nation before passing through their waters to prevent perceived acts of aggression or espionage (Starr and Browne, 2016) [See Endnote 8]. However, there is an exception to the continuous and expeditious navigation rule. A foreign vessel may enter a State's territorial waters to provide assistance to ships or people in distress (United Nations Conference on the Law of the Sea, 1982). This exception compliments SAR and allows vessels to render assistance to those at sea regardless of their location; however, it remains unclear who is responsible for conducting status determination hearings for refugees rescued by a foreign State vessel within the territorial waters of another State.

### *The Policing Authority Within a State's Contiguous Zone May Extend the State's Obligation to Refugees Under International Treaties*

The Contiguous Zone begins where the territorial sea ends and extends 12-24 nautical miles from the State's baseline. Within the contiguous zone, a State has the authority to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations and



punish infringement of the laws and regulations committed within its territory or territorial sea (United Nations Conference on the Law of the Sea, 1982). This policing authority within the Contiguous Zone allows States to stop and search vessels and provides coastal States with the ability to enforce their migration laws. The ability to extend a State's policing authority regarding customs and immigration up to 24 nautical miles from its baseline suggests that their commitments to human rights' agreements concerning refugees should extend to 24 nautical miles as well. A State's policing authority also permits the boarding of vessels and detention of passengers, which would also create a duty of responsibility for the detaining State.

### *States Have Sovereign Jurisdiction Over the Economic Resources within the Exclusive Economic Zone*

The Exclusive Economic Zone (EEZ) extends 200 nautical miles from a State's baseline. Within this area, a coastal State assumes jurisdiction over the exploration and exploitation of marine resources including fishery management over all fish and all continental shelf fishery resources (United Nations Conference on the Law of the Sea, 1982). Unlike the territorial sea and the contiguous zone, the EEZ only provides sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources in the surrounding seas. Thus, if the U.S. or EU determines that their human rights obligations do not apply extraterritorially then there is little support to apply the principle of non-refoulement and the Refugee Convention human rights principles to refugees who are intercepted 24 to 200 nautical miles from a State's baseline.

### *There is No Sovereign Territory in The High Seas*

The high seas begin where the continental shelf ends or 200 nautical miles from the coastal State's baseline (United Nations Conference on the Law of the Sea, 1982) [See Endnote 9]. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions established by UNCLOS and by other rules of international law. Within the high seas, States enjoy freedom of navigation, freedom of over flight, freedom to lay submarine cables and pipelines subject to Part VI of UNCLOS, freedom to construct artificial islands and other installations permitted under international law, freedom of fishing, subject to the conditions laid down in section 2, and freedom of scientific research subject to Parts VI and XIII of UNCLOS. No State retains sovereign control in water that is considered to be high seas. Therefore, refugees rescued in the High Seas would be least likely to receive a structured status determination process and non-refoulement protection unless the rescuing vessel is flagged in a State that specifically applies these treaty obligations internationally.

### *The Exercise of Control over the Contiguous Zone and EEZ May Create an Obligation to Comply with International Humanitarian Law*

The exercise of law jurisdictional authority leaves little doubt to a State's obligation to refugees rescued within its Territorial Seas. Nevertheless, the exercise of law enforcement authority in the Contiguous Zone and fishing rights in the EEZ may also create an obligation to apply International Humanitarian Law (IHL).

In its 2003 Concluding Observation on Israel, the Human Rights Committee (HRC) opined in relation to the International Convention on Civil and Political Rights' (ICCPR) application to the Occupied Palestinian Territories that the provisions of the ICCPR apply

to the benefit of the population of the occupied territories (United Nations Human Rights Committee, 2003). This reasoning resembles a cause and effect understanding and a variation of the factual relationship theory that can be found in European Court of Human Rights' (ECtHR) jurisprudence as discussed below (King, 2009). The International Court of Justice (ICJ) considered the question of jurisdiction in light of Israel's occupation; but it only provided meager clarity when it observed that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. However, the ICJ went on to say that considering the object and purpose of the ICCPR, it would seem natural that States parties to the ICCPR should be bound to comply with its provisions.

### **Jurisdiction to Enforce International Human Rights Obligations at Sea is Addressed within International Agreements**

Due to the lack of sovereign jurisdiction in the High Seas, a State may not be obligated to rescue refugees and transport them to a safe place for a hearing determination unless they explicitly support the enforcement of human rights obligations beyond what is considered to be their sovereign jurisdiction. The extraterritorial application of the ICCPR and the European Convention on Human Rights is effectively circumscribed by the term 'jurisdiction' (King, 2009) [See Endnote 10]. Article 2(1) of the ICCPR requires States who are party to the convention to respect and to ensure that all individuals within its territory and subject to its jurisdiction are provided the rights recognized in the ICCPR (United Nations Human Rights Office of the High Commissioner, 1966). Although the ICCPR requires rights to be secured for individuals who are within both a State's jurisdiction and its territory, the HRC and the ICJ have interpreted Article 2(1) disjunctively, thus requiring States to observe their human rights obligations beyond their territorial borders where they wield jurisdiction (United Nations Human Rights Office of the High Commissioner, 2004) [See Endnote 11].

Article 1 of the ECHR provides that the High Contracting Parties "shall secure to everyone within their jurisdiction the rights and freedoms defined within this convention" (European Convention on Human Rights, 2010). However, jurisdiction can result from a purely factual relationship between a State and an individual. An argument could be made for jurisdictional authority where a State has lawful competence to act in relation to a person under international law principles of jurisdiction, such as the international principle of non-refoulement and a status hearing determination, that a person is within its "jurisdiction" for human rights purposes, and the State has a commensurate obligation to respect and ensure those rights. This jurisdictional authority is strengthened when States exercise authority over the area such as within the Territorial Sea, the Contiguous Zone and the EEZ.

### **The European Court of Human Rights Creates a Duty to Apply International Humanitarian Law Obligations Extraterritorially**

In both *Al-Skeini v. United Kingdom* (Al-Skeini v. United Kingdom, 2011) and *Al-Jedda v. United Kingdom* (Al-Jedda v. United Kingdom, 2011), the underlying issue was whether the United Kingdom was bound by its treaty obligations under the ECHR with regard to its military presence in Iraq. *Al-Skeini* involved the joined claims of six Iraqi nationals whose relatives were killed while allegedly under the United Kingdom (U.K.) jurisdiction in Iraq. The relatives claimed a lack of effective investigation into the deaths under Article 2 of the ECHR.



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In *Al-Jedda*, a dual Iraqi-U.K. citizen challenged the lawfulness of his three-year detention in a British-controlled detention facility in Basrah City, Iraq. Both cases touch on the pivotal issue of U.K. jurisdiction over persons in areas beyond its sovereign jurisdiction, though the paths taken in the analysis of each case diverge. However, *Al-Skeini* focused on the critical calculus of determining the existence of ECHR Article 1 jurisdiction, which is most analogous to the extension of jurisdiction beyond the Territorial Sea (*Al-Jedda v. United Kingdom*, 2011).

The *Al-Skeini* Court revisited the concept of the European Court of Human Rights' (ECtHR) character as a regional instrument of European public order with regard to its applicability outside the Convention's jurisdiction (*Al-Skeini v. United Kingdom*, 2011). The Court also recognized the role of the United Kingdom (together with the United States) as an occupying power in Iraq from May 1, 2003 until the installation of the interim government. Accordingly, the Court found that it was in the United Kingdom's capacity as an occupying power in southeast Iraq that it assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government (*Al-Skeini v. United Kingdom*, 2011). Although the extension of the principle of non-refoulement and the obligation under the Refugee Convention beyond its Territorial Waters does not involve a military occupation of another nation it does entail the assumption of public powers in those areas that are normally reserved for the controlling government. Accordingly, the *Al-Skeini* decision suggests that the ECtHR will hold European Union (EU) nations to their duty to prevent non-refoulement and support a refugee's right to a status hearing when they are rescued beyond the Contiguous Zone and EEZ based on the jurisdictional powers that are exercised in these areas.

Soon after *Al-Skeini*, in 2012 the ECtHR bolstered its support of the extraterritorial application of IHL obligations in *Hirsi Jamaa and Others v. Italy*. In this case, a group of about two hundred individuals left Libya in 2009 aboard three vessels with the aim of reaching the Italian coast. On May 6, 2009, when the vessels were within the Maltese Search and Rescue Region of responsibility under SAR they were intercepted by ships from the Italian Revenue Police and coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and summarily returned to Tripoli. The plaintiffs argued that during that voyage the Italian authorities did not inform them of their destination and took no steps to identify them. Upon arrival at the Port of Tripoli, the migrants were handed over to the Libyan authorities. The plaintiffs objected to being handed over to the Libyan authorities but were forced to leave the Italian ships.

Enacted in 1968, ECHR Protocol 4 states, "the collective expulsion of aliens is prohibited," but it makes no reference to territory or jurisdiction (European Convention on Human Rights, 1968). The *Hirsi* Court determined that an ECHR contracting State had exercised its jurisdiction outside its national territory by intercepting the migrants and collectively expelling them. Furthermore, the Court decided that the special nature of the maritime environment could not justify creating an area outside the law where individuals were covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention. The transfer of the migrants to Libya had been carried out without any examination of each individual's situation in violation of their right to a status determination. Further, the plaintiffs had not been subjected to an identification procedure by the Italian authorities, which forbade disembarkation in Italy and restricted them to disembarking in Libya. Ultimately, the Court determined that the removal of the migrants had been of a collective nature, in breach of ECHR Article 4 of Protocol No. 4 (*Hirsi Jamaa v. Italy*, 2012).

*Hirsi* demonstrates ECtHR's support for the extraterritorial application of the principle of non-refoulement and ECHR jurisdiction once an EU State has intercepted refugees at sea. Although *Hirsi* does not unilaterally create a duty to rescue and transport migrants to a safe territory for a status determination, when it is coupled with a State's duty to assist vessels in distress, it is clear that once contracting parties rescue refugees they must be taken to a place other than their home country to receive a status determination hearing.

More recently, in September 2015, the ECtHR once again struck down a bilateral agreement between Italy and Tunisia that violated ECHR Article 4 of Protocol 4. In *Khlaifia and Others v. Italy*, three Tunisian nationals reached Italy on September 2011 during the Arab Spring. The Italian coastguard intercepted them and took them to the island of Lampedusa. Subsequently, they were identified by the Tunisian consul and deported to Tunisia based on a bilateral agreement between the two States. The Tunisian migrants argued that they had been victims of collective expulsion contrary to Article 4 Protocol no. 4 of the ECHR on the basis of being summarily removed on account of their nationality without individual consideration of their personal situations. The Court acknowledged that unlike the applicants in *Hirsi Jamaa*, the Tunisian applicants in *Khlaifia* had been subjected to individualized identification and processing by Italian authorities; but under the circumstances the Court did not consider an identification procedure standing alone to be sufficient. The Court concluded that, contrary to Article 4 Protocol no. 4, the Italian authorities had not taken into account the individual circumstances of those involved (*Khlaifia and Others v. Italy*, 2015). Further, the Court concluded that Italy's bilateral agreement with Tunisia was particularly suspect because it had not been made public and provided for the repatriation of irregular Tunisian migrants through simplified procedures, based on the identification of the person concerned by Tunisian consular authorities. Italy suspended its bilateral agreement with Libya after the *Hirsi* decision and is expected to suspend its agreement with Tunisia as well (Frenzen, 2012). *Khlaifia* was the fifth time the ECtHR has found a violation of the collective expulsion prohibition (*Čonka v. Belgium*, 2002; *Georgia v. Russia*, 2014; *Hirsi Jamaa and Others v. Italy*, 2012; *Sharifi and Others v. Italy and Greece*, 2014).

Although the EU has extended the IHL prohibition against non-refoulement extraterritorially, several critical questions remain. International agreements do not describe what constitutes a sufficient process to prevent refoulement or where status hearings should be held. Can the status determination hearings be held on the rescuing State's vessel? If so, what if every State in the area refuses to accept the refugees once a status determination is made? Would a military vessel be required to care for refugees during the entirety of its operations at sea?

## The United States' Interpretation of Extraterritorial Application of Human Rights Law

The U.S. has taken a contrary interpretation to the extraterritorial application of its obligations to the principle of non-refoulement and refugee status hearings. Most claims alleging that the U.S. has not adhered to its human rights obligations while acting extraterritorially involve situations of armed conflict in which deployed U.S. troops and other personnel have caused harm. In response to such claims before the various human rights bodies, the U.S. originally relied on the argument that these institutions lacked competence over factual scenarios governed by IHL as a function of their subject matter jurisdiction limitations [See Endnote 12].

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In 1992, President George H.W. Bush signed Executive Order 12807, which required the U.S. Coast Guard to force the return of all passengers discovered illegally traveling by sea from Haiti to the U.S. before reaching U.S. borders without determining whether they qualify as refugees. The Haitian Centers Council, Inc., a collection of organizations representing illegal Haitian aliens and Haitians detained at Guantanamo, requested that the implementation of the order be delayed because it violated the Article 33 of the UN Protocol Relating to the Status of Refugees. The U.S. Supreme Court determined that Acts of Congress do not generally have application outside of U.S. territory, unless explicitly noted, and that Article 33 is silent regarding extraterritorial application. Additionally, the Supreme Court interpreted the Refugee Convention to only apply to individuals who have already arrived on U.S. soil (*Sale v. Haitian Centers Council, Inc.*, 1993).

The U.S.' reluctance to apply the Torture Conventions, which restricted interrogation techniques, beyond U.S. territory demonstrates its hesitancy to enforce non-refoulement principles and the Refugee Convention extraterritorially. In its Second Periodic Report, the U.S. provided extensive information regarding its overseas operations in Afghanistan and Iraq with little discussion of the extraterritorial application of the Torture Convention (United Nations Committee Against Torture, 2005). Nonetheless, in its responses to questions from the Committee Against Torture (CAT), the U.S. noted that many legal obligations within the treaty, such as the non-refoulement principle, "do not apply to activities undertaken outside of the 'territory under the jurisdiction' of the United States." The U.S. does not accept the concept that *de facto* control equates to territory under its jurisdiction (Bellinger, 2006). The CAT deemed it "regrettable" that the U.S.' application of the treaty is not consistent with other Member States since the U.S. believes the treaty only applies to a State's *de jure* territory (United Nations Committee Against Torture, 2006). Additionally, in 2005, the U.S. declared the territorial limitations of the ICCPR, including the conjunctive interpretation of Article 2(1), when it concluded that: "The obligations assumed by a State Party to the International Covenant on Civil and Political Rights apply only within the territory of the State Party (United Nations Human Rights Committee, 2005)."

The U.S. has demonstrated a trend of growing isolation in its categorical position that its human right obligations have no extraterritorial application in light of the text of the agreements and the intent of the drafters (Schaak, 2014). Therefore, it is unlikely to assume the U.S. will accept a blanket obligation to uphold the principle of non-refoulement and to guarantee a refugee status determination beyond its territorial waters.

## Conclusion

In summary, both the EU and the U.S. recognize their duty to rescue refugees in distress at sea regardless of their location; however, their interpretation IHL diverges from there. EU jurisprudence started with a simple presumption that human rights obligations are essentially territorial. Yet, like beads of mercury, these exceptions have coalesced into a generalized doctrine of extraterritorial application. The EU's current state of the law would thus dictate that human rights obligations exist wherever a State exercises *de facto* authority or control over territory, individuals, or a transaction and has the power to respect and ensure the enjoyment of rights and freedoms (Schaak, 2014).

The United States, on the other hand, prefers a more case-by-case analysis regarding the extraterritorial application of human rights law and seems to favor options that do not restrict the actions of its sovereign vessels navigating the High Seas. Regardless of these differences, there remains an unresolved void in IHL regarding the relocation of refugees. Returning to the European Migrant Crisis, a policy of holding status determination hearings in Territorial Waters would have greatly reduced the number of Syrian refugee deaths because they would have been seized soon after leaving the Syrian coast. The EU should have established a process that would have allowed legitimate refugees to disembark at pre-determined ports and undergo asylum examination. Further, the U.S.' consistent maritime presence in the Mediterranean and its ratification of IHL treaties should have created an obligation for the U.S. to assist the EU in this process. Ultimately, the lack of international authority and a ratified procedure regarding rescued refugees creates an unfair burden on seafarers and threatens the veracity of conventions that were created to prevent the loss of life at sea.

### Endnotes

- 1) Alan Kurdi was a three-year old Syrian boy of Kurdish descent who drowned on September 2, 2015 in the Mediterranean Sea. He and his family were Syrian refugees trying to reach Europe on a small inflatable rubber or plastic boat, which capsized about five minutes after leaving Bodrum, Turkey. Sixteen people were in the boat, which was designed for a maximum of eight people. They were trying to reach the Greek Island of Kos, about four kilometers from Bodrum. To reach the original of this picture, copy and paste into the web the following: [https://en.wikipedia.org/wiki/Death\\_of\\_Alan\\_Kurdi](https://en.wikipedia.org/wiki/Death_of_Alan_Kurdi)
- 2) There is a significant distinction between migrants and refugees. Refugees, as defined under the 1951 Refugee Convention, are entitled to basic rights under international law, including the right not to be sent back to the place of persecution. A migrant is someone who chooses to resettle to another country in search of a better life. However, it is difficult to determine whether someone is a refugee or migrant before rescuing them at sea. For the purpose of this article, we will assume that those fleeing by sea are refugees seeking asylum status.
- 3) All the Member States of the EU are party to the majority of the core human rights treaties elaborated under the aegis of the UN: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC). The European Union on International Human Rights Law. *See* [http://www.europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf).
- 4) Article 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 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 Protocol Relating the Status of Refugees (1967). The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). The Convention Government the Specific Aspects

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of Refugee Problems in Africa (OAU Convention) (1974). The International Covenant on Civil and Political Rights. The American Convention on Human Rights. The African [Banjul] Charter on Human and Peoples' Rights (1981).

- 5) IMO currently has 171 Member States and three Associate Members.  
<http://www.imo.org/en/About/Membership/Pages/Default.aspx>
- 6) The baseline is the line from which the seaward limits of a state's territorial sea and certain other maritime zones of jurisdiction are measured. Normally, a sea baseline follows the low-water line of a coastal state. When the coastline is deeply indented, has fringing islands or is highly unstable, *straight* baselines may be used. UNCLOS 1982, Article 5.
- 7) If the Territorial Sea of one state overlaps with another state's territorial sea, the border is taken as the median point between the states' baselines, unless the states in question agree otherwise. UNCLOS 1982, Part II.
- 8) On January 12, 2016, a navigational error caused two U.S. Navy boats with 10 sailors to enter Iranian territorial waters without notification or permission. They were within three nautical miles from Iran's Farsi Island when they were confronted and detained by the Iranians. However, the U.S. Navy vessels did not violate international law when they entered Iranian Territorial Waters pursuant to the UNCLOS doctrine of Innocent Passage.  
<http://www.cnn.com/2016/01/14/politics/navy-boats-iran-waters/>.
- 9) The continental shelf is the natural prolongation of the land territory to the continental margin's outer edge. UNCLOS 1982.
- 10) The United States ratified the ICCPR in 1992. However, there are many reservations and its implementation has been argued to have little domestic effect. Included in the Senate's ratification was the declaration that "the provisions of Articles 1 through 27 of the Covenant are not self-executing;" and a Senate Executive Report stated that the declaration was meant to clarify that the Covenant will not create a private cause of action in U.S. Courts. Although the articles applicable to extraterritorial jurisdiction are not self-executing, they could be adopted by the U.S. as customary international law similar to the U.S.'s adoption of UNCLOS without ratification.
- 11) HRC General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13; 11 IHRR 905 (2004) at para. 10, provides: '[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party.' Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 136 at para. 111, states: '[T]he International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.' See also Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, ICJ Reports 2005, 1 at paras 178-180.

12) Melish, *supra* note 7, at 240–41. See also Geneva 001769, *supra* note 10 (cable discussing U.S. presentation before the HRC affirming “the long-standing U.S. legal position that the Covenant does not apply to the conduct of a State Party outside of its territory” but nonetheless noting a willingness to engage in extensive dialogue about overseas military operations and renditions “as a courtesy”).

## References

- Al-Jedda v. United Kingdom (2011), App. No. 27021/08, 53 Eur. H.R. Rep. 789.
- Al-Skeini v. United Kingdom (2011), App. No. 55721/07, 53 Eur. H.R. Rep. 18.
- Bellinger, J. B. (2006, May 5). *Legal Adviser, United States' Oral Responses to the Questions Asked by the Committee Against Torture*, United States Department of the State. Retrieved from <http://www.state.gov/j/drl/rls/68561.htm>.
- Čonka v. Belgium (2002), no. 51564/99, § 62-63, ECHR
- European Convention on Human Rights. (2010). Retrieved from [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)
- Frenzen, Niels. (2012, November 12). UN Special Rapporteur on HR of Migrants Expresses Concern Over Italy-Libya Cooperation on Migration, *Migrants at Sea*.
- Georgia v. Russia (2014), (I) [GC], no. 13255/07, § 175, ECHR.
- Hirsi Jamaa and Others v. Italy (2012). [GC], no. 27765/09, § 185, ECHR.
- Hirsi Jamaa v. Italy (2012), App. No. 27765/09 Eur. Ct. H.R.
- Hume, T. (2016, January 5). Deaths of migrants on the Mediterranean hit record numbers in 2015. CNN. Retrieved from <http://www.cnn.com/2016/01/05/europe/mediterranean-record-migrants-deaths/>.
- International Convention on Maritime Search and Rescue (27 April 1979). Retrieved from <http://nmsa.gov.pg/wp-content/uploads/2016/11/SAR-Convention-1979-pdf.pdf>.
- Jehl, D. (1994). Clinton changes U.S. policy on Haitian refugees, *Migration News*, 1(5). Retrieved from <https://migration.ucdavis.edu/mn/more.php?id=328>
- Jehl, D. (1994, May 17). U.S. sending back Haitian refugees despite new plan. *The New York Times*. Retrieved from <https://www.nytimes.com/1994/05/17/world/us-sending-back-haitian-refugees-despite-new-plan.html>
- Khlaifia and Others v. Italy (2015), App. No. no. 16483/12 Eur. Ct. H.R.



## Articles

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- King, H. (2009). The extraterritorial human rights obligations of states, *Human Rights Law Review*, 9(4), 521-556.
- Sale v. Haitian Centers Council, Inc. (1993), 509 US 155.
- Sharifi and Others v. Italy and Greece (2014), no. 16643/09.
- Shcaak, Beth Van. "The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change." *International Law Studies U.S. Naval War College*, 90(20), <https://ssrn.com/abstract=2390191>
- Starr and Browne (2016, January 14). Asha Carter: Navigational error behind U.S. sailors ending up in Iran, *CNN Politics*. Retrieved from <https://www.cnn.com/2016/01/14/politics/navy-boats-iran-waters/>
- Thompson, Larry Clinton. *Refugee Workers in the Indochina Exodus, 1975-1982*. Jefferson, NC: MacFarland Publishing Company, 2010, pp. 150-163.
- United Nations Committee Against Torture (2005). Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Report of States Parties due in 1999, U.N. Doc. CAT/C/48/Add.3
- United Nations Convention on Law of the Sea (1982). Retrieved from [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)
- United Nations High Commissioner for Refugees (1951), The 1951 Refugee Convention, Retrieved from <http://www.unhcr.org/en-us/1951-refugee-convention.html>
- United Nations Human Rights Office of the High Commissioner. (1966). *International Convention on Civil and Political Rights Article 2(1)*. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- United Nations Human Rights Office of the High Commissioner (2003). Concluding Observations of the Human Rights Committee regarding Israel, CCPR/CO/78/ISR. Retrieved from <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15240&LangID=E>
- United Nations Human Rights Office of the High Commissioner (2004). HRC General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13; 11 IHRR 905, Retrieved from [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/c\)GeneralCommentNo31TheNatureoftheGeneralLegalObligationImposedonStatesPartiestotheCovenant\(2004\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/c)GeneralCommentNo31TheNatureoftheGeneralLegalObligationImposedonStatesPartiestotheCovenant(2004).aspx)
- United Nations Human Rights Committee (2005). Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Third Periodic Reports of States Parties Due in 2003: United States of America , Annex I, U.N. Doc. CCPR/C/USA/3.

- United Nations High Commissioner for Refugees (2013, May 15). State of the world's refugees, 2000, Retrieved from <http://www.unhcr.org/en-us/>
- United States Department of Defense (January 2006). U.S. Department of Defense directive number 3003.0, Retrieved from <http://www.jag.navy.mil/distrib/instructions/DODI3003.01DoDSupporttocivilSearchandRescue.pdf>
- Wright, P. (2015, December 30). More than 1 million asylum seekers reached Europe by sea this year: UNHCR. *Australian Broadcasting Corporation*. Retrieved from <http://www.abc.net.au/news/2015-12-30/more-than-1-million-asylum-seekers-reached-europe-by-sea-in-2015/7060012>