Received: 29.07.2024
Accepted: 02.12.2024
Published Online:31.12.2024
DOI: 10.18613/deudfd.1524388
Research Article

Dokuz Eylül University
Maritime Faculty Journal
Vol:16 Issue:2
Year:2024 pp:276-299
E-ISSN: 2458-9942

MARITIME INTERDICTION AND THE RETURN OF MIGRANT BOATS UNDER THE LAW OF SEA

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ABSTRACT

Maritime Interdiction is currently one of the most disputed instruments used by states to manage their borders. All states possess the inherent right of granting or denying access to its territories. By exercising this sovereign right, states use all means and resources to interdict and turn back migrants' boats that have come to their borders. One of the real problems that emerge here is that such interception measures taken rarely check properly which of the migrants need protection and which are illegal. These circumstances raise many concerns under International Law: the issue of refugee protection, the obligations upon states to protect life at sea, the obligation upon states for search and rescue, and protection under the principle of Non-Refoulement. In addition to these concerns, it also questions the states authority to control the seas as an immigration policy tool. Such are some of the issues that concern various human rights at sea. The aim of this paper is to understand the legal status of the concept of Maritime Interdiction and the return of migrant boats under the International Law, United Nations Convention on the Law of the Sea (UNCLOS) and the contemporary state practice. The authors argue that humanitarian considerations (i.e. protection of lives at sea) must prevail over personal interests of states. This paper uses doctrinal research methods and comparative analysis of states approaches to maritime interdiction actions. Analysis has also been strengthened with the decisions of states, regional and international courts.

Keywords: *Maritime Interdiction, Interception, Migrants, Human Rights.*

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DENİZ HUKUKU ÇERÇEVESİNDE DENİZ YASAĞI VE GÖÇMEN TEKNELERİNİN GERİ GÖNDERİLMESİ

ÖZ

Deniz Yasağı, günümüzde devletlerin sınırlarını yönetmek için kullandığı en tartışmalı araçlardan biridir. Tüm devletler, topraklarına giriş izni verme veya reddetme hakkına sahiptir. Bu egemenlik hakkını kullanarak, devletler, sınırlarına ulaşan göçmen teknelerini engellemek ve geri göndermek için tüm imkân ve kaynakları seferber eder. Burada ortaya çıkan gerçek sorunlardan biri, bu tür müdahale önlemlerinin, hangi göçmenlerin korunmaya ihtiyaç duyduğunu ve hangilerinin yasa dışı olduğunu doğru şekilde tespit edilmesidir. Bu durum, Uluslararası Hukuk kapsamında birçok endişe yaratmaktadır; örneğin, mülteci koruma sorunu, devletlerin denizde hayatı koruma yükümlülüğü, arama ve kurtarma yükümlülüğü ve Non-Refoulement (geri göndermeme) ilkesi kapsamında koruma gibi. Bu endişelere ek olarak, devletlerin denizleri bir göçmenlik politikası aracı olarak kontrol etme yetkisi de sorgulanmaktadır. Bu makale, Deniz Yasağı kavramının ve göçmen teknelerinin geri gönderilmesinin Uluslararası Hukuk, Birleşmiş Milletler Deniz Hukuku Sözleşmesi (UNCLOS) ve çağdaş devlet uygulamaları bağlamındaki hukuki statüsünü anlamayı amaçlamaktadır. Yazar, insani gerekçelerin (denizde hayatların korunması gibi) devletlerin kişisel çıkarlarından üstün olması gerektiği görüşündedir. Bu makale, doktriner araştırma yöntemlerini ve devletlerin deniz yasağına yönelik tutumlarının karşılaştırmalı analizini kullanmaktadır. Analiz, ayrıca devletlerin, bölgesel ve uluslararası mahkemelerin kararlarıyla güçlendirilmiştir.

Anahtar Kelimeler: *Denizcilik Yasaklama, Engelleme, Göçmenler, İnsan Hakları.*

1. INTRODUCTION

The travelling that most migrants and asylum seekers undertake through sea eventually give rise to various problems under the Law of Nations. For instance, the issue of safeguarding refugees; the right to be salvaged (of migrants); the right to interdict (of states); and the concept of liberty at Sea are some of the issues that need to be addressed (Heijer, 2012). Around 56,993 migrants and asylum seekers have already drowned since 2014, most of them in the Mediterranean Sea (IOM, 2024). On many occasions the purpose of interception is to send back the migrants without any further delay to their state of origin or transit countries. The problem that arises sometimes is when the migrants are needed to be salvaged. The international law obliges states to rescue those people whose vessels are

unseaworthy at sea (UNCLOS[3], 1982, art 98). But when such vessels carry undocumented or irregular persons, the obligation to rescue unseaworthy vessels at sea becomes blur and thus, states may intercept or restrict the entry of such vessels into their territorial waters. Although a case may be classified as a rescue, the guidelines for state treatment of rescued individuals, including asylum seekers on board, remain a challenging issue (UNHCR[4], 2002). The first critical point to examine is the range of obligations states have when intercepting vessels carrying migrants or asylum seekers at sea. Although in the Law of Nations, it is well founded that states possess the absolute jurisdiction to manage and administer their borders, yet the extent of how they may do so needs clarification. The first and most obvious principle of the Law of Nations which is touched during maritime interdiction is the *Principle of Non-Refoulement* (UNCHR, 1997). The principle is incorporated in several international legal instruments including Convention Relating to the Status of Refugees, 1951; United Nations Declaration on Territorial Asylum, 1967. Article 33(1) of the Refugee Convention 1951 prevents states parties to the convention from returning back all those individuals who are facing or in danger of being persecuted at their state of origin (Convention Relating to the Status of Refugees, 1951). Such right to be rescued from persecution is also enjoyed by asylum seekers and refugees. Although state may rescue such individuals within their territory and territorial waters, the real question of controversy is that how extraterritorial interdiction of migrant or asylum seekers boats is operated under International Law? Some states have taken the stance that interdiction, which the term itself indicates is meant to happen outside the territorial waters of that country, and so this does not attach any responsibilities within the Regime of International Human Rights and the Refugee Law, including the most important, the *Principle of Non-Refoulement*. Furthermore, interception by a third party on behalf of a state does not make states responsible (Brouwer & Kumin, 2003). As per the Regime of Law of Sea, states can invoke their jurisdiction in relation to cases of migration not only in its territorial sea but also in the contiguous zone (UNCLOS, 1982). Although, interdicting vessels in the international waters does not come within the exclusive power of the interdicting state, (UNCLOS, 1982) yet there is another part of International Law which requires countries to intercept to counter offences, for instance trafficking and smuggling in persons (United Nations, 2000).

The authority of all states to manage its border by preventing the entry of non-nationals is well founded in the Law of Nations. Owing to this reason states employ various tools to control their borders and usually

[3] United Nations Convention on the Law of Sea

[4] United Nations High Commissioner for Refugees

intercept refugees at sea. Interception is defined as follows: "*all measurers applied by a state, outside its national territory, in order to prevent, interrupt, or stop the movement of persons without the required documentation crossing international borders by land, air, or sea, and making their way to the country of their prospective destination*." (UNHCR, 2000, p.3). Interdiction of migrant boats by states could be done for many other purposes as well. For example, States hold this right to interdict any vessel which is suspected of illegal migration, smuggling or any kind of human or drug trafficking. However, the recourse to any of these means prompts international legal obligations from various branches of the Law of Nations (McAdam, 2018). Various terminologies are used for intercepting migrant boats. These include 'interdiction', 'push back' or 'turn back' or 'taking back', and 'diversion and escorting back' (Gallagher & David, 2014). Maritime interception occurs in two phases. In the first phase the vessel carrying migrants is intercepted for inspection and in some cases boarded. In the second phase the intercepted vessel is deflected to some other location within or outside the territory of interdicting state. Such locations may be either high seas, any point of embarkation or towards their previous location (Ghezelbash, 2018). The prerogative of who may enter one's state territory, space or waters and who may stay there belongs to the state themselves (IOM[5], 2002). For this purpose, states resort to various means and methods. Some states tighten its borders through strict visa policies; responses to the trafficking and smuggling of persons; maritime interdiction; and financial barriers on carriers (Brouwer & Kumin, 2003). Though visa policies do not directly constitute interdiction measures, yet it still amounts to the restriction of asylum seekers' ability to seek asylum (Morrison & Crosland, 2001).

This paper uses descriptive, analytical and comparative approach to determine state practice and the law applicable to maritime interdiction, in order to evaluate whether the practice and law permit maritime interdiction or not. Therefore, first the concept of maritime interdiction would be defined, and its extent in the territorial zones would be explained. In the second part State polices and practice would be analysed. Finally, this paper would come with conclusion and recommendations.

[5] International Organization for Migration

2. MARITIME INTERDICTION

2.1. A State Right of Interdiction

Interdiction is the practice of states to enforce their jurisdiction, whereby they compel the vessels in the sea to adhere to the rules of the interdicting country (Gallagher & David, 2014). The total absence or the presence of powers of the state to intercept including to stop, board, carrying search, seizure and return of the vessel depends upon the flag of the vessel it carries and the maritime zone in which such vessel has been intercepted. The moment the intercepting state vessel intercepts the suspicious vessel, it falls within the sovereign authority of the intercepting state (Al-Skeini et al. v. the United Kingdom, 2001). Because of this, maritime interdiction usually initiates state jurisdiction over the intercepted migrant boats. In the following situations states can enforce its laws or in other words assert its jurisdictions over vessels carrying undocumented migrants:

a) When the vessel carrying migrants is in the coastal state's territorial waters and if the coastal state believes that the vessel intends to disembark the migrants without complying to the legal regime of the coastal state;
b) In certain cases when the vessel is in the contiguous zone; and
c) In the International Waters under the regime of Law of Sea (UNCLOS, 1982).

States possess the right to visit any vessel, regardless of its nationality, that is irrespective of the territorial zone in which the vessel is located (UNCLOS, 1982).

2.1.1. The Territorial Waters

Just as States have exclusive and absolute rights to oversee the behaviour of individuals taking place on its territory, it also possesses the similar sovereignty over its territorial sea (ILC[6], 1956). This right has now been protected by article 2 United Nations Convention on the Law of Sea 1982 and article 2 of the Geneva Convention on the Territorial Sea and Contiguous Zone 1958. While a state's sovereign authority extends to its territorial sea, this does not imply that the state's domestic legal framework automatically applies within these waters. (Churchill & Lowe, 1999). For example, the issue of application of immigration laws to those individuals who have reached the territorial sea of some state but who haven't set their

[6] International Law Commission

feet on the land territory of that state could be answered in terms or relevant provisions of the domestic law (Goodwin-Gill & McAdam, 2007).

The USA has established a "wet foot/dry foot policy" for immigrants that try to enter USA. According to this policy all those immigrants who touch the United States rocks, bridges soil, etc. become automatically subject to the United States Immigration laws. Migrants who have entered territorial waters but have not reached land ("wet-foot" status) are often returned, unless there is a credible threat of persecution if they are sent back. Meanwhile, they are taken to Guantanamo Naval Base for more analysis of their status and then possible sending them back to any other country (Heijer, 2012). However, Australia has in this regard made a distinction between what they call "offshore entry persons" and "onshore arrival persons". According to the policy all those persons, who enters an offshore territory of Australia without legal documentation—such as those arriving by boat without a visa—is taken to Australia's Christmas Island for detention. There, their status is assessed. These detainees remain subject to Australian jurisdiction and its Migration Act, except when they are in the process of applying for a visa. Hence the persons claiming asylum are scrutinised against the standard set by the Refugee Convention (Australian Migration Act, 1958).

Contrary to USA and Australia, European Union countries haven't excised their territorial waters from their migration laws. The contemporary practice of European states indicates that although occasionally ships diversion do occur in the territorial waters, yet those ships found in the territorial waters of any of the European state are generally provided asylum and immigration protections, whether it be under their own Domestic law, European law, or International law, without being the ships push back or returned to high seas. Rather such ships taken to nearest ports and the persons of the ships are then processed as per procedures (Human Rights Watch, n.d., 2009).

One of the main factors that prevent states from invoking their national laws in the territorial waters is because vessels of all states possess the "right of innocent passage" through the territorial waters (UNCLOS, 1982; Convention on the Territorial Sea and the Contiguous Zone, 1958). The "right to innocent passage" grants the ships the right to traverse the territorial waters and the access to and the departure from state's internal waters and ports. The passage of the vessels is innocent as long as they do not endanger the peace of the coastal state, including its security and good order. The UNCLOS has clearly mentioned that "the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State" would render the passage of such vessel as pre-judicial to the peace, good order or security of the coastal state. A vessel whose passage becomes pre-

judicial falls within the jurisdictional authority of the coastal state (UNCLOS, 1982; Churchill & Lowe, 1999). A state may establish regulations to ensure that vessels exercising the "right of innocent passage" adhere to its immigration laws, potentially imposing conditions for access to its ports as a safeguard (UNCLOS, 1982). Since the UNCLOS does not gives the "right of innocent passage" to those vessels who violate the immigration laws, it is commonly understood that the legal regime at sea have allowed the coastal states to prevent the access of irregular migrants to its land territory and the territorial sea.

As per UNCLOS, the releasing of individuals in the territorial waters as against the immigrations laws of the littoral state makes the passage of that ship pre-judicial to the peace, good order or security of the coastal state (UNCLOS, 1982). The central question of controversy lies in whether the aforementioned rule also applies to migrant vessels that are merely transiting through territorial waters or attempting to reach the coast. Specifically, the issue is whether such vessels can be subjected to interdiction? The European Commission has considered the course of ships to be pre-judicial which carry undocumented migrants through territorial waters of its member state against the peace and security of the coastal state and trying to reach another member state. Such ships can be lawfully interdicted (Commission of the European Communities, 2007). For the purposes of state collaboration for preventing illegal migration, states devote much energy and resources in conducting border patrols and occasionally they interdict migrant ships in another country's territorial waters. But since interception operations in the territorial sea of another country is the conduction of such actions within the territorial sovereignty of that country, it requires the authorisation and permission of that state to do so (Heijer, 2012).

2.1.2. The Contiguous Zone

The contiguous zone is zone adjacent to the territorial sea measuring up to 24 nautical miles and not beyond (UNCLOS, 1982). The control of the state in this zone extends to prevent the breach of customs, sanitary, and immigration laws, and regulations in its territory and territorial sea as enshrined in art 33 of UNCLOS. However, the control is not exclusive in all matters. Though state can control immigration issues, yet the power and authority of the state is not unlimited in such cases.

According to Trevisanut (2008). article 33 has given this general power to the coastal states to interdict and return back undocumented or irregular migrants if they are found in the contiguous zone. Contrary to this, some authors (Guilfoyle, 2009; O'Connell, 1982; Shearer, 1986) have

made a distinction between prevention of the violation of state laws and the punitive measures under article 33 of the UNCLOS. Based on this reasoning, they argue that the "Punish" means actions taken by state after breaching the coastal state laws whether it be in its land territory or in the territorial waters. On the other hand, "Prevention" would mean only to inspect, approach and a warning to the vessel not to infringe the coastal state laws, and so it does not include returning the vessel or arresting the migrants. This would then mean that since the illegal migrants have yet not set feet in the coastal state territorial waters they cannot be declared as having acted in breach of the immigration laws of the coastal state, thus they cannot be subjected to coercive measures which also includes forcible return to the sea by the coastal state. It follows from this argumentation that firstly if at all there is any vessel that is feared to infringe the coastal state immigration laws, then enforcement actions can only be taken with the permission of the flag state as per the rule of the flag state jurisdiction. Secondly the coastal state will not take enforcement actions if the ship follows the coastal state regulations in the territorial sea of the coastal state.

2.1.3. The High Seas

International Waters consist of that portion of the sea which does not form part of territorial sea, contiguous zone, the Exclusive Economic Zone (EEZ), internal waters of a country or archipelagic of an archipelagic state (UNCLOS, 1982). The legal regime that operates in the High Seas contains two important concepts, i.e., the "freedom of navigation" and the principle of "flag state jurisdiction". According to freedom of navigation principle not all states possess the right to sail through the high seas and that no state can bring the High Sea within its sovereignty. As per the flag state jurisdiction principle: "*a vessel which flies the flag of a state comes under the jurisdiction of that state*" (UNCLOS, 1982).

Thus, the flag state jurisdiction rule means a state cannot interdict ships carrying another state flag without previous agreement or consent. Accordingly, the European states have concluded between themselves and also with other states various treaties, for example treaty on the suppression of drug trafficking, to intercept suspected ships carrying irregular or undocumented migrants in the international waters. It is through these bilateral treaties that states seek prior consent of the flag state for seizing and searching the ship. The conclusion of such treaties is given in Article 110 of the UNCLOS. Unless a state has sought prior permission from the flag state to search and seize the vessel, such state cannot resort to means of coercive measures, rather the state can give a warning alarm to the vessel stating that if it entered to the territorial sea of the state, it will be either seized or returned back. However, for this to happen, compliance

with the Law of Nations is essential (Guilfoyle, 2009). Reports suggests that the European states have on occasions violated the flag state principle and without an assent from the flag state, or those on board the ship, interdicted vessels carrying migrants on the grounds of search and rescue operations (Rijpma, 2009). However, the European Union in its Council Decision 2010/52 has held that unless the flag state has given authorization, or unless the ship is in situation of emergency, a state cannot take coercive measures against the migrants on board the vessel, rather it should carryout survey at a reasonable distance from the vessel.

2.2. The Right to Visit

One of the most important exemptions to the rule of "flag state jurisdiction" with regards to irregular maritime migration is the "right to visit" envisaged under art 110 of UNCLOS, 1982. According to this right state ships are allowed to search and visit suspected ships which carry illegal migrants in the international waters. The "right to visit" generally gives the impression that it put a limitation on the right to freely navigate in the high seas. Thus, it is a right which is exceptional in nature and therefore must be exercised carefully (Guilfoyle, 2015). The "right of visit" is permitted when sufficient suspicion exists that suspected ship has participated in either, unauthorised broadcasting, slave trade, piracy, or the ship has no nationality (Guilfoyle, 2009; Trevisanut, 2014) or is flying a false flag (UNCLOS, 1982). When a state intends to exercise its right to visit, it shall then send a vessel under the directions of an official to visit the ship. The commanding official may then verify the papers of the suspected vessel and if suspicion remains still, he/she may carry further examination of the vessel. However, if it is founded that the state visit to the vessel was not lawful, the visited ship shall then receive a recompense for any kind of damage or loss it incurred during the visit (UNCLOS, 1982). Furthermore, the right of visit entails that a state may only resort to necessary and proportionate force to stop a vessel which attempts to escape the visit (Vaughan & Tzanakopoulos, 2013).

Since the aim of the "right to visit" is to confirm the identity of the vessel or to check that it is not involved in slave trade, unauthorised broadcasting, or piracy, it therefore means that the right to visit does not involve comprehensive searches (Fink, 2018; UNCLOS, 1982). It also implies that the "right to visit" is not illimitable; it is limited by the purpose of the visit as enshrined under art 110 of UNCLOS. Thus, the right to visit means the authority to proceed and embark the ship for purposes of verification (Moreno-lax, 2011). Furthermore, the "right to visit" doesn't mean the visiting state have a right to seize the suspected vessel (Churchill

& Lowe, 1999; Guilfoyle, 2009; Moreno-lax, 2011; Papastavridis, 2013). The UNCLOS (1982) has provided for only two such grounds, whereby the intercepting state can seize the suspected vessel They are piracy and unauthorised broadcasting.

2.3. The Issue of Stateless Vessels

Another and the most important question of controversy is that states usually exercise their jurisdiction with regards to stateless people in the high seas. It has been reported that most of the migrants crossing between Asia and Europe usually do so in stateless vessels. A ship is declared to be a stateless vessel when it fails to provide any nationality on the request of the requesting state/coastal state (Anderson, 1996). The European Commission has held that states may arrest, seize and prevent further movement forward of a ship which has failed to prove any nationality subject to the fundamental rights and the norms of international law. The view of the European Commission corresponds with that school of thought which suggests that those ships who possess no nationality are not qualified for enjoying any protection in the open seas, and thereby due to absence of competing jurisdiction of any state, the stateless vessel could be under the authority of all states. All states may apply their own state laws. And for that purpose, the stateless vessel can be interdicted, seized, escorted back etc. Stateless vessels are subjected to stringent measures due to the absence of a flag or registration with a particular state. Flagging and registering vessels under a specific state's jurisdiction is fundamental for maintaining order and security on the high seas. These legal requirements are designed to ensure that international waters do not become areas of anarchy or lawlessness. The rule of UNCLOS is that all vessels must fly the flag of its state when passing through the high seas and that all vessels must have only one nationality (UNCLOS, 1982, art 91 and 92).

However, the above view is also disputed by some authors. According to Churchill and Lowe (1999), for any state to invoke its sovereignty over a stateless ship, some form of jurisdictional nexus is necessary. Although Art 110 of the UNCLOS permits states to exert its authority over stateless vessels, it only gives the state the "right of visit". The "right of visit" grants states the authority to board foreign vessels on the high seas to ascertain that the ship is lawfully registered and is flying an appropriate flag. This right allows the visiting state to embark on the vessel, conduct searches, and examine the ship's documents to ensure compliance with legal and regulatory standards (UNCLOS, 1982, art 110). If the verification by the state asserting jurisdiction leads to any suspicion of criminal activity by the stateless vessel, it can then invoke criminal

jurisdiction over the ship and all the persons on board it. Article 110 of the UNCLOS grants states the right to visit foreign vessels on the high seas to verify their flag and ensure compliance with international laws. However, it does not authorize states to intercept stateless vessels, arrest their crew, or seize the vessel unless there are specific violations such as piracy or illegal activities. Guilfoyle (2009) has asserted that treaty practice favours the need of further jurisdictional nexus to carry coercive measures against the stateless vessel, but also endorses that state practice suggests the absence of such prohibitive rule for taking coercive measures against such vessels.

The need for a further jurisdictional link to exercise authority over stateless vessels arises from the principle that the Law of the Sea allows interception of stateless ships only if explicitly stated by international law. However, the issue becomes contentious as to whether such explicit declarations are necessary for stateless vessels, given their lack of a flag state and the complexities surrounding enforcement under the UNCLOS (1982). The liberty to freely navigate in the international waters, the right of innocent passage and many other related concepts and rights are endowed on states by the Law of Sea (UNCLOS, 1982). The result of this view of the UNCLOS is that it excludes the stateless vessels from the protections available to the ships of states carrying its flag. This means that stateless vessel has no liberty of freely navigating in the international waters. The absence of a flag state does not grant immunity from intervention by other states, as they may exercise jurisdiction over such vessels. Furthermore, the domestic courts including those of UK and USA have also endorsed that International Maritime Law has allowed states to assert jurisdictions on stateless vessels (*United States v. Marino Garcia*, 1982; *Niam Molvan v. Attorney General for Palestine*, 1948). The ongoing controversy surrounding the status of stateless vessels is supported by the argument that allowing such ships to freely navigate the high seas or international waters would effectively turn international waters into sanctuaries for vessels beyond the jurisdiction of any state. This would create a scenario where no state could assert legal authority over these ships, which contradicts the principles of international law. (Meijers, 1967). Therefore, since the Law of the Sea has not endowed stateless vessels with any such protections, the Law of Nations does not prohibit states from interdicting stateless ships in the open sea and asserting its authority over such vessels.

This never means that the interdiction of stateless vessels is beyond the rules of international law. The truth is that states assert its diplomatic protection over the stateless vessel whose subjects are in that stateless vessel (Guilfoyle, 2007). Moreover, the coercive measures if when taken against the stateless vessel comes under the umbrella of Human Rights

Law. Coercive measure taken is legitimate if they have basis in either domestic law or international law.

3. THE JURISPRUDENCE OF UNITED STATES, AUSTRALIA AND ITALY

3.1. United States

The Convention Relating to the Status of Refugees 1951 comprehensively embodies the *non-refoulement* principle under its article 33. The United States has adopted the UN Protocol Relating to the Status of Refugees 1967 which embodies some of the operational part of the Refugee Convention, thus obliging U.S to follow up the law of Refugee Convention thus also adding up the *principle of non-refoulement* under art 33 (Legomsky, 2006). The issue that art 33 of the Refugee Convention also extends to unauthorised migrants who travel through sea and then claim refugee status is a disputed one. Thus, the issue that whether art 33 has an extraterritorial application and requires states to provide for arrangements for those interdicted in the international waters in order to claim refugee status or that the Refugee Convention do not provide for any such opportunity?

The Supreme Court of USA ruled in the case of *Sale v. Haitian Centers Council, Inc* that neither the Refugee Convention nor its implementing statute has an extraterritorial application in the USA. Thus, the US Supreme Court upheld the return of Haitians who were trying to immigrate to USA when they were intercepted in the International Waters by the US Coast Guards and were not given any chance of claiming refugee status (*Sale v. Haitian Centers Council, Inc,* 1993).

3.1.1. The Haitian Migration and United States Response

The internal political and economic disturbance in Haiti has always led the Haitians to flee to the USA. This migration of the Haitian people began to increase in number in the 1970s and much more in the 1980 and 1981 (Legomsky, 2006; Wasem, 2011). The increased Haitian Migration led the US Presidents to respond, without corresponding to the principle of non-refoulement. In 1981, an agreement was reached between Haiti and President Ronald Reagan, where it allowed the USA to interdict Haitian boats and return them to Haiti if it was suspected of carrying illegal migrants to USA (U.S. Customs and Border Protection, n.d.). However, if during an interview at the high seas with the Haitian migrants suggested that an individual or more has potential claim for refugee status, then such

persons would be taken to the USA in order that their claim be considered. The USA pledged that those individuals who were found to be refugees will not be sent back to Haiti. In practice, the USA over the next ten years from 1981 to 1991 returned almost 25,000 Haitians and gave full asylum hearings to only 28 Haitians (Refugees International, 2021).

The Military takeover in Haiti in 1991 increased the flow of emigration from Haiti. On the other hand, interdiction operations by the USA continued, but they were detained at Guantanamo Bay, rather than returning them back to Haiti. Soon the naval base at Guantanamo was overpopulated and President H.W. Bush made a statement that since the non-refoulement obligation applies in the territorial area of USA, all Haitians interdicted at sea will be sent back to Haiti without giving them opportunity for claiming refugee status (Federal Register, 1992). This policy continued during the Clinton Presidency, and it was also endorsed and validated by the United States Supereme Court in the important decision of Sale Case (*Sale v. Haitian Centers Council, Inc*, 1993). However, Clinton removed the no screening for refugee status policy in 1994. In the same year the coup d'état ended in Haiti and flow of migrants reduced. Those at Guantanamo base were returned to Haiti involuntarily.

In 2004, once again Haiti was struck with internal violence and the new exodus has begun. This time it was President George W Bush who responded to the migration flow. He made the following statement: "*I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore.*" (Frelick, 2004). From the International Refugee Law perspective this statement is very important. Moreover, although, a US President declared the Haitian migrants as "refugees" for the very first time, he stated that they will be returned. However, the President's statement conformed to the decision taken by the S.C in Sale v. Haitian case.

3.1.2. The Case of Sale v. Haitian Centers, Inc

Those Haitians who were interdicted at the sea and then detained at Guantanamo Bay were represented by the plaintiffs in this case. They stated that they had "the right to apply for refugee status" under various treaties and laws which they were denied. The Act of Law which implements the non-refoulement obligations upon states is provided in the amended provision of the Immigration and Nationality Act 1952. Section 243(h) (1) provides as follows:

'*The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D)) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality,*

membership in a particular social group or political opinion' (Immigration and Nationality Act, 1952).

The complainants argued that the section of law provided that an alien shall not be returned due to amendment of 1980 which removed the phrase "within the United States", the Act become applicable extraterritorially. Prior to its amendment in 1980, section 243(h) provided: "*The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason*." This position of the plaintiffs was acknowledged by the second circuit court (*Haitian Centers Council, Inc v. McNary*, 1992). However, the US Supreme Court would latter not endorse the plaintiff's assertion.

The US Supreme Court reasoned that since section 243 (h) (1) included just the word "Attorney General" therefore the actions of the President and the Coast Guards were excluded from its application. Furthermore, since the responsibilities of the Attorney General with regards to hearings and deportation of migrants under the "Immigration and Nationality Act" has only its application in the United States, the hearings under section 243 cannot be conducted beyond the territory of USA. Thirdly, the US Supreme Court decided that the evidence did not establish that the extraterritorial application of the section 243 was intended by Congress, and so there was not sufficient proof which could bypass the presumption taken by the Supreme court that section 243 does not apply extraterritorially. Finally, the Supreme Court recognised one thing that section 243 can be applied only in local municipal procedures whereby the Attorney General of US decides which non-nationals can reside in the US (*Sale v. Haitian Centers Council, Inc,* 1993).

3.2. Australia

3.2.1. The Tampa Incident and Australia's Pacific Solution

Australia is not free of controversy when the question of interdictions of migrants is discussed. The most important and relevant case which overviews the approach and jurisprudence of Australia is the incident of MV Tampa. The MV Tampa was a Norwegian cargo ship which rescued 433 "boat people"[7] on 26th August 2001 from the distressed

[7] The boat people refers to the refugees on board the boats trying to reach another country. The phrase 'the boat people' became popular after Vietnamese refugees who were trying to flee Vietnam after the end of Vietnam war 1975 in small boats and ships.

fishing ship Palapa of Indonesia near the coast of Christmas Island of Australia. Most of the people on board of the distressed vessel were refugees from Afghanistan who came from western Indonesia with the help of human traffickers. However, the Australian authorities refused their access to Australia and wanted them to return to the point from where they embarked on their journey. The boat people complained, and the Tampa took to the edge of Australian territorial sea. The Australian authorities threatened the captain Arne Rinnan to return the passengers and boat people to Indonesia or otherwise they would try him as a smuggler of illegal migrants (Rothwell, 2002). After several days just off the edge of Australian territorial waters, the refugees/asylum seekers finally convinced the Tampa captain Arne Rinnan to reach Australian territory. Australian authorities refused their access and sent its Special Air Service (SAS) to interdict and capture the Tampa when it entered the territorial sea of Australia despite several radio warnings from the coastal authorities (Marr & Wilkinson, 2004). This stance would mark the new and prolonged harsh policy of Australia towards future asylum seekers. The boat people were confined in the Tampa for several weeks in the sea.

This new policy of Australia towards asylum seekers is known as the "Pacific Solution". Through Pacific Solution Australia intended not to bring the distressed migrants to its shores and initiating the application of Australian Migration Act 1958. While previously the Australian legal regime offered some space and opportunity to the migrants and asylum seekers to reach the Australian courts or claim their refugee status, the "Pacific Solution" excised the territories of Christmas Island, Cocos Islands, and Ashmore Reef from the applicability of Australian Migration Act (Australian Government, 2010). These territories were removed from the "migration zone" where Migration Act does not apply. This means that asylum cannot be sought in these outlying territories of Australia. Furthermore, the "Pacific Solution" authorised Australian Navy to interdict the incoming migrant boats and keeping them at detention centers for investigations and formal processing. Put in brief "Pacific Solution" means the returning or pushing back of migrant boats approaching Australia to other states (Kneebone, 2003). The Australian maritime interdiction policy has been subject to much controversy. According to Crock (2003) it breaches the non-refoulement obligations as well as other general obligations

3.3. Italy

The situation of Italy in confronting migrants coming through boats is similar to the USA. Many migrants and asylum seekers from Eritrea,

Somalia and North Africa try to reach Italy via Libya through unauthorised means (Frelick, 2009). However, Italy's response is no different from that of USA. Italy signed agreements with Libya whereby Italy would interdict migrant boats coming from Libya and then would return back to Libya without going into formal procedures for their determination of refugee status (Hessbruegge, 2013). It was under such circumstances that the European Court of Human Rights (ECHR) decided in the landmark case of *Hirsi Jamaa vs Italy (2012),* which brought extraterritorial interdictions of migrant boats under the jurisdiction of International Human Rights Law.

3.3.1. The Hirsi Jamaa Case

The petitioners in this matter were 13 Eritreans and 11 Somalis who along with about 200 persons were intercepted by the Italian authorities in south of Lampedusa. The migrants had embarked from Libya and were interdicted by military ships of Italy and were returned to Libya against their will, without giving any chance to them for claiming their refugee status (*Hirsi Jamaa vs. Italy*, 2012). Since the boat people contained individuals who had fled Eritrea and Somalia, it was possible that most of them had well founded claims of non-refoulement either due to the situation in Libya or that Libyan authorities would have refouled them to Eritrea and Somalia. The ECHR referred the case to its "Grand Chamber". The Court decided unanimously on the issue of interception in the international waters that Italy had breached its obligations under the ECHR. The Court further concluded that the petitioners in the matter were under exclusive jurisdiction of Italy during the time of happening of events. For instance, when the applicants were interdicted, they were taken on board Italian ships and remain under the jurisdiction of Italy till they were handed over to Libya. Therefore, the events which unfolded the breach fell entirely within the jurisdiction of Italy under Article 1 of the ECHR (Messineo, 2012). Furthermore, the Court made it clear that since Italy has exercised its jurisdictional authority, it cannot claim that it carried rescue operations at High Seas.

After having concluded that events unfolded within Italy's Jurisdiction, the Court then discussed the case merits. The first question was whether Italy had violated the ECHR. To decide the issue, another question needed to be further examined: whether Italy violated art 3 of the ECHR which says that: "*No one shall be subjected to torture, inhuman or degrading treatment or punishment*." (European Convention on Human Rights, 1950). The Court concluded that since Article 3 implies that no such individuals shall be sent back to their own state or another country where it is probable that they may be subjected to such inhuman or

degrading treatment, Italy had violated Article 3, because "Italy knew or should have known" that Libya was not treating well unauthorised migrants and that Libya was going to send the migrants back to their own states which they had fled. This means that Italy had indirectly exposed the Eritreans and Somali's migrants to be refouled to their states through Libya. Finally, The ECHR founded that by interdicting the refugees at sea and returning them to a third state without individual assessment, Italy had breached Article 4 of Protocol 4 of the ECHR, 1963 which states that "*Collective expulsion of aliens is prohibited."*

4. CONCLUSION

Migration by sea raises complex legal and humanitarian challenges that warrant careful consideration from multiple perspectives. Asylum seekers and migrants often flee persecution but, due to lacking legal documents, they face interdiction on the High Seas and are subsequently returned to their countries of origin or third states. This raises key issues within International Law, particularly regarding state rights to interdiction and the protection of migrants' human rights. While the state right to interdict vessels on the High Seas is well established in International Law as a means of protecting borders, it must be exercised within the bounds prescribed by international conventions, such as the Refugee Convention. The legal implications of maritime interdiction, however, vary depending on the state's approach. The U.S. Supreme Court's 1993 decision, which ruled that the Refugee Convention did not apply extraterritorially, aligns with the U.S. policy on immigration control. As a result, the U.S. considers its interdiction operations at sea as legitimate, though the humanitarian consequences are often contentious. Australia's response, exemplified by the treatment of the MV Tampa incident, involves a policy known as the Pacific Solution, which permits the pushback of migrant boats seeking refuge without consideration for the immediate distress of the individuals onboard. This approach further complicates the broader legal framework, as Australia justifies its actions within a strict interpretation of national sovereignty and border protection. Contrastingly, ECHR has taken a significantly different stance, declaring that the return of migrants to third countries or their country of origin violates international law and obligations under human rights frameworks. This illustrates a fundamental tension between state sovereignty and the humanitarian obligation to protect migrants from refoulement. However, this analysis suggests that while maritime interdiction is not explicitly prohibited under international

law, it must be carefully weighed against the broader human security concerns of those seeking refuge. Legal and policy approaches vary, but they must consider the protection of human rights as paramount. States can maintain their sovereignty and protect their borders while simultaneously upholding their international obligations to assess the asylum claims of individuals entering their territorial waters or ports. Considering the differences in legal contexts and state practices, further exploration of these cases from a human security perspective is crucial to understand the full scope of their impact on migrants. As the balance between state interests and human rights continues to evolve, the legal framework surrounding maritime interdiction will need to adapt to ensure the protection of individuals in distress at sea.

AUTHOR CONTRIBUTION

CONTRIBUTION RATE	EXPLANATION	CONTRIBUTORS
Idea	Pointing out the research idea or forming hypotheses	Author 1 and 2
Review of Literature	Conducting the literature review for the study	Author 1
Research Design	Forming the research design, including research methodology, deciding on scales and samples	Author 1 and 2
Data Collection and Editing	Data collection, editing, and analyzing	Author 1
Findings and Discussion	Reporting and discussing the findings	Author 1

Conflict of Interest

No conflict of interest was reported by the authors.

Financial Support

The author(s) has not received any financial support fort his study.

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