9 Seaborne Bordering: Legal Negotiations on Boats and Boat Migrants in EU Border Policies

The previous section examined the powerful image of the refugee boat by describing the extent to which the vessel's recurring attributes of being small, overcrowded and unseaworthy go beyond a mere technical assessment of a vessel's suitability to move on water. I have illustrated that the image together with the vessel's attributes call forth assumptions and fantasies about the condition and origin of its passengers and their political status, as well as the organization of the journey, thus opening up the possibility to valuate and classify the status and ambitions of migrants and refugees arriving in Europe. This chapter focuses on legal reasoning advanced in EU border policies toward migrants and refugees encountered at sea.

When in 2000 (and explicitly in 2004) Michael Pugh considered it justified to apply the term boat-people to the context of maritime migration to the EU, he did so in order "to distinguish their status in law and political discourse" (Pugh 2004: 51). Yet, what distinguishes the status of boat-people from that of other migrants and refugees? Pugh's formulation suggests that it is, in fact, the vehicle that makes the difference. However, others observe a blurring (Inhetveen 2010: 155) or nullifying (Budz 2009) effect of the vehicle on the legal status of its passengers. This section explores the vessel's share in the legal argumentations of EU border enforcement measures.

Against the background of the seemingly self-explanatory image of the refugee boat, it felt almost naive to ask a Frontex official working with the Sea Border Sector about how he could know at sea whether a vessel was used for unauthorized migration. Yet, there was no mention of the crowd of people crammed on deck or the condition of the vessel. "They do not fly a flag" was the taken-for-granted answer that the official provided. In further interviews and when analyz-

ing legal documents related to sea voyages, I affirmed that the relevant legal ground for intercepting vessels with migrants and asylum seekers on board is *the vessel's* "absence of nationality" (Papastavridis 2009: 159). Would a flag then prevent a migrants' boat from being intercepted or pushed-back? Legally speaking: maybe. Empirically deducing: rather not.

And still, could the vessel provide the legal ground for border police intervention, while the target and concern of border guards sits inside the vehicle? What does this legalistic separation – a distinction between legal reasoning *in rem*, that is, concerning the vessel itself, and legal reasoning *in personas*, that is, concerning the crew and passengers of a vessel – allow for? Which legal status is attached to the means of transport – the boat? Which legal status is, in turn, attached to its passengers? Furthermore, how does the legal reasoning *in rem* interfere with the *in personas* reasoning?

For the purpose of working out the vessel's share in legal reasoning, the analysis concentrates on those arguments which rely on the vehicle itself, justifying the interception of "stateless vessels," of "vessels in distress," and of "suspicious vessels." This allows for testing the hypothesis of whether a prioritization of the vehicle in legal reasoning allows for operational practices which otherwise would have been difficult if not impossible to justify. Focusing on the boat, is not to say that persons are no longer considered a part of the relation. Rather, I intend to understand how the reference of having been on board "such a boat" effects migrants' classification and administration in Europe.

In order to explore how the liquid sea and the movable environment of the boat can determine the legal status of migrants – who then are even called seaborne or boat migrants – the relation between territorial border enforcement and the different maritime spaces needs to be assessed. Section 9.1 discusses the extent to which maritime spaces converge with, or diverge from, the notion of territorial borders. As maritime interceptions are a common state practice in the Mediterranean, section 9.2 examines its legality as a border enforcement practice at sea. The section also goes into the three most virulent characterizations of the vessel that legitimize interception: the stateless vessel, the vessel in distress and the suspicious vessel. Section 9.3 summarizes the preceding three chapters on the refugee boat as vehicle, moving target, and integrating figure of EU bordering. The final section analyses the share of the refugee boat to the crafting of an external EU border.

9.1 MARITIME SPACES AND TERRITORIAL BORDER ENFORCEMENT

Political geographer Victor Prescott identified two characteristic differences between maritime borders and land borders: first, maritime borders are rarely demarcated; second, they are more permeable than land borders (Prescott 1987: 25). It follows that in practical terms, border enforcement along maritime borders is more challenging than along land borders.

In terms of national jurisdiction and thus the range of state authority, border enforcement can occur at a port or within the territorial waters of a coastal state, the breadth of which is restricted to twelve nautical miles by Art. 3 of the 1982 LOS Convention. However, Art. 33 (1) LOSC compensates for the practical difficulties of maritime border enforcement by allowing for certain control practices to be expanded up to 24 nautical miles.

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

Border surveillance and control can be enacted inside the territorial waters[1] *and* in the contiguous zone. The competences of a state extend to 24 nautical miles off the baseline of its coast.[2] Meanwhile, the legal border of individual's rights is not explicitly expanded; as the obligations of a coastal state only fully apply in its territorial waters. Thus, the purpose of the contiguous zone explicitly consists in providing for the possibility of effective border control along blue borders (Rah 2009: 61). For the maritime space of the contiguous zone this means that state powers are extended to it, while at the same time the contiguous zone is no longer state territory.

1 According to Art. 3 of the Law of the Sea Convention (LOSC), the breadth of the territorial sea, to which the sovereignty of a coastal state extends, can be extended to twelve nautical miles.

2 LOSC, Art. 33 (2).

However, as in the exercise of state power on land, these control measures must equally consider the principle of proportionality and non-discrimination; they also have to satisfy humanitarian obligations and the principle of non-refoulement. Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur advance the territorial argument in a non-geographical interpretation: they argue that border control measures "have a functional territorial reference point since they are linked to the enforcement of state jurisdiction," regardless of where they are carried out. It follows that border enforcement measures continue to be linked to a territorial frame, even in extraterritorial areas. "The factually substantiated territorial reference significantly relativises exterritoriality and means that sovereign measures linked to border control activities fall within the ECHR's scope" (Fischer-Lescano/Lohr/Tohidipur 2009: 277). According to Fischer-Lescano and colleagues, extending the legal border of policing without simultaneously extending the legal border of rights externalizes responsibilities while provoking a "lack of efficient access to legal protection" (ibid: 295) on the side of refugees encountered at sea.

Effectively, border zones and designated danger zones are areas where the competences of policing are exceptional. The exceptional competences allotted to border guards or border police for the geographic location of the political border *and limited to it*, have been stressed by Kaufmann et al. (2002), Kaufmann (2006: 42), and Mau (2010: 59). No reasonable suspicion is required for intervention and identification checks by the police. Enforcing the border, the liberties of persons can be limited. Access to rights can be rejected to those not carrying the right documents. Borders are thus "border zones of limited rights" (Basaran 2011: 7). The tension between the legal borders of rights and the legal borders of policing characterizes border zones (ibid: 6-8), because it entails a lawful way of limiting the liberties of citizens and foreign nationals. The relation between the legal border of policing and the legal border of rights is generally asymmetrical in areas dedicated to sorting people and granting access, that is, border zones.

On land, this asymmetry between policing and rights is restricted to a certain geographical area – the geographical location of the borderline and 30 kilometers of hot pursuit. At sea, however, this asymmetry is, in principle, limited to the legal construct of the contiguous zone.

Yet, the contiguous zone not only extends the legal borders of policing geographically, it even strengthens them by extending competences while tying rights and obligations to the territorial waters and to land. This one-sidedness of this maritime zone can be used to the advantage of the coastal state in its control

and enforcement capabilities. This radical split is at the bottom of so called pushback and interception operations. Before discussing the reasonings that sustain so called interception or pushback operations, I shall go into a brief excursus on the maritime zone of the high seas and its notion of the freedom of the sea.

The first to claim that the sea was a free space was the Dutch philosopher Hugo Grotius (1583-1645). In *Mare Liberum*, Grotius argued that the sea was international rather than merely at the disposal of the capable sea powers. He claimed that "no part of the sea can be considered as the territory of any people whatsoever" (Grotius 2001 [1609]: 34) but as a common property which "all men might use […] without the prejudice to anyone else" (ibid: 2). According to Grotius, all nations should be able to undertake and profit from ocean-going trade and at the same time grant mutual non-interference. The assumption that directional movement occurs for the purpose of trade and commerce underpinned Grotius's claim. The emphasis on movement and on the principle of non-interference with innocent passages at sea is key to what Grotius understood as the freedom of the sea. In other words, no authority should control access to the sea. The claim was revolutionary for the early 17th century. *Mare Liberum* not only undermined the Pope's world order, it also opposed the British maritime mastery.[3] It thus provoked several responses.

In 1635, the British polymath John Selden (1584-1654) published *Mare Clausum,* which divided the sea into exclusive spheres of interest and power. In 1703, Cornelis van Bynkershoek mediated the two positions arguing that possession of the sea was principally possible, but that a state's dominion and possession over the sea ended "where missiles […] exploded" (quoted in Prescott 1987: 16). In the early 18th century, the range of a cannon shot was roughly three miles long. Bynkershoek's cannon shot rule has been referred to as argumentative basis for the legal construct of the territorial waters. However, the mediation it offered was too variable (ibid: 16-17), and states continuously tried to expand their spheres of influence and possession at sea. Even though different empirical examples can demonstrate states' eagerness to appropriate the sea, the international customary law of the freedom of the sea is frequently brought against these ambitions. The stipulation twelve nautical miles in the Law of the Sea Convention of 1982 is a refining of territorial waters and thus state authority and jurisdiction, states dominion and possession is restricted geographically. Until this date, the

3 The Catholic Church promptly indicated *Mare Liberum* as it undermined the papal world order (Raya).

freedom of the sea is enshrined in Art. 87 of the LOS Convention. It declares that the high seas are "open to all States, whether coastal or land-locked." It provides among other things for the freedom of navigation.[4]

The freedom of the sea opposes the taking of possession, the territorialization, and the striating of the sea by stressing that the sea is "the spatial extension resource, principally useful as a domain for movement" (McDougal/Burke 1962: vii). Grotius claim that "the seas are by their very nature a domination-free sphere of trade routes [Ger.: *herrschaftsfreie Handelsstraßen*], which cannot be subjected to state appropriation" (Gadow-Stephani 2006: 39) implies that there is no supreme authority, no monopoly ruling over the legitimate means of movement at sea.

The notion of a space of movement free from dominion, and the principle of territorial sovereignty grounded on some sort of measured spatial extension stress different premises. While in the latter case, rules apply "within" a certain area, the former is concerned with movement itself. And while in the latter, movement as such can be interdicted, the former may merely define the "traffic rules." When movement across maritime borders is surveilled and controlled, these two principles – the freedom of the sea and territorial order – confront each other. Meanwhile, boats and ships navigate between them, integrating and challenging both principles.

Overall, it is important to keep in mind that the contiguous zone already compensates for the practical difficulties of maritime border surveillance and control. In *strictu sensu* of the 1982 United Nations LOS Convention, which the EU joined in August 2013, border enforcement measures can only legitimately occur within the territorial waters of a coastal state and its contiguous zone. In fact, the contiguous zone is a maritime construct granted in order to address the practical difficulties of maritime border enforcement. With the contiguous zone providing

4 Ships enjoy freedom of navigation, even in territorial waters of a third coastal state, provided their passage is innocent and that there is a genuine link between the vessel and a flag state. Apart from providing for the freedom of navigation, Art. 87 (1) of the LOS Convention lists: "(b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII."

already exceptional competences beyond the territorial border-line, anything beyond 24 miles has nothing to do with border enforcement measures.

And still, despite the right to innocent passage and the principle geographical limitation of border enforcement measures to the contiguous zone, the LOS Convention encompasses no provisions from which refugee boats or migrants' vessels could profit. It is instead composed of rights and obligations which states grant each other (Rah 2009: 21). Moreover, considering the history of the Freedom of the Sea and the Freedom of Navigation, these ideas and norms have been formulated without any bearing on (small) vessels or on the case of flight and migration as a purpose of seafaring. To a certain extent the discussions around the legality of maritime interceptions connects with these loopholes.

9.2 LEGITIMIZING MARITIME INTERCEPTION AS A BORDER ENFORCEMENT PRACTICE

Ever since operational border enforcement along Schengen borders has been coordinated by the Frontex agency, maritime border enforcement practices of European Mediterranean states have changed. Under the premise of "proactive" and "integrated border management," border enforcement measures have also been implemented beyond the contiguous zone, and thus occur where border enforcement is not supposed to occur. On the high sea, or in foreign waters, border enforcement measures encompass interceptions or pushback of migrants' vessels in designated "operational areas." Monitoring, control and recovery efforts are geared toward the small, crowded and barely seaworthy boats as condensed moment of suspicion, unease and insecurity. In fact, the interception "of boats carrying irregular migrants is the primary tool by means of which States attempt to stem the number of arrivals at their shores and thus fulfill their main policy aim" (Mallia 2010: 18) in the area of immigration control.

Yet, it is debatable whether maritime interception is to be considered a legitimate border enforcement practice. Both the available official description of "interception" as well as practitioners' early assessments of practices that were subsumed under this term, reveal a disconnect between a common state practice at sea and the legal provisions in place. This section examines how these gaps are being closed by reference to the three most virulent characterizations of the vessel that legitimize interception: the vessel's statelessness, its being in distress and its being suspicious.

It should be noted that there is no official definition of interception as a policing practice or border enforcement measure. There rather is a description of a modus operandi.

In June 2000, UNHCR's Executive Committee described past and current state practices and thereof derived a provisional definition of interception. The "definition" should not be read as affirmation by UNHCR of the respective control practices. The Executive Committee found that interception encompasses "all measures 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 prospective destination."[5]

The most important aspect of this definition is that it provides for an alternative location to control the movement of persons other than the administrative territorial border or the national territory. Moreover, the definition reveals that interception occurs with the sole intention to stop unauthorized mobility. With this intention defining it, interception rather appears as a policy than a practice. In fact, it entails "all measures applied by a State, outside its national territory," to prevent that someone without the necessary authorization enters its territory. Barbara Miltner underlines that this definition "reflects and emphasizes the *extraterritorial* character of interception" (Miltner 2006: 79, original emphasis).

This forward displacement, or extra-territorialization, is not derived from the practical difficulties of maritime border control. Rather, it occurs to fend off obligations, which are triggered when refugees and migrants are encountered or picked up at sea. The ExCom correspondingly observed that in "most instances, the aim after interception is return without delay of all irregular passengers to their country of origin."[6] Effectively, access to the legal border of rights is restricted or even made impossible by relocating, that is, by pushing the frontier further off territory. While in 2000 the stock-taking definition of interception also entailed administrative instruments such as the non-issuing of a visa, the Executive Committee narrowed this description to active practices in 2003. It stated that

5 Executive Committee of the High Commissioner's program, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), June 9, 2000: Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a comprehensive Approach, at: https://www.unhcr.org/4963237411.pdf (accessed September 2, 2019), Section B (i) (Defining interception, para. 10).

6 Ibid: Section B (ii) (Description of interception practices, para. 12).

"interception is one of the measures employed by States to:

- prevent embarkation of persons on an international journey;
- prevent further onward international travel by persons who have commenced their journey; or
- assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;
- where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner."[7]

Implicitly, the notion of interception revolves around control practices at sea, with regard to vessels repurposed for facilitating migration. Similar to the 2000 definition, interception is first and foremost thought of to tackle the movement of undocumented persons. Interception is thus not part of overall immigration or mobility policies, but tackles a particular segment, that is, those cases which have no legitimate means of movement in the first place.

Even before 2015 and the operation *Mare Nostrum*, the legality of maritime interception practices in the Mediterranean has been analyzed and debated widely (Gavouneli 2006; Miltner 2006; Fischer-Lescano/Lohr/Tohidipur 2009; Trevisanut 2010; Tondini 2012; Coppens 2012; Papastavridis 2013). Generally, interceptions on the high seas without flag-state consent are considered a violation of the principle of free navigation on international waters under the LOS Convention.[8] Effectively, however, a number of legal constructs have been advanced, which allow for the maritime interception of migrants while at the same time circumventing the principle of non-refoulement.

In fact, considering a statement given by a commander of the Armed Forces of Malta (AFM) already in 2005, it seems as if legal reasoning was constructed for a state practice that already functioned all too well. In an interview with Silja Klepp, the commander concedes that "the current status of international law […] doesn't really facilitate this type of interception operations" (Klepp 2011: 295).

7 Executive Committee of the High Commissioner's Program/Standing Committee (2003): Conclusion on Protection Safeguards in Interception MeasuresConclusion on Protection Safeguards in Interception Measures, at: https://www.unhcr.org/3f93b2894.html (accessed October 19, 2019).

8 The argument is also advanced by Brouwer/Kumin (2003: 14); Basaran (2011: 74).

He briefly mentions the different legal statutes which have been advanced to justify maritime interception: the Palermo protocols – "about the fact that they still believe in flag state permission and these are not wearing a flag" – the LOSC and the crimes listed – namely slavery, piracy, illegal transmission – actually "attract international jurisdiction,"[9] including the Vienna Convention's concerning drug trafficking. According to the commander, the facts which have been used to justify interception don't really match with the situation of encountering migrants and refugee vessels at sea. The statement of facts under which interception occurs is thus unclear (ibid). With regard to maritime interceptions of migrants' vessels, the AFM commander concluded that

> "[t]here is no body of international law which covers it. Now again we have said that stateless vessels on the High Sea are subject to anyone's jurisdiction, but A you have to have something in your national law which covers it and Malta hasn't and B you have to talk about proportionality." (quoted in Klepp 2011: 295)

The commander further explains that Malta could only legitimately intervene in the case of rescue (Klepp 2011: 296). Similarly, Matteo Tondini (2012: 62-64), strategist and former military legal adviser to the Italian Navy, states that the SAR regime is the only available legal instrument to contribute to the legality of interception. Beyond that, if competences cannot be mobilized under criminal law nor for humanitarian reasons, there is a third reason: the suspicion of smuggling migrants, which works on the notion of risk and proactivity. These three legitimizing constructs will be considered in detail in the following subsections. All three deduce the legality of interception from different traits of the vessel: its legal, situational and techno-legal traits.

9.2.1 The Stateless Vessel

The legality of interception was first established on the grounds that vessels are stateless. As described by the AFM official cited above, it had been argued that on the high sea, ships without a flag are subject to anyone's jurisdiction. They may, in accordance with Article 110 (1d) of the LOS Convention, be stopped, boarded and seized. Because the rights of international maritime law are rights which states grant each other and thus based on reciprocity and mutual recognition, vessels without a flag cannot count on these rights nor on the protection by

9 LOSC, Art. 99-108.

any state. In other words, stateless vessels cannot rely on the principle of non-interference. Rah adds that "no rights of a foreign state are violated when such vehicles [vessels with no flags] are stopped" (2009: 21).

If a migrant vessel was flying a flag and if there was a genuine link between the vessel and the flag state, the vessel could, in principle, profit from the right to innocent passage in the territorial waters of a coastal state. It could also profit on the principle of non-interference and the freedom of navigation on the high sea. In fact, "the act of carrying migrants on the high seas is not an international crime as such" (Papastavridis 2009: 163). Yet, despite these principle legal provisions, flying a flag is not part of the optional equipment for a vessel repurposed for unauthorized migration. If it were for legalistic reasons, the genuine link between a ship and the flag state required by Article 91 (1) of the LOS Convention is not only implausible but also inexpedient.

Flag state registration is implausible since the watercraft used for seaborne migration – wooden fishing boots, inflatable boats, dinghies, unregistered freighters – would regularly not meet the requirement to fly a state's flag. UNODC reported that the fishing vessels used for smuggling "often do not require registration domestically or internationally, and are [also] not required to have satellite or other tracking systems on board."[10] Flag state registration is inexpedient with regard to the purpose of the journey. Neither the facilitators, nor the migrants, nor the refugees would claim the protection of a state (as flag state). Which flag could they possibly fly, which would render their movement on water acceptable, and which would meaningfully help to identify the vessel? If a flag could be flown to indicate the need for protection (for example, a "Nansen-flag"), the migrants' vessels could fly the flag of the European Union. However, I dare hypothesize that procedures at sea would remain as they are, with or without flag, as the absence of the vessel's nationality is not the issue at stake, but "merely" the basis for interception.

This question or rather omission of a plausible answer demonstrates the absence of nationality as legitimate ground for intercepting migrant vessels. It belongs to a straw man argument, as the stateless vessel ground builds upon a set-up implausibility. In fact, the reference to a state would rather increase the risk for mi-

10 United Nations Office on Drugs and Crime (UNODC) (2011): Smuggling of Migrants by Sea, at: http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf, (accessed August 25, 2015), p. 29.

grants and refugees alike for being identified with that state and deported to it. Flag state protection thus helps the "tourists" (Bauman 1997: 83-93), who do not – by their very movement – contest the authority over the legitimate means of movement. Hence, grounding the legality of maritime interception on the statelessness of the migrants' vessel allows one to overlook the possible need of protection of its passengers. A stateless vessel is argued to be legitimately intercepted on the high seas, and be taken or pushed back to its place of embarkation. The principle of non-refoulement can effectively be circumvented by prioritizing the boat as object of legal reasoning. This legal narrative avoids the elephant in the boat.

Being on board "such a vessel" therefore entails risking (Bauman 1997) and asking for international protection. As a legal figure, the vehicle shows similarities with Agamben's (1998 [1995]) *homo sacer*: the seizure and even destruction of the vessel can occur exempt from punishment as it does not violate the rights of a foreign state or private owner. The migrants' vessel doesn't form part of the international order of (flag) state affiliation. Consequently, Herman Meyers argues that the statelessness can be understood as "allocationlessness" (Meyers 1967: 309), as no rights or duties are attached to a vessel without flag. Moreover, its perceived condition reduces it to a piece of material that barely floats. It is not treated as territory and thus, the vessel's deck does not provide its occupants with rights. The migrants' vessels are a *bare thing*, which according to "generally end up at the bottom of the sea and were never intended for use in more than one journey."[11] Effectively, the hybrid "migrants' vessel" or "refugee boat" is vested with a double statelessness – its passengers are not infrequently traveling without papers on a stateless vessel. For this hybrid, access to rights is (at the very least) protracted and set at an angle. The competences of law enforcement authorities over the vessel, by contrast, are ample and declared straightforward. It has been stressed that the passengers of a stateless vessel are not automatically stateless and that the absence of nationality of the vessel should not affect the nationality of the individuals on board (Meyers 1967: 309; Papastavridis 2009: 163). However, with state practices and their legal reasoning resorting first and foremost to the vehicle, and plainly omit the human cargo, the vulnerability of the migrants on board is augmented. Enforcement jurisdiction over the vessel *in rem* allows for one to nullify the principle of non-refoulement applicable to passengers in search for international protection.

11 United Nations Office on Drugs and Crime (UNODC) (2011): Smuggling of Migrants by Sea, p. 29.

9.2.2 The Vessel in Distress

A vessel without nationality legally justifies the hunter's engagement in border enforcement. A vessel in distress alarms allies to assist or rescue passengers from a capsizing vessel. Interviewees in this study have mentioned that interception operations can easily turn into search and rescue operations.[12] This is an apt description when looking at patrol activities in the Mediterranean. Since many vessels used by migrants and refugees to cross the Mediterranean travel in substandard condition and are overcrowded, distress situations are common.[13] In 2009, the European Commission even conceded that "[m]ost of the maritime operations coordinated by Frontex turn into search and rescue operations."[14] When patrol vessels encounter boats or ships in distress, they are obliged – just like all other ships or coastal states – to "go to the aid of ships in distress regardless of where they are" (Brouwer/Kumin 2003: 14).

12 Similarly, Thomas Gammeltoft-Hansen quotes a Spanish navel captain who in 2007 saw that the encounter "may provoke capsizing, either deliberately as migrants seek to provoke a rescue operation, or involuntarily if the weight of those on board the often overcrowded ships shifts too much to one side" (quoted in Gammeltoft-Hansen 2011: 141). The researcher thereof concludes that "[i]n practice, interception operations may quickly change to a situation of search and rescue" (ibid). The reasons he advances are: first, the bad condition of many vessels and second, the difficult situation of encounter between intercepting and migrant vessels.

13 For instance, in 2011 UNHCR published a table with documented distress incidents at sea involving refugees and migrants for the period between January 1, 2011 and October 31, 2011. For the investigated period of nine months, UNHCR documented 39 incidents of distress at sea in different regions of the world. In 23 incidents the location of distress had been the Mediterranean Basin, which means that almost 60 per cent of the distress incidents were documented for the Mediterranean Basin which increases the probability of border patrols encountering or being called by a vessel in distress and thereby being obliged to rescue. Yet, in the case of the Mediterranean incidents, the circumstances of the distress situation remain mostly unelaborated.

14 European Commission: Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, November 27, 2009, COM (2009) 658 final: section 2 (Reasons and Objectives).

This obligation follows from Article 98 (1) of the LOS Convention, which mandates that every vessel, official and private, to "render assistance to any person found at sea in danger of being lost" and "to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance."[15] Seline Trevisanut clarifies that although Article 98 "is located in the LOSC section on the high seas, the duty to render assistance applies in all maritime zones" (Trevisanut 2010: 526) as the duty "could not disappear just because of the crossing of a maritime frontier" (ibid: 527, fn. 8).

In fact, the international search and rescue regime operates beyond the principle of territory, which typically structures international relations and agreements. It imposes duties on all coastal and seafaring states independent of the maritime zone and encourages them to coordinate their search and rescue services (Gammeltoft-Hansen 2011: 141). Unlike in the case of territories, search and rescue (SAR) zones can also overlap, as is the case of the Maltese and the Italian SAR zones (Trevisanut 2010: 524).[16]

While enforcement measures are restricted to a defined territorial area, humanitarian duties such as rescue operations request universal application and thus exceptions to territorial references in law enforcement measures. While the specific geographical location is central for ascertaining the competences and duties of law enforcement vessels vis-à-vis a vessel in question and its passengers, the humanitarian operation of rescue at sea enables and even requires interference, regardless of geocodes or juridical-administrative references. Therefore, border enforcement activities effectively depart from their designated operational purpose and domain by responding to a distress call. To a certain extent, distress situations rescind the spatial restrictions to law enforcement competences. A distress situation both obliges and authorizes its witnesses. However, they only do so temporarily and for the purpose of the respective rescue operation.

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15 In 2014 the EU has taken a similar formulation into: Regulation (EU) No 656/2014 of the European Parliament and of the European Council of May 15, 2014: establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union: Preamble (14).

16 "Malta has unilaterally declared this zone and has not negotiated its delimitation with neighboring States. As a result, the extension of the Maltese SAR zone is equivalent to 750 times its territory" (Trevisanut 2010: 524) Moreover, its extension coincides with the Maltese Flight Information Region (Klepp 2011: 341).

Distress situations at sea trigger the legal framework of the 1974 International Convention on the Safety of Life at Sea (SOLAS)[17] and the 1979 International Convention on Maritime Search and Rescue (SAR Convention)[18], both of which fall under the Law of the Sea Convention (LOSC). The SAR Convention defines the actual distress phase as a "situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance."[19]

Practitioners' statements that interception operations can easily turn into search and rescue operations suggest that while patrolling, border guards would not only detect vessels but assess whether the vessel in question was in a situation where "immediate assistance" was required. Their assessment of the situation would thus change subsequent proceedings with the vessel and its passengers. If the vessel is not found to be in a distress situation, interference with the vessel occurs in the framework of border enforcement measures. The lack of a flag or the suspicion of smuggling migrants (cf. below) would legitimize the exercise of jurisdiction over the vessel (and its passengers).

Without distress, focus is on the rights and the security of states and thus the competences of law enforcement agencies vis-à-vis migrant vessels. In case of distress, emphasis shifts to the safety of migrants and refugees on board. If the vessel is found to be in distress, a rescue obligation according to the LOSC and SAR Convention would be triggered. The translation from hunter to friend thus partly depends on the assessment of the hunter himself. At the same time, the humanitarian character of rescue often conflicts with migration control objectives that underpin border enforcement measures (Miltner 2006: 82).

A common definition of distress shared by EU member states seems particularly important for joint operation contexts. Yet, while some member states consider all migrants' vessels to be in distress due to their bad condition, overcrowding, or the lack of a professional navigator, others argue that migrants are not in distress

17 International Convention for the Safety of Life at Sea (SOLAS) (adopted November 1, 1974, in force May 25, 1980); in: United Nations (ed., 1980): Treaty Series 1184/18961: 278-453.

18 International Convention on Maritime Search and Rescue (SAR Convention) (adopted April 27, 1979, in force June 22, 1985), in: United Nations (ed., 1985): Treaty Series 1405/23489: 118-256.

19 SAR Convention, Annex, Chapter 1 (1.3.11).

until their vessels actually start sinking.[20] These diverging interpretations of the SAR provisions result in conflicting operational practices between national border enforcement units. Even the European Commission criticized in 2009 that "these rules are not interpreted or applied uniformly by the Member States."[21] It even noted that "the fact that the operations become search and rescue operations removes them from the Frontex coordination and Community law."[22] In addition to these differences in operational practice, the legal basis for intervention and subsequent obligations change based on the fact there is a "vessel in distress."

According to the SAR Convention, "rescue" is defined as an "operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety."[23] Rescue fends off the loss of lives at sea. As with other emergency operations, it prevents something worse from happening in a life-threatening situation. The description evokes a relatively straightforward yet temporary operation: rescue persons from danger at sea and take them to a place of safety in which the "grave and imminent danger" no longer exists. Yet, "the relatively straightforward issue of the disembarkation and subsequent return to their country of origin of sailors rescued at sea" (Gammeltoft-Hansen 2011: 142) has become twisted with the presence of unauthorized migrants and refugees on board vessels.

The change stems first and foremost from the disembarkation duty and the controversies about what constitutes a place of safety. In 2004, the IMO adopted amendments to the SAR and SOLAS Convention.[24] These were intended to con-

20 Among legal analysts this is not a clear-cut issue, either: Violeta Moreno-Lax (2011: 22-23) argued in 2011 that unseaworthiness entails distress. Coppens (2012: 345) summarizes that for "some EU member states, the vessel must be on the point of sinking while, for others, it is sufficient for the vessel to be unseaworthy. Some member states require a request for assistance from the people on board while others do not."

21 European Commission (2009): Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, November 27, 2009, COM(2009) 658 final , Section 2 (Reasons and objectives).

22 Ibid.

23 SAR Convention, Annex, Chapter 1 (1.3.2).

24 Both amendments were adopted by the International Maritime Organization (IMO), and entered into force on July 1, 2006. See Maritime Safety Committee, 78/26/Add. 1

trol inconveniences for rescuing ships or captains and was supposed to clarify what constitutes a place of safety. The amendments stipulate that the state responsible for the SAR zone should also ensure, as soon as possible, a safe haven (place of safety) for the disembarkation of rescued persons.

Effectively, the crux of disembarkation resides in the state's responsibility for those being rescued. Disembarkation not only terminates the actual rescue phase,[25] it is also measured by the safety of the rescuees; a place of safety "is also a place where the survivors' safety of life is no longer threatened."[26] Further obligations open up for the rescuing state with regard to unauthorized migrants – the same migrants the state had otherwise wanted to prevent from illegally crossing the border. When applied to refugees and asylum seekers, safety bears different meanings than when applied to shipwrecked persons in general. In the case of refugees, safety entails the right to seek asylum, which complicates the notion of a place of safety. The life-threatening situation of a fugitive isn't resolved when the distress situation is terminated – it's the reason for his or her being *en route* in the first place. In principle, if refugees are on board, their safety is only achieved when "effective protection" is provided (cf. Legomsky 2005).

In order to not be burdened with that obligation, state practices have extended to rescuing or assisting boats in foreign SAR zones and to disembarking migrant passengers in their place of embarkation. Rescue transforms the operation from being a humanitarian obligation to an instant mandate. This provides a basis for interference where border patrols have no enforcement jurisdiction. Rescue is repurposed and submitted to the objectives of border policies.

Different experts of international refugee law argue that the rights of migrants and refugees on board these vessels cannot be circumvented by declaring border enforcement as a series of rescue operations. And yet this is what actually happens. The distress situation of the vessel provides a legitimizing narrative for circumventing the principle of non-refoulement. The principle of refoulement

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Annex 3 and 5 respectively. "The purpose of these amendments and the current guidance is to help ensure that persons in distress are assisted, while minimizing the inconvenience to assisting ships and ensuring the continued integrity of SAR services" (Rah 2009: 120-121).

25 "A place of safety is a location where rescue operations are considered to terminate" (SAR Convention).

26 "and where their basic human needs (such as food, shelter and medical needs) can be met" (Maritime Safety Committee; IMO (2004): Guidelines on the Treatment of Persons rescued at Sea, Resolution MSC.167(78), adopted on May 20, 2004), para. 6.12.

becomes part of operations when distress is the basis of intervention. Distress also empowers immediate assistance to a vessel or other craft and tow or escort it back to a place of safety, often the shores of the country of embarkation, while ignoring the fact that on board the vessel are passengers with mixed legal statuses (Coppens 2013: 2). Hence, when disguised as assistance, even operations of hindrance can find a legitimizing narrative. Violeta Moreno-Lax sees a *mala fide* implementation of maritime law by EU member states and a "direct breach" of their protection obligations vis-à-vis asylum seekers (Moreno-Lax 2011: 26). However, this doesn't occur in an alleged grey zone, but rather via the fact that legal border policing is stretched out by a humanitarian mandate to conduct sea rescues. It is, in fact, the reference to the vessel (in distress) that appears as mobilizing and empowering.

Mare Nostrum and the Legitimizing Narrative of Saving Lives at Sea

Italy's large-scale rescue operation *Mare Nostrum* launched 15 days after the Lampedusa shipwreck of October 3, 2013 has fostered this argumentative construct. *Mare Nostrum* lasted for a little more than a year, from October 18, 2013 to October 31, 2014. Before the operation was launched, defense minister Mario Mauro explained the operation′s intention:

> "the ships would be escorted to the nearest safe port, in compliance with international law. If there aren′t any migrants in need of medical assistance [...] and if the ship is able to sail, it "will be taken to the safest and nearest port, not necessarily Italian." (quoted in ANSAmed (N.N.) 2013)

These procedures, however, were not what made the news. Even though a careful reading reveals that Mauro′s announcement invited a worsening of the vessels′ condition, the most important operational difference to conventional maritime border control was the official extension of the operational area to 70.000 square miles of sea – three times the region of Sicily.

Most importantly, in terms of equipment and personnel, operation *Mare Nostrum* spoke rescue. According to the Italian Defense Ministry, Italy deployed five Italian navy ships "either patrollers or corvettes – with wide range and medical care capabilities," One amphibious Landing Platform Dock (LPD) vessel with "specific command and control features, medical and shelter facilities for

the would-be migrants."[27] Additionally, three aircrafts, one equipped with Forward Looking Infrared (FLIR), up to nine helicopters "to be readily deployed to Lampedusa or Catania," and two unmanned aerial vehicles (UAVs) of the type Camcopter S-100 surveilled the sea from above. The coastal radar network and the Italian AIS (Automatic Identification System) are shore stations that routinely support operations and have been used during *Mare Nostrum* as well. Furthermore, submarines have been deployed to investigate the smuggling business and other criminal activities. *Mare Nostrum* operated on a monthly budget of 9 million euros and was supported with 900 officers – 300 per shift. In total, 150,810 migrants were rescued during the operation.[28]

The fact that a large number of seaborne migrants could potentially find space on board an Italian navy ship was a novel idea. With assets acknowledging the need for rescue capacity, *Mare Nostrum* was prepared to function as a search and rescue operation – it expected to take on board those spotted at sea. However, the approach attracted criticism from other European member states. Opponents considered *Mare Nostrum* a pull factor as "the migrants in the boats and their smugglers could be fairly certain that they would be rescued by one of Mare Nostrum's ships" (*IRIN News* (N.N.) 2015a). The British Foreign Office minister Baroness Anelay, for instance, argued that the operation "only encouraged more people to make the treacherous journey" (quoted in ibid) Overall, the discussion about *Mare Nostrum* challenged and even reversed established arguments and practices of maritime border enforcement:

- Since the early days of Schengen, opponents of restrictive EU border policies used to argue that EU policies provoked, increased and perpetuated the smuggling business; it's now the opponents of a humanitarian rescue operation who argue that a humanitarian approach would fuel the smuggling business.
- Furthermore, the acceptance of where border enforcement should legitimately occur changed: When the Frontex operation Triton was launched to

27 Ministero della Difesa (2014): Operation *Mare Nostrum*, at: http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx (accessed November 17, 2014).

28 The cited information on *Mare Nostrum* has been summarized in August 2015 according to the website of the Italian Ministry of Defense. Additional information, some of which differs from the Ministry's account have been provided by (Andres 2014: 28), and in quite a comprehensive graphic of *The Guardian* (Kirchgaessner/Traynor/Kingsley 2015).

replace *Mare Nostrum*, NGOs and the critics of EU border policies argued in a way unthinkable before. They requested that *Triton* be provided with more equipment and an extended operational area. European coastal services should expand their activities during the *Mare Nostrum* operation. So, those who before vehemently claimed that Frontex had nothing to search for in foreign waters or even on the high seas now support, in addition to an expansion of the mandate, Frontex's presence beyond territorial waters.

- Since *Mare Nostrum*, the occurrences at sea no longer happen out of sight. A variety of private individuals and non-governmental organizations, such as SOS Mediterranée and Sea Watch, interfere with border surveillance and border enforcement in the Mediterranean. As a result, not only is the information monopoly on the part of border enforcement agencies broken, news of rescue *ships* – rather than boats – with migrants on board is also increasingly reaching public attention. This intensifies the focus on the image of the small refugee boat and thus the marginalization and depoliticization of the people on board.

Going back to the legitimizing construct of the vessel in distress, on the whole it appears that, on the one hand, the purpose of migration control has become impossible thanks to vessels in distress. On the other hand, vessels in distress empower intervention by providing a mandate to do so. Accordingly, the rights of states and ships are no longer bound to maritime legal zones but are subordinated to distress. The vessel in distress thus mobilizes law enforcement competences. In a distress situation, the goal of patrol vessels transforms from immigration and border control to salvage. This mediation (translation) fits the law enforcement vessel with a mobilization of its operational area, that is, a situational geographical extension of the (legal) possibility to intervene.

According to Latour, translation refers to the "the creation of a link that did not exist before and that to some degree modifies two elements or agents" (Latour 1994: 2). In this case, the migrants' vessel translates the law enforcement vessel into a rescue vessel – the hunter into a friend. Even though seaborne migrants deploy the vessel as a technology of movement, their vehicle (as a thing) also becomes integrated into EU border policy reasoning providing the (situational) mandate to intervene.

9.2.3 The Suspicious Vessel

Considering the merging of interception and rescue operations, it can be stated that an enforcement vessel operates as a dual service vessel with a paradox objective. When this dual service vessel identifies or encounters an unseaworthy vessel, flagless under reasonable suspicion of smuggling migrants, this third argument ultimately legitimizes the latter's interception. In fact, with the entry into force of the Migrant Smuggling Protocol, maritime interception on the high seas or in foreign waters was rendered "a legitimate tool" for border control and enforcement (Miltner 2006: 105), as reasonable grounds to suspect that a vessel is engaged in smuggling already provide for the search, boarding and seizure of persons and cargo of such a vessel.[29] Instead of focusing on the act of illegal immigration as such, this third legal reasoning focusses on its facilitation. The hunter is not chasing migrants, but smugglers.

In fact, the Protocol against Smuggling of Migrants by Land, Sea and Air states as its purpose to "prevent and combat the smuggling of migrants, as well as to promote cooperation among State Parties to that end, while protecting the rights of smuggled migrants."[30] Thereby, the Migrant Smuggling Protocol intends a remarkable balancing act: while the *facilitation* of illegal border crossing is declared a crime in international law, the criminal liability of the facilitated migrants is explicitly excluded from the Protocol, with the migrant being declared an "object of [such] conduct,"[31] namely of smuggling.[32] Smuggling refers to the mere physical movement, the transportation of persons across international borders "on a payment-for-service basis" (Mallia 2010: 10). The service ends with the arrival of migrants at a destination (ibid: 11).

29 Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, U.N. Doc. A/55/383 (2000), Annex III, [hereafter cited as Migrant Smuggling Protocol], Art. 8, p. 5-6.

30 Migrant Smuggling Protocol, Art. 2, p. 2.

31 Ibid, Art. 5, p. 3.

32 "Smuggling" is defined in Art. 3(a) of the Migrant Smuggling Protocol as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident,"

Effectively, border surveillance and enforcement practices pursue facilitation networks by tackling their vehicular indicator as the final link of the facilitation chain: the vessel boarded by migrants who travel without authorization by the state of destination. Even though the offense "is constituted by the act of the illegal crossing of an international border" (Mallia 2010: 11), it is the profit that is made out of its facilitation which gives way to a criminalization of the conduct of smuggling. However, as Papastavridis stresses "the act of carrying migrants […] is not an international crime as such; the only conduct that is criminalized is the 'smuggling of migrants' and solely for the States parties to the respective Protocol" (Papastavridis 2009: 163).[33] Yet again, if the facilitation networks were non-commercial, the unauthorized migrants would still be tackled by border enforcement, yet the point of intervention could only be the territorial border, or in the case of seaborne migration, in the contiguous zone or the territorial waters. Interception *en route* would principally not be legitimate.

Nonetheless, with the entry into force of the Migrant Smuggling Protocol, maritime interception on the high seas or in foreign waters could be justified by reference to the (potential) crime of smuggling (Miltner 2006: 105). This legal frame criminalizes the commercialized facilitation and tackles the facilitator. However, the legalistic frame allows for systematically neglecting empirical knowledge about this type of migration. Although the inmates in this narrative are victims, their rights can be circumvented by preventing smuggling, understood as the transport in boats for money.

The suspicious fact in this scenario is the boat, particularly when seen to be overcrowded. However, when captured by satellite imagery, small boats are already suspicious even before someone has entered them. Thereby, border management is equipped with a different operating logic. The generation of suspicion no longer occurs during patrol activities, but in the mode of "proactive" border enforcement. While the stateless vessel and the humanitarian ground refer to a concrete, individual situation, smuggling tackles structures, a business, and a type of migration. Hence, this activity occurs prior to situations in which vessels are intercepted or rescued. Surveillance and the suspicion of smuggling legitimize to have a look in the first place. The vessel remains the moment of condensed suspicion, its tracking, tracing, monitoring, and identification is part of border surveillance activities. In fact, as I have elaborated in chapter 3, the Euro-

33 Even though Papastavridis refers to the high seas, his claim that the transport of migrants is not a crime as such also holds for land and air routes.

pean Border Surveillance System, EUROSUR tackles vessels rather than migrants.

The small, overcrowded and unseaworthy boat is regarded as a condensed suspicious fact by European border authorities, and mobilizes both control and rescue measures. The reference to something "suspicious," "strange," "abnormal" or "unidentified" traveling toward the Schengen area is regarded as a legitimate factor for further monitoring and eventual interception. As vehicle of migration, the refugee boat impacts upon, if not determines, the agency and the legal status of the persons it carried. The double statelessness of vessel and refugee allows for a patronizing treatment of the refugee-boat hybrid, which oscillates between pity and encroachment.

9.3 THE REFUGEE BOAT: VIRTUALLY (AT) THE BORDER

Tracing the construction of an external border to the EU from the perspective of the refugee boat has allowed us to explore the tones, connotations and fantasies, as well as the institutional and legal reasoning, along which the refugee boat has turned into a moving target for EU border policies. As such, the refugee boat hybrid acts as an integrating figure in the construction of a supranational EU border. Itself the only landmark at sea, a *mobile in mobili*, it mobilizes repressive state practices *and* humanitarian intervention alike, the hunter and the helper.

Exploring the international response to the earliest case of the Vietnamese "boat-people," it could be shown that the term had been introduced by political actors with the evasive intention not to discuss and decide the refugee status of the persons on board. At the same time, the situation on board the vessel was taken both as indication for the facilitation business and, in certain dramatic cases, it was in turn used as evidence for the humanitarian refugee status to apply. This kind of oscillating reference could also be demonstrated in the context of Europe-bound flight and migration since the beginning of the Schengen Process. It could be demonstrated that all three attributes: small, overcrowded and unseaworthy, share the impetus that this maritime journey is not meant to occur. At the same time, the vessel as stateless, in distress and suspicious provides the legitimizing narrative for interception or operations of hindrance at sea. In this manner, the vessel not only facilitates a subversive trip or option of last resort, but contributes significantly to the mobilization and justification of EU border enforcement measures.

The analysis of EUROSUR already allowed to trace this mobilization and mandating of EU border enforcement measures. However, while EUROSUR virtually indicates where reaction capability is needed, the vessel counts as a valid reason for interception. Serhat Karakayli and Enrica Rigo argue that the "ever vessel suspected of transporting 'illegal' migrants is considered *a virtual border* when its nationality is unknown or uncertain." (Karakayali/Rigo 2010: 124, emphasis added). They see the virtual maritime border as "one example […] of externalization of the European Union's frontiers" (ibid). In fact, it is not one of its examples. It is its driving force. The concept of the virtual border mobilizes both a more flexible approach to the geography of border controls and an expansion of the competencies of border police.

Overall, analyzing the refugee boat as mediator, it turns out that these vessels not only facilitate unauthorized maritime journeys; they are not only utilized as technologies of movement and mobility, but are also a moving target as well, a vacillating reference and integrating figure of EU bordering. The vessel facilitates, juxtaposes and negotiates the migrants' access to Europe, while also mobilizing and legitimizing the control of its access – that is, the practices of border surveillance and control. In this way, the vessel thereby mediates EU bordering.

The migrant vessel's mediation can be summarized by the following aspects:

- *Europe's other: valuating the other by their means of movement*. The hybrid of the refugee boat mediates Europe's *other* as a versatile figure. This versatility does not consist in the fact that the vessel moves on water, nor does it refer to the mixed flow of people on board. The vehicle and the attributes attached to it in the European public view, which is to say, as small, overcrowded and unseaworthy, allow for flexible valuations of the phenomenon and the people on board. It could be demonstrated that all three attributes applied to the vessel share the impetus that this maritime journey is not meant to occur. While the gaze of pity and risk is applied to the migrants, the vehicle arouses suspicion and allows for de-individualization and depoliticization of the persons on board who appear as a boatload of people.
- *Mobilization and legitimization of enforcement measurements*. With regard to EU enforcement of maritime borders, a prioritizing of the vessel in legal reasoning could be traced. This allowed for enforcement measures which otherwise would have been impossible to justify. In the territorial logic, border enforcement at sea can only legitimately occur in the territorial waters or the contiguous zone of a coastal state. By reference to the migrants' vessel as "stateless," "in distress" or "suspicious," interception and opera-

tions of hindrance found their legal construct. The legitimate reason for interceptions is found in the vessel itself, in fact, more in its condition as unseaworthy and overcrowded than in its position or purpose. Although it subverts border surveillance and control, the migrant vessel paradoxically triggers the emergence of common EU measures of border enforcement.