The Right to International Solidarity as a Game Changer when it comes to "Crimes of Solidarity"?

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Abstract

The article discusses whether there is a Right to International Solidarity that hinders the prosecution of "Crimes of Solidarity" in the context of (illegal) migration. The focus lies therefore on European and International Human Rights Law, the Facilitation Directive of the EU, UNCLOS and the Draft Declaration on the Right to In-

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ternational Solidarity. The notion "Crimes of Solidarity" refers to cases where private actors face judicial consequences for "doing good" (sea rescue, providing shelter, food and medical aid to migrants). As there is neither a right to enter a certain harbour nor a duty to let people disembark, a possible ground for justification might be the Right to International Solidarity, providing a right to help and to be helped. This could have the effect of excluding prosecution for these crimes of solidarity. The article analyses to what extent a Right to International Solidarity exists and thus might hinder the criminalisation of acts of solidarity. Under the current international and regional law there is no Right to International Solidarity, neither through treaty nor customary law. Nevertheless, the potential to become a game changer can be seen in its possible effects on the interpretation of other established (human) rights and international standards. Even though the UN Special Rapporteur on Human Rights and Solidarity's "Draft Declaration on the Right to International Solidarity" cannot be qualified as soft law as long as it is not adopted by the General Assembly, it can nevertheless serve as a starting point for necessary discussions in the decriminalisation of solidarity.

Keywords: Right to International Solidarity, Crimes of Solidarity, Draft Declaration, Facilitation Directive, Sea Rescue, Herrou Case, Customary Law, Soft Law

A. Introduction

In June 2017, *Virginia Dandan*, the UN Special Rapporteur on Human Rights and Solidarity presented a Draft Declaration on the Right to International Solidarity. This report to the UN General Assembly (Draft Declaration) enshrines in Art. 5 "the right [of every human being] to claim their Right to International Solidarity".[1] In December 2018, the UN Member States adopted the Global Compact for Safe, Orderly and Regular Migration (Global Compact),[2] reiterating the importance and their willingness

> to save lives and prevent migrant deaths and injuries through individual or joint search and rescue operations, […] assuming collective responsibility to preserve the lives of all migrants, in accordance with international law.[3]

In June 2019, two years after the Draft Declaration and only six months after the Global Compact the captain of the vessel Sea-Watch-3 – *Carola Rackete* – was arrested for landing her boat with 40 migrants and possible refugees in the Italian har-

1 The full text of the Draft Declaration can be found at: www.ohchr.org/Documents/Issues/Solidarity/Draft DeclarationRightInternationalSolidarity.pdf (26/7/2021).
2 *UNGA*, Global Compact for Safe, Orderly and Regular Migration, A/Res/73/195, available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195 (26/7/2021).
3 Ibid., para. 24.

bour of Lampedusa.[4] *Rackete* was accused – *inter alia* – of human trafficking and smuggling. The case of *Rackete* represents one of many,[5] where the defendants are accused of having committed what NGOs label as a "Crime of Solidarity".[6] This notion refers to cases where private actors face judicial consequences for "doing good" (e.g. providing shelter, food and medical aid to migrants).[7]

"Crimes of Solidarity" entail any kind of facilitation of illegal entry or stay, which may be the provision of food, shelter or even a car lift from one city to another. Prosecution of acts connected with sea rescue normally relate to the assistance with illegal entry, human trafficking and smuggling, as the "perpetrator" brings the migrants to the coast of a European State and thereby enables them to enter the EU's territory illegally.[8] The acts on sea and those on land do have a substantial overlap as far as the illegal entry is concerned, but only on land mere "Samaritan acts", such as providing food or shelter can develop into a crime under national immigration laws.[9] Despite the fact that *Rackete* was set free by the examining Italian magistrate after a couple of days, her case highlights important aspects. Even if scrutiny of the facts makes the behaviour non-punishable, actors such as *Rackete* are – sometimes for years – burdened with administrative and criminal prosecution.[10] In other cases the investigations led to long prison sentences.[11] Both situations cannot only involve high costs for the accused, but also interrupt their

4 For an encompassing summary of the facts of that case see: *Hughes*, Carola Rackete: How a ship captain took on Italy's Salvini, available at: www.bbc.com/news/world-europe-48853050 (26/7/2021).

5 For an overview of the year 2018 see Table 2 in: *FRA*, Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-mediterranean_en.pdf (26/7/2021); see also a summary of incidents in: *Mainwaring, De-Bono*, EPC: Politics and Space 2021, p. 2 f.

6 Sometimes the notion "Crimes of Humanity" is used as a synonym, see *Tazzioli*, Radical Philosophy February 2018, p. 6, available at: www.radicalphilosophy.com/commentary/crimes-of-solidarity (26/7/2021).

7 See eg. *ReSOMA*, The criminalisation of solidarity in Europe, https://www.migpolgroup.com/wp-content/uploads/2020/03/ReSoma-criminalisation-.pdf (19/10/2021).

8 *Fekete, Webber, Edmond-Pettitt*, When witnesses won't be silenced: citizens' solidarity and criminalisation, Institute of Race Relations Briefing Paper Nr. 13, available at: www.irr.org.uk/publications/issues/when-witnesses-wont-be-silenced-citizens-solidarity-and-criminalisation/ (26/7/2021), for the prosecution of private rescue at sea see p. 5 ff., for the respective acts on land, see p. 14 ff.; for a encompassing overview see also: *Webber* in: Fekete/Webber/Edmond-Pettitt (eds.), available at: www.irr.org.uk/publications/issues/humanitarianism-the-unacceptable-face-of-solidarity/ (26/7/2021).

9 Even though the question if the individual act is an actual crime might be controversial, see e.g. the attempt of the Major of Callais to prohibit the distribution of food to refugees, which was later set aside by an administrative court, www.theguardian.com/world/2017/mar/02/calais-mayor-bans-distribution-of-food-to-migrants (26/7/2021); for the judgement see: www.france24.com/en/20170626-france-calais-court-orders-officials-provide-migrants-aid-water-toilets (26/7/2021).

10 See also: *Fasia*, In Court for saving Lives – The Binder and Mardini Case, Verfassungsblog, 24/11/2021, https://verfassungsblog.de/in-court-for-saving-lives/ (6/1/2021).

11 As has been the case for Domenico Lucano, the mayor of Riace, who was sentenced to 13 years in jail *inter alia* for abetting illegal migration: https://www.theguardian.com/world/

work.[12] Furthermore, such practices create a "chilling effect",[13] reducing the willingness of private actors to engage in private rescue missions on the Mediterranean Sea, even if they are clearly necessary from a humanitarian perspective.[14] Several incidences, especially during the Covid19-pandemic,[15] show that states do not act in solidarity with migrants. They even take concrete (legal) action against private individuals acting in solidarity and step up their immigration laws, such as the UK in July 2021, for example.[16] While on the UN-level *Obiora C. Okafor* recalled "the need for international solidarity for migrants and refuges (sic!) at sea",[17] the criminalisation of humanitarian actors and the help they provide to migrants and refugees has become commonplace in nearly all European states.[18]

This gives rise to the question as to what extent the aforementioned Right to International Solidarity could oppose this development. The article will therefore start with defining solidarity for the purpose of this analysis (B), and the so-called Crimes of Solidarity (C) before it analyses how the Right to International Solidarity (D) can have an impact on the legal framework as it stands now (E).

B. Solidarity and what it means

The attempt to define the term solidarity fills many articles and monographs in different academic disciplines.[19] This article does not want to add a new attempt to this

2021/sep/30/pro-refugee-italian-mayor-sentenced-to-13-years-for-abetting-migration (6/1/2022).

12 With reference to further examples see: *Heller/Pezzani*, Blaming the Rescuers – Report, available at: https://blamingtherescuers.org/report/ (26/7/2021).

13 See the quote of the cruising manager of the Royal Yachting Association: "People believe you must render assistance at sea but you don't have to if it puts your boat in danger. It sounds very harsh, but you could have a massive bureaucratic problem and be tied up in bringing illegal immigrant into the country. Our advice is stand off and report". As quoted by *David Matyas*, The Nationality and Borders Bill: Closing Space for Humanitarian Assistance at Sea, EJIL:Talk!, 26 August 2021, https://www.ejiltalk.org/the-nationality-and-borders-bill-closing-space-for-humanitarian-assistance-at-sea/ (6/1/2022).

14 *Caritas Europa*, Position Paper: The "criminalisation" of solidarity towards migrants, p.5, available at: www.caritas.eu/wordpress/wp-content/uploads/2019/06/190617_Caritas_Europa_criminalisation_solidarity_FINAL.pdf (26/7/2021).

15 N.N, Migranten verlassen nach Quarantäne Fähre, Zeit Online, 5/5/2020, available at: https://www.zeit.de/gesellschaft/zeitgeschehen/2020-05/alan-kurdi-gefluechtete-minderjaehrige-deutschland (26/7/2021), see also below text to fn. 62 ff.

16 *Matyas*, The Nationality and Borders Bill: Closing Space for Humanitarian Assistance at Sea, EJIL:Talk!, 26 August 2021, https://www.ejiltalk.org/the-nationality-and-borders-bill-closing-space-for-humanitarian-assistance-at-sea/ (6/1/2022).

17 The statement of the expert was made on the 2/2/21 and can be accessed here: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26712&LangID=E (26/7/2021).

18 *Edmond-Pettitt, Fekete*, Investigations and Prosecutions for crimes of solidarity escalate in 2018, available at: www.irr.org.uk/news/investigations-and-prosecutions-for-crimes-of-solidarity-escalate-in-2018/ (26/7/2021).

19 A good overview for these approaches can be found in: *Kurt Bayertz*, Solidarität – Begriff und Problem.

list but will use the definition of the Draft Declaration. Accordingly, solidarity can be defined as

> […] the expression of a spirit of unity among individuals, peoples, States and International organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals [,][20]

Solidarity therefore is manifold: it can be expressed between individuals, between individuals and peoples, between individuals and states, between states and peoples and so on. For the purpose of this article, the solidarity between individuals remains in focus, as it aims at deducing a right to help and respectively a right to be helped from the Draft Declaration. If there is a right to help or likewise a right to be helped, the criminalisation of the respective acts is illegitimate. The concrete content of the draft's solidarity concept remains arguably vague. However, *Okafor* qualified the so-called Crimes of Solidarity as an expression of said international solidarity between individuals.[21] Sea rescue and other humanitarian acts can, thus, be considered an expression of solidarity in the sense of the Draft Declaration and this paper.

C. Crimes of Solidarity

After defining the meaning of solidarity, it is necessary to define the so-called Crimes of Solidarity and their legal framework in order to map the road to a possible Right to International Solidarity.

I. Definition of "Crimes"/criminalised behaviour in the context of sea rescue and illegal stay on state territory

When reflecting on the notion of "Crime of Solidarity" the contradiction between the two terms becomes apparent. Solidarity is a positive form of behaviour, showing compassion and helping those in need whereas the notion of "Crimes" is the opposite, depicting negative behaviour which violates the law and is outside/against/without socially accepted rules. It is noteworthy that none of the "Crimes" discussed in this article are actually characterized as a "crime of solidarity" by the respective legislator. The term stems from civil society, NGOs, and activists convicted for assisting migrants and refugees with illegal entry to their state's territory and the connected violation of the national immigration laws.[22]

20 Art. 1 (1) Draft Declaration.

21 *Human Rights Council*, Human rights and international solidarity – Report of the Independent Expert on human rights and international solidarity, A/HRC/41/44, para. 4.

22 *De Massol de Rebetz*, The "crime of solidarity" – On the symbolism and the political message behind court rulings, available at: https://leidenlawblog.nl/articles/the-crime-of-solidarity (26/7/2021); *Tazzioli/Walters*, Migration, solidarity and the limits of Europe, Global Discourse 2019, p. 185.

Clearly, cases such as the 39 dead people who were found in a refrigerated truck near London,[23] as well as the case where 71 migrants were found dead in a truck in Hungary,[24] show the necessity to punish the professional smuggling of human beings. The criminalisation of the facilitation of illegal entry into a state's territory is unquestionably justified if it aims to punish smugglers and human traffickers who financially benefit from the desperation of migrants trying to reach Europe and a presumably better life there. Regarding these cases, the purpose of the law is not only to protect state borders but also the migrants, by making the smuggling unattractive, due to the expected penalties in place. Such instances are therefore excluded from the examination, as the aim of this article is not to argue for the repeal of penalties for professional facilitation of illegal entry or stay on a state's territory, but for the introduction of humanitarian clauses into European immigration laws.

Crimes of Solidarity in the sense of this article therefore refers to cases where national (immigration) laws prohibit that a person helps another person even out of a humanitarian motivation to enter, transit or stay in the territory of the state concerned. For the criminalisation in the understanding of this paper it suffices that the law sets out certain punishments such as fines or imprisonment – an actual conviction is not necessary. This leads to the question of how and why the criminalisation of these acts emerged under European and International law.

The European norms that criminalise "doing good" in the context of sea rescue and illegal stay on state territory were enacted as a consequence of Art. 27 Schengen Convention 1994 and later of the 2002/90/EC Directive *defining the facilitation of unauthorised entry, transit and residence*, (Facilitation Directive) which replaced Art. 27 of the Convention.[25] The Directive obliges the Member States (MS) to:

> 1. […] adopt appropriate sanctions on:
> (a) any person who *intentionally assists* a person who is not a national of a Member State to *enter, or transit across*, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens; (b) any person who, *for financial gain, intentionally assists* a person who is not a national of a Member State *to reside within the territory* of a Member State in breach of the laws of the State concerned on the residence of aliens.[26]

One of its main purposes was/is the effective combat of human trafficking and smuggling, to end the suffering of migrants.[27] The effective fight against the facilita-

23 N.N, Essex lorry deaths: 39 bodies found in refrigerated trailer, BBC news, 23th October 2019, www.bbc.com/news/uk-england-50150070 (6/1/2022).

24 N.N, Hungary jails gang for deaths of 71 migrants in lorry, BBC news 14th June 2018, www.bbc.com/news/world-europe-44481439 (6/1/2022).

25 The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239 of 22/9/2000, p. 19–62.

26 Art. 1 of the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (Directive), OJ L 328 of 5/12/2002, p. 17–18, (Emphasis made by the author).

27 See 2nd Recital of the Directive.

tion of unauthorised entry, transit and residence is not only an aim of the European Union, but a concern for states worldwide. Two years before the Directive was enacted, the "Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime" (UN-Protocol) was adopted.[28] In Art. 6, the Protocol places on State Parties the obligation to:

> […] adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally *and* in order to obtain, directly or indirectly, a financial or other material benefit:
> (a) The smuggling of migrants;
> (b) When committed for the purpose of enabling the smuggling of migrants:
> (i) Producing a fraudulent travel or identity document;
> (ii) Procuring, providing or possessing such a document;
> (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.[29]

Whereas on the European level all kinds of assistance (including the assistance out of humanitarian reasons) must be penalised, Art. 6 seems to prohibit only the assistance with a criminal intent, namely in order to obtain any kind of benefit.[30] However, subparagraph 4 of the Protocol allows states to take measures against persons whose conduct constitutes an offence under domestic law, which enables the MS to go further in criminalising assisting acts. The norms created by the European legislators are more restrictive than required by the UN Protocol,[31] which UN representatives regularly point out and criticise.[32] However, as the Protocol allows for deviations, the regulations created by the MS are not *per se* a violation of the Protocol.[33]

28 *UN General Assembly (UNGA)*, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, available at: www.refworld.org/docid/479dee062.html (UN Protocol) (26/7/2021).

29 Art. 6 UN-Protocol, fn. 27 (emphasis made by the author).

30 According to the *Travaux Preparatoires*, the aim of the Protocol was to exclude the punishment of humanitarian action in connection with the illegal entry into the territory of a state, see: *UNODC*, Travaux Preparatoires of the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 2006, p.469, available at: www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf (26/7/2021).

31 E.g. when it comes to criminal liability the Protocol exempts family members; whereas under European law the family relationship is irrelevant for a conviction, see Art. 1 of the Directive referring to "any person".

32 *UN Secretary General*, Saving lives is not a crime – Note by the Secretary General, A/73/314, para. 71 ff.

33 Seen differently by *Ryngbeck*, The EU Facilitation Directive is not aligned with human rights standards, available at: www.socialplatform.org/blog/the-eu-facilitation-Directive-is-not-aligned-with-human-rights-standards/ (26/7/2021); *Carrera/Vosyliute/Smialowski* et al, Fit for purpose? The Facilitation Directive and the Criminalisation of humanitarian

The cited European and International provisions lay the ground for the national legislator to criminalise the mentioned assisting acts in connection with the illegal entry onto their territory. Due to Art. 31 of the Geneva Convention,[34] as well as Art. 5 of the UN-Protocol, irregular entry does not constitute a crime for the refugee as the capacity of being a refugee is considered as a ground for exemption from penalty.[35] This exemption from criminal liability does not apply to their accomplices.[36]

While the Directive obliges MS to criminalise the above-mentioned acts, it also allows them to introduce a so-called "Humanitarian Clause" into their national immigration laws, which entails exceptions to the punishment if the act was carried out with the aim *"to provide humanitarian assistance to the person concerned"*.[37] The majority of the EU MS, however, did not introduce such a Humanitarian Clause, which prompted the European Parliament (EP) to publish the "*Guidelines for Member States to prevent humanitarian assistance from being criminalised"*.[38] In these Guidelines, the EP expressed its concern about the "unintended consequences of the Facilitators Package[39] on citizens providing humanitarian assistance to migrants and on the social cohesion of the receiving society as a whole",[40] and therefore, called on the MS to *"[…] transpose the humanitarian assistance exemption […]."*[41] These Guidelines have had thus far no effect on national legislators and did not lead to the introduction of exemption clauses.[42] This reluctance proves to be especially problematic regarding the rescue at sea in the Mediterranean Sea through private persons and NGOs.

assistance to irregular migrants: 2018 update, p. 106 ff., available at: www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf (26/7/2021).

34 *UNGA,* Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

35 Another trend is that the migrants themselves steer their boat and not professional captains (smugglers) in order to avoid the punishment for smuggling, for an examination in this regard see: *Ricard-Guay*, EUI Working Papers 2018/32.

36 For the german legal system see: BGH, 4.5.2018 3 StR 69/17, NStZ 2018, 286, (287).

37 Art. 1 para. 2 of the Directive.

38 European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised (2018/2769(RSP)).

39 This refers to Directive 2002/90/EC (see fn. 25) and Framework Decision 2002/946/JHA) (SWD(2017)0117) on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5/12/2002, p. 1.

40 Ibid., No. 2.

41 Ibid., No. 6.

42 Only 8 of 28 European Member States use a humanitarian clause in their respective law codes, *UN Secretary General*, Saving lives is not a crime – Note by the Secretary General, A/73/314, para. 71; the UK after leaving the EU even increased the maximum penalty to lifetime imprisonment, see: Art. 38 Nationality and Borders Bill, accessible here: https://publications.parliament.uk/pa/bills/cbill/58-02/0141/210141.pdf (6/1/2022).

II. Sea rescue as an example for assisting illegal entries on the territory

Most migrants reach Europe by sea and the passage over the Mediterranean Sea has become particularly dangerous with thousands of migrants drowning along the route.[43] The lack of effective sea rescue by the EU and its MS has led to the current situation,[44] where private actors have taken over sea rescue. The EU with its MS stands by[45] and/or hampers the rescue of migrants by closing harbours and borders,[46] as happened during the Covid pandemic. Before examining the potential of the Right to International Solidarity in this context, this article will firstly examine the existing legal framework that comes into question for the justification of the so-called crimes of solidarity. Therefore, it will firstly discuss the legal implications of these closures (a) before it assesses whether there is a right to enter a specific harbour (b). If there were not only a duty to rescue but also a right to enter a certain harbour it would be incompatible with international law to criminalise those acts.[47]

The criminalisation of sea rescue is even more problematic since a duty under international law exists, not only to rescue persons that are in distress at sea but also to bring those persons to a safe place upon rescue.[48] The prosecution of the crew members and captains who help migrants in distress may thus be incompatible with this duty under international law. The duty to rescue persons in distress at sea can be found in Art. 98 of the Convention on the Law of the Sea (UNCLOS).[49] The

43 UNHCR estimates that in 2019 1,028 persons died in the Mediteranean Sea, for an overview of the numbers of the last years see: https://data2.unhcr.org/en/situations/mediterranean (26/7/2021).

44 Even though the European Union Naval Force Mediterranean Mission (Sophia-Mission) was prolongued until March 2020, the mission was operated without ships but only via air controls with helicopters and air planes, which led to an ineffective mission, as even Federica Mogherinis' spokesperson admitted, *Romann*, Marine Operation ohne Schiffe, Tagesschau online, 27/3/2019, available at: www.tagesschau.de/ausland/sophia-operation-101.html (26/7/2021); for the prolongation see: Council Decision (CFSP) 2019/1595 of 26 September 2019 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), ST/12006/2019/INIT, OJ L 248, 27/9/2019, p. 73.

45 Whether Italy can be held responsible for the acts of the Libyan Coast Guard in a rescue operation that caused the death of several migrants, is object of a complaint procedure before the ECtHR (ECtHR, App. No: 21660/18, *S.S. and others v Italy*, http://hudoc.echr.coe.int/eng?i=001-194748).

46 See text to fn. 61 ff.

47 The existence of such rights denying: *Matz-Lück*, Seenotrettung als völkerrechtliche Pflicht: Aktuelle Herausforderungen der Massenmigrationsbewegung über das Mittelmeer, available at: https://verfassungsblog.de/seenotrettung-als-voelkerrechtliche-pflicht-aktuelle-herausforderungen-der-massenmigrationsbewegungen-ueber-das-mittelmeer/ (26/7/2021).

48 Art. 98 UNCLOS read in conjunction with SAR Convention Section 1.3.2: "Rescue. An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety".

49 *UNGA*, Convention on the Law of the Sea, 10 December 1982, UN Treaty Series Vol. 1833, 1-31363, 396 ff.

obligation is not only a treaty obligation, but also mirrored by customary law.[50] As Røsæg puts it: "Non-assistance to refugees and migrants at sea is not a legal option."[51]

States must ensure that every captain of a vessel is obliged to help persons in need. The boats that are used by migrants are regularly overloaded and are not equipped according to safety standards. In order to trigger the duty to rescue this would need to be seen as sufficient for a situation of distress. According to the Search and Rescue Convention (SAR),[52] a situation of distress only exists if there is an imminent threat for the life and the physical integrity of the persons concerned,[53] whereas it is not sufficient that the ship is merely overloaded or lacks sufficient security precautions, such as life vests or life belts.[54] However, once those boats (mostly dinghies) start sinking or a panic on board develops, a situation of distress exists.

The duty to rescue clearly opposes the criminalisation of rescuing acts. In cases where captains of the rescue boats are arrested after docking their boats, it appears that despite the rescue at sea being an obligation, it is still criminalised.[55] It is there-

50 It was firstly introduced in Art. 11 of the Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea of 1910, available at: www.admiraltylawguide.com/conven/salvage1910.html (26/7/2021); Art. 12 (1) of the UN Convention on the High Seas, United Nations, Treaty Series, vol. 450, p. 81; Annex of SOLAS, Chapter V, Rule 10; Annex to the SAR Convention, Chapter 2, No. 2.1.10; Art. 10 of the International Maritime Organisation, International Convention on Salvage, available at: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a58b3 (26/7/2021); Art. 98 UNCLOS; as well as in European Law: Art. 9 (1) of the Council Regulation (EU) No 656/2014; for the qualification as customary law see: *Guilfoyle* in: Proelss (ed.), Art. 98 para. 1.

51 *Erik Røsæg*, The duty to rescue refugees and migrants at sea, Border criminologies, 25 March 2020, available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/03/duty-rescue (6/1/2022).

52 *International Maritime Organisation*, International Convention on Maritime Search and Rescue, 1979, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20140 5/volume-1405-I-23489-English.pdf (26/7/2021), SAR Convention.

53 SAR Convention Annex, para. 1.3.13.

54 See: *Matz-Lück*, fn. 47.

55 Not criminalised but hampered if not made impossible is the sea rescue by NGO's also through measures that are on first sight not related to migration issues, such as the german "Schiffssicherheitsverordnung (SchSV)" a law that requires a certain safety certificate for boats flying under the german flag. The so-called "Schiffssicherheitszeugnis" is not needed if the boat serves "spare time purposes". In the jurisprudence of the national administrative courts sea rescue was classified as an activity that falls under the respective purposes (Hamburgisches Oberverwaltungsgericht 3. Senat, Beschluss vom 5.9.2019, 3 Bs 124/19). However, the German transport minister then changed the "sport and spare time purposes" to "sport and recreational purposes" in order to exclude the boats of private sea rescuers from the exemption. Their boats regularly do not fulfil the requirements of said safety certificate and are thus stopped from flying under the german flag, which ultimately hinders them from rescuing. On the difficulties to get a flag for a rescue boat see e.g.: *Schatz, Endemann*, Ecclesia rules the waves: der Vatikan als Flaggenstaat privater Rettungsschiffe im Mittelmeer?" Verfassungsblog, 14/11/18, available at: https://verfassungsblog.de/ecclesia-rules-the-waves-der-vatikan-als-flaggenstaat-privater-rettungsschiffe-im-mittelmeer/ (26/7/2021).

fore important to stress that the sea rescue itself is not forbidden under the respective national (immigration) laws. "Crimes of Solidarity" only come into existence when rescued persons are brought ashore after rescue, onto the territory of the coastal state.

However, since the return of fugitives to Libya, for example, is not acceptable in terms of human rights[56] that rescuers have the sole option of bringing the rescued to Europe. There, in turn, they are threatened with criminal prosecution for aiding and abetting illegal entry. Therefore, at least indirectly, sea rescue is made a punishable offence which appears to be contradictory to the clear obligation to rescue at sea and the duty of states to guarantee the right to life. The same conclusion was *inter alia* reached by the local court in Agrigento and reaffirmed by the Italian Supreme Court in the *Rackete* case.[57] The Supreme Court considered the duty of rescue to take precedence over national entry regulations and rejected criminal liability for aiding and abetting unauthorised entry, by stating that the act was at least justified.[58] Despite coming to the right decision as a result, the legal reasoning of the judgement has a flaw. Not the rescue itself but the assistance of entry onto the state's territory is criminalised by the Italian immigration law. The duty to rescue someone in distress at sea would only oppose this criminalisation or at least justify the criminal offence, if it further entailed the duty to bring someone not only to a safe place but also to a specific safe place, meaning that there is a right to enter a specific harbour and/or a right to disembark the rescued persons in this harbour, as part of the obligation to rescue. The lower instance court in Aggrigento can be understood in the sense that it qualifies the Italian harbour as the required safe place when it states that it "is the prescribed outcome of the fulfilment of the duty of rescue, which does not end with the mere taking aboard of the shipwrecked persons but in taking them to a

56 See eg. EctHR, App. no. 27765/09, *Hirsi Jamaa and Others v Italy;* but also: *OHCHR*, "UN human rights chief: Suffering of migrants in Libya outrage to conscience of humanity", 14 November 2017, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393 (26/7/2021); see also: *UNSMIL/OHCHR*, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya, 18/12/2018, p. 25 ff. available at: www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf (26/7/2021).

57 The judgement can be accessed here: https://www.giurisprudenzapenale.com/wp-content/uploads/2020/02/Cass-6626-2020.pdf (26/7/2021).

58 "L'insussistenza del reato die cui all'art. 1100 cod. della Nav. E, quanto al reato di cui all'art. 337 c. p., *l'operatività della scriminante di cui all'art. 51 c.p.* giustificano la mancata convalida dell'arresto ed il rigetto della richiesta di applicazione di misura cautelare personale." Judgement of the Tribunale di Agrigento of 2 July 2019, No. 3169/19 R.G.N.R, Nr. 2592/19 R.G.GIP (ZaöRV 2019, 727, (736)) (Emphasize made by the Author); the judgement was upheld by the Italian Cassation Court in January 2020, see: *Scifo*, Carola Rackete non andava arrestata", Cassazione boccia il ricorso del pm di Agrigento, La Repubblica, 17 January 2020, available at: https://palermo.repubblica.it/cronaca/2020/01/17/news/cassazione_boccia_il_ricorso_del_pm_di_agrigento_contro_carola_rackete-245995722/ (26/7/2021).

safe harbour."[59] However, if there is no right to enter a certain harbour and/or a right to disembark the rescued, the duty to rescue persons in distress on sea does not exclude the criminalisation of aiding and abetting the illegal entry into the respective territory.

1. Consequences of the Covid-19 pandemic

The Covid19-pandemic further aggravated the situation of migrants and asylum seekers coming to Europe. In April 2020, when the Corona Pandemic spread through Europe and "lock downs" were imposed in many countries, *Dunja Mijatović*, the Council of Europe's Commissioner for Human Rights emphasised that "solidarity and concrete action to share responsibility and protect human rights [was] now more than ever of the essence."[60] Likewise, the UNHCR insisted:

> While countries are closing their borders and limiting cross-border movements, there are ways to manage border restrictions in a manner which respects international human rights and refugee protection standards, including the principle of Non-Refoulement, through quarantine and health checks.[61]

These statements were a consequence of the actions of some EU MS such as the Netherlands, Portugal and Spain, which allowed only restricted entrance to their territory, and the Mediterranean countries, which started to close their borders in the context of the so-called "*EU Travel Ban*".[62] In contrast to the *Commission's Guidance on the implementation of the temporary restriction on non-essential travel*

59 (ZaÖRV 2019, 735): "costituisce il prescritto esito dell'adempimento del dovere di soccorso, il quale – si badi bene – non si esaurisce nella mera presa a bordo dei naufraghi, ma nella loro conduzione fino al più volte citato porto sicuro." English translation of this part of the judgement of the court in Aggrigento made by the author.

60 The full statement can be accessed here: https://www.coe.int/en/web/commissioner/-/states-should-ensure-rescue-at-sea-and-allow-safe-disembarkation-during-the-covid-19-crisis (26/7/2021); the actual willingness of the Member States was and is more than doubtful, as could be seen in the context of the refusal of the Joint Declaration of Intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism (an analyis can be found here: *Frasca*/*Gatta*, The Malta Declaration on search and rescue, disembarkation and relocation: Much Ado about Nothing, eumigrationblog 3/3/2020, available at: http://eumigrationlawblog.eu/the-malta-declaration-on-search-rescue-disembarkation-and-relocation-much-ado-about-nothing/ (26/7/2021).

61 The full statement can be accessed here: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25762&LangID=E (26.7.2021); The italian decret can be retrieved here: https://www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf?fbclid=IwAR1ND4AFGVqsfnO7pzXcIdlG2NlPGcPKUgT1Mjjg6lYqsU-3cEsfPu3ovU4 (26/7/2021); the maltese decision can be found here: https://www.gov.mt/en/Government/DOI/Press%20Releases/PublishingImages/Pages/2020/April/09/pr200648/PR200648a.pdf (26/7/2021); a critical analysis can be found by *Chetail*, Front. Polit. Sci. 2:606307, doi: 10.3389/fpos.2020.606307.

62 *Salvo Nicolosi*, Non-Refoulement during a Health-Emergency, EJIL:Talk! 14. May 2020, https://www.ejiltalk.org/non-refoulement-during-a-health-emergency/ (6/1/2022).

to the EU,[63] which exempted "Persons in need of international protection or for other humanitarian reasons respecting the principle of non-refoulement" from the "temporary restriction of non-essential travel", the Italian and Maltese decisions effectively targeted especially persons coming to Europe across the Mediterranean Sea.[64]

Such border closures – in contrast to border controls[65] – are not in line with international (human rights) law but infringe especially the prohibition of collective expulsion (Art. 4 Prot. 4), which obliges states to assess each request for international protection individually. The general border closure leads to a situation where people arriving are categorically denied access to international protection without the necessary individual assessment. This is a development that seems to be justified in the light of the ECtHR's grand chamber decision of *N.D. and N.T. v Spain*.[66] In this judgment, the court held that when it comes to the scope of the protection afforded by Art. 4 Prot. 4, "the applicant's own conduct was a relevant factor".[67] The applicants in this case tried to enter Spanish territory illegally by crossing the fences at the Melilla enclave. Before entering the territory by climbing over the fence, the applicants were discovered by the Spanish border guards and brought back onto Moroccan territory without the possibility to file an application for asylum. According to the Court, the applicants tried to enter Spanish territory "in an unauthorised manner, deliberately took advantage of their large numbers and used force" instead of using legal ways of entry which Spain provided for them, which (in the courts view) justified their direct expulsion.[68] This so-called "own culpable conduct" of the applicants excluded them from the protection of Art. 4 Prot.4 according to the ECtHR.

The Greek government adopted these arguments when it suspended the application of the right to asylum in March 2020.[69] This ECtHR judgement and especially

63 Communication from the Commission on: COVID-19 – Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy, C(2020) 2050 final, available here: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200327_c-2020-2050-report.pdf (26/7/2021).

64 Even though small autonomous boats still were allowed to enter the harbour, e.g. the "Alan Kurdi" with 150 people aboard was not allowed to enter the harbour of Lampedusa, *Pantaleone*, Italy closes ports to migrant ships because of coronavirus, 8/4/20, available at: https://www.reuters.com/article/us-europe-migrants-italy-ports-idUSKBN21Q11C (26/7/2021).

65 On the difference between closure and control: *Chetail*, fn. 60.

66 ECtHR, App. No. 8675/15 and 8697/15, *N.D and N.T v Spain*, http://hudoc.echr.coe.int/eng?i=001-201353 (6/1/2022).

67 Legal summary of the Judgement, *N.D and N.T. v Spain*, App. No. 8675/15 and 8697/15, available at: http://hudoc.echr.coe.int/eng?i=002-12726 (6/1/2022).

68 Ibid.

69 See e.g. Manfred Weber in an interview with Deutschlandfunk, https://www.deutschlandfunk.de/europaeische-fluechtlingspolitik-an-der-aussengrenze-muss.694.de.html?dram:article_id=471420 (26/7/2021).

the *"own culpable conduct test"* derived from *N.D. and N.T. v Spain*[70] was heavily (and rightly) criticised.[71] However, even if applied to the persons aboard the private sea rescue boats, and even if argued that these persons could have applied for visas in their home states and therefore could be refused an individual assessment, such refusal still has to be in line with the principle of non-Refoulement, as was also pointed out by the ECtHR in *N.D. and N.T. v Spain*.[72]

The principle of non-Refoulement is part of customary international law[73] and has been written down in several international (human rights) treaties,[74] as well as explicitly reaffirmed in the context of the pandemic.[75] Furthermore, the Refoulement-prohibition is absolute on the ECHR level, whereas the 1951 Refugee Convention allows certain derogations in Art. 33 para. 2. As is normal with exceptions, they must be interpreted narrowly, which necessitates an individual assessment of the threat a person poses to national security. A general assumption for a group of arriving persons, for example, cannot be made.[76] The pandemic can be a danger to the state and arriving persons might add to this danger, but for the applicability of Art. 33 para.2, each individual person had to be a danger to national security. This is not only highly doubtful,[77] but also the mere claim of states without further proof in this regard cannot be accepted as sufficient in order to suspend the prohibition of

70 Judgement (fn. 68), paras. 206–232.

71 Instead of many see: *Schmalz/Pichl*, "Unlawful" may not mean rightless. The shocking ECtHR Grand Chamber Decision in case N.D. and N.T., Verfassungblog, 14/2/2020, https://verfassungsblog.de/unlawful-may-not-mean-rightless/ (26/7/2021).

72 See Judgement (fn. 68) para. 171; bearing in mind that the judgement is in this regards self-contradictory, as the court did not find a violation of Art. 3 ECHR even though there was no individual assessment, for this critique see also: *Lehnert*, Die Herrschaft des Rechts an der EU Außengrenze?, Verfassungsblog 4//3.2020, https://verfassungsblog.de/die-herrschaft-des-rechts-an-der-eu-aussengrenze/ (26/7/2021).

73 *Guggisberg*, in: Papastravidis/Trapp (eds.) p. 251 f.

74 In Art. 33 Geneva Convention, Art. 3 UN Convention against torture, Art. 7 ICCPR, Art. 3 ECHR, and is embedded in the EU primary law: Art. 78 (1) TFEU, as well as Art. 19 (2) CFR.

75 See e.g. in this regard: *UNHCR*, Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response, available at: https://www.refworld.org/docid/5e7132834.html (26/7/2021); *UNHCR*, Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic, available at: https://www.unhcr.org/cy/wp-content/uploads/sites/41/2020/04/Practical- Recommendations- and- Good- Practice- to- Address- Protection- Concerns- in- the-COVID-19-Context-April-2020.pdf (26/7/2021); *OHCHR*, COVID-19 and the Human Rights of Migrants: Guidance, available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf (26/7/2021).

76 *Chetail*, fn. 60.

77 *Nicolisi,* Non-Refoulement During a Health Emergency, EJIL:Talk! 14 May 2020, https://www.ejiltalk.org/non-refoulement-during-a-health-emergency/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2 (26/7/2021).

Refoulement.[78] The principle consequently applies also during pandemics and cannot generally be suspended.[79]

Whether the refusal of entry into a harbour amounts to Refoulement or not will be analysed in the next section that deals with the existence of a right to enter a harbour.

2. Is there a right to enter a harbour as ground for justification?

A justification for the assistance with the illegal entry might be the right to be brought to a safe place. Besides the duty to rescue under UNCLOS, SAR defines the details for the performance of such rescue missions. It *inter alia* defines the end of a rescue as that moment when the rescued person is brought to a safe place.[80] A right to enter a certain harbour, in order to bring the rescued persons to a safe place, is nonetheless not established in international maritime law. There is the possibility to agree on such a right in a bilateral or multilateral treaty, as for example provided in Article 2 of the 1923 Convention and Statute on the International Regime of Maritime Ports.[81] However, there is currently no such treaty in force that would entail the right to enter a specific harbour. Another starting point for the deduction of the right to enter a certain harbour could be the so called right to a "harbour of refuge". This right is accepted as customary law and allows the entrance into a harbour if the ship concerned finds itself in a situation of distress.[82] The possibility to restrict the sovereignty of the coastal state is vested in Art. 18 (2) UNCLOS, where the admissibility of the passage is made dependent on the circumstances of the case at hand and thus might be extended under certain conditions. The right to enter a harbour of refuge only covers those cases where the rescuing ship itself is in distress and not where the vessel is carrying persons on board that were in distress before their rescue.[83] Distress thereby means

> A situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance[.][84]

78 Ibid.; see also: *Chetail*, fn. 60.

79 As *Chetail*, fn. 60 also correctly points out: "Returning someone to his or her own country, where the health care system is broken or not available, may in some exceptional circumstances amount to an inhuman or degrading treatment." He refers to the jurisprudence of the ECtHR and the Committee against Torture, what is important to bear in mind is, however, that the case law refers to the deportation of ill persons and not the deportation of a healthy person, to an underdeveloped or overburdened health system as an infringement of Art. 3 ECHR.

80 SAR Convention Section 1.3.2.

81 League of Nations, Treaty Series, vol. 58, p. 301, https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2058/v58.pdf (26/7/2021).

82 *De Zayas*, in: Bernhardt (ed.), p. 288.

83 *Wissenschaftliche Dienste des Bundestages*, Völkerrechtliche Schutzpflichten gegenüber Migranten in Seenot, WD 2 – 3000 – 078/13, p. 6.

84 SAR Convention Section 1.3.13.

The boats that are used by the migrants themselves are usually entitled to enter the harbour as they regularly easily qualify as "being in distress" and normally do not even reach the territorial waters because of their poor condition.[85] The mere fact that a rescuing boat has castaways on board does not suffice to characterise it as being in distress: it is additionally necessary that medical and sanitary emergencies occur on board.[86] As long as emergencies can be solved by a coastal state through the provision of medical assistance as well as food and water to persons on board, there is no duty of granting a rescue ship access to its harbour.[87] Only if the supply with the aforementioned goods is insufficient and the medical condition of a person or a group of persons requires care in a hospital on land, the respective persons have to be allowed to enter the harbour and disembark.[88] This exception does not apply for the rest of the rescued persons and therefore, does not constitute a general right to enter a specific harbour.

The right to enter a specific harbour could nevertheless result from the Rule 3.1.9 of the SAR Convention, added in 2004.[89] It requires the state responsible for the search and rescue region to ensure that rescued persons are disembarked and delivered to a place of safety "as soon as reasonably practicable".[90] The Convention itself does not provide a definition of a place of safety. This is instead defined in the *Guidelines on the Treatment of Persons Rescued at Sea* as:

> […] a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from

85 "[…] migrants and refugees are crammed into unseaworthy wooden boats or rubber dinghies without lifejackets, and at times without a compass, escorts or satellite communication." *UNSMIL/OHCHR*, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya, 18.12.2018, S. 34 available at: www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf (26/7/2021); *Blanke/Johr*, DÖV 2019, p. 931.

86 See e.g: *Lenk*, ZaöRV 2019, p. 720.

87 *ECtHR*, Press release 29/1/2019 – ECHR 043 (2019), http://hudoc.echr.coe.int/eng-press?i=003-6315038-8248463 (26/7/2021).

88 The ECtHR requires the responsible state to take special care for "vulnerable individuals", such as pregnant women, children and medical emergencies, *ECtHR*, Press release 29/1/2019 – ECHR 043 (2019), http://hudoc.echr.coe.int/eng-press?i=003-6315038-8248463 (26/7/2021); *Papastavridis*, The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?, Ejil Talk!, 27/6/2018, available at: https://www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/ (26/7/2021).

89 Resolution MSC.155(78) Adoption of amendments to the International Convention on Maritime Search and Rescue, 1979, as amended, MSC 78/26/Add.1, available at: www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20MSC.155-%2078.pdf (26/7/2021).

90 SAR Convention, Section 3.1.9; Art. 94 (4) lit.c) UNCLOS gives the state the obligation to oblige the captains of the rescue vessels to bring the rescued persons to a place of safety.

> which transportation arrangements can be made for the survivors' next or final destination.[91]

Albeit not legally binding, the guidelines are broadly accepted as interpretation standard and will therefore be referred to in the following analysis.[92] With regard to the place of safety it is furthermore important to bear in mind that it

> […]may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination.[93]

In other words, a rescue boat on its own may be considered sufficient to qualify as a place of safety.[94] According to Section 3.1.6.4 SAR Convention, it is generally enough if the responsible state for the respective search and rescue region attempts to find such a place and to coordinate with other states the disembarkment of rescued persons, meaning that it discharges its obligations by merely searching for a place of safety.[95] Even though a state responsible for a search and rescue region is normally the closest one (thus disembarkment in one of its harbours would be the "soonest"/nearest reasonably practicable solution), state practice in this regard shows that states do not interpret the provision that way.[96] A responsible state is consequently only obliged to engage in the search for a harbour and as there is no obligation to provide one of its own. [97]

However, a right to enter a specific harbour could be derived from the human rights of the rescued persons themselves. Whereas the human right to leave a coun-

91 *International Maritime Organization (IMO)*, Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea, 20 May 2004, Nr. 6.12, available at: www.refworld.org/docid/432acb464.html (6/1/2022).

92 *Barnes*, in: Ryan/ Mitsilegas (eds.), p. 142.

93 *IMO*, Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea, 20 May 2004, Nr. 6.14, available at: www.refworld.org/docid/432acb464.html (26/7/2021).

94 *Talmon*, 2019, p. 804.

95 SAR Convention, Section 3.1.9, however, this also only binds the state if it did not object the rule or has a certain reservation (Malta for example has such an objection), see also: *Fink/Gombeer*, In search of a safe harbour for the Aquarius: the troubled waters of International and EU law, EU Immigration and Asylum Law and Policy 9 July 2018, available at: https://eumigrationlawblog.eu/in-search-of-a-safe-harbour-for-the-aquarius-the-troubled-waters-of-International-and-eu-law/ (26/7/2021).

96 *Papastavridis*, The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?, EJIL Talk!, 27 June 2018, available at: https://www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/ (6/1/2022).

97 On the absence of a duty to open a harbour: *Natalie Klein*, in: Biran Opeskin, et al. (eds.) p. 331; a duty to allow disembarkment only exists for EU led rescue missions under Art. 10 para. 1 of the Council Regulation 656/2014. The ECtHR also affirmed that there was no duty to let rescued persons disembark as long as the respective state provided appropriate help on board, ECtHR, Press release 29/1/2019 – ECHR 043 (2019), http://hudoc.echr.coe.int/eng-press?i=003-6315038-8248463 (26/7/2021).

try of residence is generally accepted,[98] a right to enter another country without the possibility for the respective country to regulate and set up prerequisites for the entrance does not exist.[99] There is no duty for a state to let a person on its territory and no right "to be let in".[100] An exception to this is the principle of non-Refoulement. As already mentioned, this principle not only gained importance during the pandemic, it is also one of the most important principles in international (refugee) law. In order to be relied upon, the prohibition of Refoulement nonetheless has to apply to the concrete situation. It is questionable whether the "mere" hindrance of rescue ships from entering a harbour/territorial waters constitutes a Refoulement as well. The ECtHR and other courts have not yet decided on this issue.[101]

Even if the applicability of the prohibition is assumed, the mere prohibition against entering a harbour of a specific state is not equivalent to the acceptance of Libyan pull backs,[102] or sending those on board of the vessel back to their point of departure as in Hirsi Jamaa.[103] The concerned persons may apply for entry with any other state as denial by one state does not oblige the vessel to turn around and bring the migrants back to the point of departure.[104] However, the reality in Europe is that there are situations imaginable where either no state is willing to open its harbours or the state willing to is too far away for the vessel to reach, or the route would be too dangerous.[105] This argues in favour of qualifying the refusal of the nearest state to open its harbour and allow the disembarkment of the rescued migrants as Refoulement. To ensure effectiveness of the Refoulement prohibition, it must also be applied to indirect interferences by states. This is, however, neither mirrored by state practice nor by (International and European) jurisprudence, according to which the principle of Non-Refoulement prohibits the return of migrants to a place where they might be prosecuted, as well as the rejection at the border if this results in forcing a migrant to return to a state where he or she fears prosecution, torture or inhumane and degrading treatment.[106] Otherwise, the prohibition of Refoulement does not hinder the prohibition to enter a specific harbour.[107]

98 The right is for example set out in: Art. 13 Universal Declaration of Human Rights, Art. 12 para. 2 International Covenant on Civil and Political Rights, as well as Art. 2 of Protocol No. 4 to the ECHR, European Treaty Series No. 46, Art. 21 TFEU (referring only to EU citizens) and Art. 45 CFR.

99 *Grabenwarter, Pabel*, in : Grabenwarter/Pabel (eds.) § 21 Freiheit und Freizügigkeit, para. 58 ff.

100 As recently reassured by the ECtHR with regard to the Melilla enclave: App. No. 8675/15 and 8697/15, N.D. and N.T v Spain, Grand Chamber Decision of 13 February 2020, available at: https://hudoc.echr.coe.int/eng#_Toc31809955 (6/1/2022).

101 A pending case in this regard is e.g: ECtHR, App. No. 21660/18, *S.S. and others v Italy*.

102 See in this regard *Moreno-Lax*, German Law Journal 2020, p. 385–416; said functional approach had been introduced by the Human Rights Committee in its General Comment 36 on Article 6: right to life, CCPR/C/GC/36, paras. 22, 63.

103 ECtHR, App.Nr. 27762/09, *Hirsi Jamaa and others v Italy*.

104 *Blanke, Johr*, DÖV 2019, p. 937.

105 *Cusumano, Gombeer*, Mediterranean Politics 2018, p. 6.

106 *Moreno-Lax*, p. 251.

107 The obstruction for the entrance can however constitute a violation of Art. 5 ECHR, see: *Blanke/Johr*, fn. 106, p. 938; also if the situation on the boat amounts to a inhumane

As the law currently stands, the duty to rescue at sea does not exclude the criminal liability of aiding and abetting illegal entry, stay or transit. Also, there are currently no other rights that would justify aiding and abetting the illegal entry, stay or transit on a state's territory that could be used to oppose the above described criminalisation.[108] This legal gap, sometimes called the "Maritime Legal Black Hole" needs to be closed,[109] which leads to the question whether the Right to International Solidarity could be of help. The following section therefore looks at the origins of a possible Right to International Solidarity (D. I), its justiciability (D. II.) and possible legal nature (D. III, IV).

D. The Right to International Solidarity

I. The Draft Declaration

Up to this day, the Right to International Solidarity is set forth solely in the Draft Declaration adopted by the Human Rights Council but no other UN organ, which makes its actual legal effects subject to the future adoption through e.g. the General Assembly.[110] The Right to International Solidarity in the draft declaration is derived from a conglomerate of International treaties, declarations and resolutions, as well as regional human rights instruments and plans of action.[111] Noteworthy for the purpose of this article are in particular the Preamble to the Convention relating to the Status of Refugees, as well as the Universal Declaration of Human Rights, the fifth preambular paragraph of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as the founding treaties of the European Union.[112] In these treaties, Solidarity is a principle or legal concept that applies between states and urges them to cooperation.[113]

treatment because of the medical and sanitary conditions, Art. 3 ECHR can be violated, see: *Blanke/Johr*, fn. 106.

108 Even the Non-Refoulement principle can only be used to a limited extent.

109 This term stems from: *Mann*, German Law Journal 2020, p. 598–619, with further references.

110 The extent to which the Right to International Solidarity, once adopted, can and will have consequences for the so called "Crimes of Solidarity" will be examined based on the assumption that the text of the Draft Declaration will be adopted unchanged.

111 For the various legal grounds of the declaration see: Preamble of the Draft Declaration, fn. 1.

112 *UNGA*, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137; *UNGA*, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); *UNGA*, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; *UNGA*, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; Consolidated version of the Treaty on European Union, OJ C 326, 26/10/2012, p. 13–390 (TEU); Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390 (TFEU).

113 See eg. Art. 80 TFEU.

However, the Draft Declaration goes one step further and for the first time in international law it explicitly incorporates solidarity between individuals into the definition of the term, reiterating the importance of individual persons for International Solidarity and the realisation of human rights. This is further highlighted by the Right to Solidarity in Art. 5 of the Draft, which is declared as a

> human right by which individuals and peoples are entitled, on the basis of equality and non-discrimination, to participate meaningfully in, contribute to and enjoy a social and international order in which all human rights and fundamental freedoms can be fully realized.[114]

The Draft places a special emphasis on the Right to International Solidarity as a right that can be claimed by individuals and private organisations, with a "particular reference to […] migrants [and] refugees […]".[115] Consequently, refugees and migrants constitute a special target group of the Draft Declaration. Moreover, the important role of private actors and their relationship with states is the subject of the objectives of the Draft and the chapter on its implementation. The Draft explicitly states that trust and mutual respect between states and non-state actors are part of its general objectives.[116] These objectives are reiterated in the implementation part of the Draft, where Art. 7 *inter alia* obliges the states to "cooperate with each other and with non-State actors to promote collective action to address […]preventable deaths […]",[117] and imposes on states and non-state actors the duty "to ensure that actions and omissions by States and non-State actors do not adversely affect the exercise and full enjoyment of human rights."[118] The Draft Declaration was drafted with NGOs and private actors in mind, which are acting in solidarity with the special target group "refugees and migrants". The abstract importance of the Draft's Right to International Solidarity thus becomes apparent, which makes it necessary to analyse its concrete legal nature and effects.

II. Justiciability of the Right to International Solidarity?

Prerequisite for any legal effects of the Right to International Solidarity is the possibility to actually invoke it before a court. Despite being a matter of contention, the justiciability of the right was explicitly supported by one member of the working group.[119] The expert proposed the introduction of a cause of action that can be invoked by civil organisations and private individuals aiding migrants.[120] In order to be justiciable, provisions of international law need to have a sufficient degree of cer-

114 Art. 4 (1) Draft Declaration.
115 Art. 5 Draft Declaration.
116 Art. 3 (1) Draft Declaration.
117 Art. 7 (1) Draft Declaration.
118 Art. 8 (1) Draft Declaration.
119 *Human Rights Council*, Report of the Independent Expert on human rights and International Solidarity A/HRC/35/35, para. 61.
120 Para. 61.

tainty and need to be concrete enough to enable a court to base a decision in an individual case on it, meaning that a state obligation or rather an individual right must be identifiable from the wording.[121] The wording of the Draft Declaration argues for the justiciability of the entailed rights as it clearly sets out rights for individuals. What is nonetheless important to bear in mind is that even if adopted, declarations of the UN General Assembly are not legally binding.[122] This limits their legal effects to that of a standard of interpretation of existing international law or a starting point (*opinio juris*) for the development of a rule of customary international law.[123] Justiciability should therefore be denied as long as there is no state practice with regard to the Right to International Solidarity, which would turn the Draft Declaration into binding customary law. This leaves the only assessable impact of the Declaration comparable to those effects that are regularly connected with soft law, for instance as a standard of interpretation.[124] Questionable is then, whether the draft can actually be qualified as soft law.

III. The Draft Declaration as soft law?

In order to qualify as soft law, the Draft Declaration needs to meet the following prerequisites: It must "express[…] common expectations concerning the conduct of international relations,[…]" be "[…]created by subjects of international law[…];" must "[…]not – or not entirely – [have] passed through all stages of the procedures prescribed for international law-making […]"; and it should show"[…]a certain proximity to the law, and [a] capacity to produce certain legal effects."[125] In other words, "[…] things that fall short of international law are called soft law."[126] The Draft Declaration did not go through any procedure for international law making (e.g. treaty negotiations or otherwise) and lacks legally binding force, therefore it falls short of international law. However, whether the other prerequisites are fulfilled needs a more thorough analysis.

1. Created by subjects of international law

Subjects of international law are especially states, but also certain International Organisations (IO) such as the UN.[127] The adoption of the Draft Declaration through

121 *Kunig* in: Graf Vitzhum/Proelß (eds.), para. 41.
122 See Art. 13 (1) of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
123 For the possibilities see generally: *Epping*, in: Ipsen (ed.), p. 290, para. 138 ff.
124 For an argument that the principle will develop into an actionable right, see *Dandan*, Foreign Voices 2016, p. 4; more generally on soft law: *Thürer*, Soft law in: Max Planck Encyclopedia of Public International law, available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469?rskey=qxRjpA&result=1&prd=MPIL (26/7/2021).
125 *Thürer*, fn. 128.
126 *Guzman/Meyer*, p. 172.
127 *Herdegen*, § 7 Rn. 3 f.

the Human Rights Council in order to refer it to the UN General Assembly cannot be considered sufficient to qualify it as being "created by subjects of International law". UN General Assembly Resolutions are considered to be able to produce soft law.[128] Once the Draft Declaration is adopted as a Resolution of the UN General Assembly, it can then fulfil the prerequisite of being created by subjects of international law.[129]

2. Common expectations concerning the conduct of international relations

To meet the requirement of common expectations, the Right to International Solidarity, including solidarity in the sense of the Draft Declaration,[130] has to be a common expectation of the UN MS as the soft law will be created by the General Assembly.

A reference to fundamental rights as "Solidarity Rights" can for example be found in the Charter of fundamental rights of the European Union (CFR),[131] namely in its Chapter IV. There is a form of solidarity between MS and EU citizens and it does, at least to a certain extent, also apply directly between individuals according to the latest jurisprudence of the ECJ on Art. 31 (2) CFR.[132] The ECJ's case law can furthermore be used to deduce common expectations of the European MS with regard to *"a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, […]"*.[133] This refers to the necessity of a certain financial solidarity between (European) individuals. This already shows the limits of these "common expectations"; they are regional common expectations, referring to union citizens and financial solidarity, whereas the Draft Declaration would need to mirror a global common expectation referring to all human beings regardless of their nationality and the nature of the concrete action of solidarity.

In order to qualify as common expectation, the Draft Declaration´s content would have to be mirrored in international law. On the international level, Solidarity Rights as fundamental rights are discussed and to a certain extent acknowledged, which might allow for the deduction of the aforementioned common expectation. These Solidarity Rights as collective rights are part of the so called third generation human rights, meaning that they do not represent first generation civil and political

128 With a list of examples: *Focarelli*, Rn. 84.1 ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/sulb/detail.action?docID=5790830 (6/1/2022).
129 *Thürer*, fn. 128, para. 11.
130 This means solidarity not only between states but also between states and individuals, as well as between individuals.
131 Charter of Fundamental Rights of the European Union, OJ C 326 of 26/10/2012, p. 391–407.
132 ECJ, Case 569/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para. 92.
133 ECJ, Case 184/99 *Grzelczyk,* ECLI:EU:C:2001:458, para. 44.

rights or second generation social and economic rights, but rights that "*embody the solidarity of the international community*".[134]

The problem with these rights is that they are, except for the Right to Self Determination provided in Art. 1 of the two Covenants,[135] not part of treaty law, but mostly derived from human rights that are explicitly guaranteed by human rights treaties.[136] This dependence of Solidarity Rights on already existing rights and the lack of a separate enshrinement in human rights treaties makes the legal nature of these solidarity rights nebulous and causes their existence to be disputed. However, in order to be a common expectation, as opposed to binding law, it suffices for those rights to be, for example, enshrined in General Assembly Resolutions.[137] Once adopted as a Resolution they mirror a conviction of the states that to a certain extent such rights apply to a certain situation and therefore show a common expectation concerning the conduct of international relations.

Although the Solidarity Rights (provided that and to the extent to which they are acknowledged) refer only to the relationship between states and (foreign) individuals and do not extend to relationships between private individuals, the former is nonetheless sufficient for the derivation of a common expectation. Since at least in this respect it can be assumed that as a matter of soft law, states must show solidarity with (foreign) individuals.

3. Certain proximity to the law

The draft needs to show a certain proximity to the law and have a certain capacity to produce legal effects.[138] This is the case for *„non- binding rules that have legal consequences because they shape states' expectations as to what constitutes compliant behavior."*[139] As stated above, the Draft has a clear wording enshrining explicit human rights as well as state duties to ensure the enjoyment of all human rights and to cooperate with actors that help therewith. Arguably, this certainty of the Draft's content is sufficient for it to be capable of producing said legal effects as it could, for example, be used as a standard of interpretation and guidance for the legislators.

134 *Minnerop, Roht-Arriaza, Aminzadeh*, Solidarity Rights (Development, Peace, Environment, Humanitarian Assistance) in: Max Planck Encyclopedia of Public International law, para.1, available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1470?rskey=aUYLIh&result=2&prd=MPIL (26/7/2021).

135 "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Art. 1 (1) ICCPR and ICESCR.

136 Minnerop, Roht-Arriaza, Aminzadeh, fn. 3 paras. 3, 25.

137 As it is the case for the Right to Development which was first mentioned in *UNGA*, Resolution 24/2542 of 11 December 1969, available at: https://undocs.org/en/A/RES/2542(XXIV) (26/7/2021) or the Right to Humanitarian Assistance see: UNGA Resolution 43/131 of 8 December 1988, available at: https://undocs.org/en/A/RES/43/131 (26/7/2021).

138 *Thürer*, fn. 128, para. 9.

139 Guzman/Meyer, p. 175.

However, without an adoption trough the UN's General Assembly, the Draft Declaration lacks the capacity of becoming soft law. This leads to the question of whether the Draft Declaration mirrors an already existing Right to International Solidarity that stems from customary international law.

IV. The Draft Declaration as customary international law – The Herrou Case as an example of state practice?

Once located on one of the Member State's territory some migrants try to (illegally) enter other MS, or they face hardship after entry to the relevant MS due to the illegal nature of their entrance in the first place. Persons providing migrants with a lift over intra EU-borders or giving them shelter and food may fall under the prohibition against facilitating in any way the illegal stay of persons that entered the territory illegally in the respective national laws.[140] The helpers consequently are prosecuted for their crimes of solidarity.

A famous example is the case of *Cédric Herrou*, who was accused several times and acquitted for facilitating the illegal entrance and stay of migrants and caused the (at least partial) withdrawal of the French "Crimes of Solidarity"-Provision Art. L622-4 *Code de l´entrée et du séjour des étrangers et du droit d´asile* (CESEDA). The provision proved to be incompliant with the French constitutional principle of *Fraternité,* a principle that is often considered as the root of solidarity.[141] The *Herrou* case is the first case in the context of assisting irregular migrants where the court refers to a certain right to help others in need, as an expression of solidarity and an underlying value of the French constitution. As "constitutional traditions, common to the Member States (can) constitute general principles of the Union's law", judgments of national constitutional courts can have a certain importance also for the interpretation and application of EU law. This is especially so since the Facilitation Directive also provides for the possibility of creating an exception for humanitarian aid: the *Herrou* case might prove a corresponding general principle in national constitutions. However, general principles of EU law need to be mirrored by the majority of the Member States' constitutions, which is currently not the case with regard to solidarity. The judgment may nonetheless, be considered as constituting state practice with regard to a right to International Solidarity and might thus signify the starting point of customary law which is why it is worthwhile to take a closer look at it.

140 For an overview of such cases see: *Webber* in: Fekete/Webber/Edmond-Pettitt (eds.) p. 12 ff., available at: <www.irr.org.uk/publications/issues/humanitarianism-the-unacceptable-face-of-solidarity/> (27/6/2021).

141 *Campanelli*, Solidarity, Principle of in: Max Planck Encyclopedia of Public International law (2011), available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2072 (26/7/2021).

1. The facts of the case

Cédric Herrou is a French farmer who helped migrants to cross the border between Italy and France by guiding them through the mountains, giving them a lift with his car, as well as providing them with food and shelter.[142] He was convicted for assisting the illegal entry and stay of irregular migrants in France and was fined with 3,000€ by the second instance court after being acquitted by the first.[143] The judge interpreted *Herrou*'s statement that he would continue to violate the existing law, as it would be inhumane to adhere to it, as a political statement. Therefore, the judge held that *Herrou* acted not out of a humanitarian drive, but for "the global contestation of the law".[144] This could, according to the judge and attorney general, be considered as some sort of "contrepartie" (reward) for the assistance, which disabled *Herrou* from invoking Art. L622-4 (3) CESEDA.[145] *Herrou* appealed against this judgement and the court of appeal made a preliminary reference to the *Conseil constitutionelle* (French constitutional court),[146] asking whether Art. L622-1 and L622-4 CESEDA were in line with the French constitution.[147]

The *Conseil constitutionelle* held that Art. L622 was partially unconstitutional, as the French constitution entails a so-called *Principe de Fraternité* that allows individuals

> […] to help one another, for humanitarian reasons, without consideration as to whether the assisted person is legally residing or not within the French territory.[148]

It held that by criminalising the facilitation of illegal stay, the legislator exceeded what was necessary to ensure that the illegal entry into France was punished. Furthermore, the court decided that by helping migrants who are already on French soil, the "facilitator" does not necessarily create a situation of illegality that needed to be punished.[149] The principle of *Fraternité* which had to be considered by the French legislator was not correctly balanced with the objective of protecting the

142 He also helped a group of migrants to occupy an empty SNCF holiday building, N.N., French farmer on trial for helping migrants across Italian border, The Guardian, 4 January 2017, available at: www.theguardian.com/world/2017/jan/04/french-farmer-cedric-herrou-trial-helping-migrants-italian-border (26/7/2021).

143 *Boudou*, The Solidarity Offense in France: Egalité, Fraternité, Solidarité!, Verfassungsblog, 6 July 2018, available at: https://verfassungsblog.de/the-solidarity-offense-in-france-egalite-fraternite-solidarite/ (26/7/2021).

144 As cited by *Boudou*, fn. 146.

145 The judgement of the Cour d'Appel d'Aix en Provence is available at: www.gisti.org/IMG/pdf/jur_tgi-nice_2017-02-10_16298000008.pdf (26/7/2021).

146 A so called Question prioritaire de constitutionalité, QPC.

147 *Cour de Cassation*, Chambre Criminelle, N° T 17-85.736 F-D, N° 1163, 9 May 2018, available at: www.conseil-constitutionnel.fr/les-decisions/decision-n-2018-717718-qpc-du-6-juillet-2018-decision-de-renvoi-cass (26/7/2021).

148 *Conseil Constitutionnel*, Decision Nr. 2018-717/718 QPC of 6 July 2018, Mr. Cédric H. et al., para. 8, english translation available at: www.conseil-constitutionnel.fr/en/decision/2018/2018717_718QPC.htm (26/7/2021).

149 Ibid., para. 12.

public order in the context of Art. L622-4 CESEDA.[150] The *Conseil constitutionnelle* further held that Art. L622-4 (3) applies to all acts that help migrants out of humanitarian reasons and not only those explicitly listed in the provision.[151] Art. L622-4 CESEDA was consequently changed and now entails a humanitarian clause.[152]

2. The case of Herrou and the principle of Fraternité – already reflecting a customary Right to Solidarity?

On the first look, the decision seems to support the idea of the existence of a right to solidarity. While the judgement makes it clear that solidarity can have constitutional status, which then leads to the criminalisation of supporters being unconstitutional, it becomes clear upon closer inspection that the judgement does not allow the deduction of a right to international solidarity as provided in the draft declaration for several reasons: First, *Fraternité* finds its limits at the borders of France, as the assistance with illegal entry into the country is still considered as a crime. In these cases, according to the *Conseil*, the objective of protecting the public order outweighs *Fraternité*.[153] Second, the judgement in no way mentions the Right to International Solidarity but only refers to a principle of the French constitution.[154] Third, the right to solidarity (*Fraternité*) is applied in a very restricted way, only concerning the facilitation of stay, not to the assistance with entry to the territory of the state.

Any impact of the ruling on other European legislatures is not to be expected for the aforementioned reasons. The Right to International Solidarity as it is included in the Draft Declaration therefore does not mirror a respective customary right. If the Right to International Solidarity were to be part of international customary law, states would be obliged to introduce a humanitarian clause into their (immigration) laws, as "[…] individuals and peoples are entitled, […] to […] contribute to and enjoy a social and International order in which all human rights and fundamental free-

150 Ibid., para. 13.
151 Ibid., para. 14.
152 Art. L622-4 (3) in its current version reads: "De toute personne physique ou morale lorsque l'acte reproché n'a donné lieu à aucune contrepartie directe ou indirecte et a consisté à fournir des conseils ou accompagnements juridiques, linguistiques ou sociaux, *ou toute autre aide apportée dans un but exclusivement humanitaire."* www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=406D16B512F56821BE4A45F1F8DD4B82.tplgfr26s_3?idArticle=LEGIARTI000037398912&cidTexte=LEGITEXT000006070158&categorieLien=id&dateTexte= (26/7/2021).
153 See also the decision in the so called "Briançon Seven" case, where the accused helped the migrants to cross the boarder and were therefore convicted for a violation of Art. L622-1 CESEDA, *Fekete/Webber/Edmond-Pettitt*, When witnesses won't be silenced: citizens' solidarity and criminalisation, Institute of Race Relations Briefing Paper Nr. 13, 2019, p. 15, available at: www.irr.org.uk/publications/issues/when-witnesses-wont-be-silenced-citizens-solidarity-and-criminalisation/ (26/7/2021).
154 Ibid.

doms can be fully realized."[155] The Right to International Solidarity makes it necessary to allow or at least exempt individuals from punishment if they help others that are in distress at sea or face hardship on land (e.g. lack of food, medicine or shelter) and therefore cannot (fully) enjoy their human rights. The adoption of a Right to International Solidarity by the UN General Assembly as a Resolution could be an expression of an *opinio juris* of the states that such a right exists and therefore serves as a starting point for such a customary right.[156] Besides *opinio juris*, the Right to International Solidarity would need to represent state practice for a certain duration.[157] This requirement is not needed in the case of so called "instant" customary law that comes into existence when there is the "urgency of coping with widespread sentiments of moral outrage", as was the case with the atrocities committed in Rwanda and Former Yugoslavia, for example.[158] Although human rights lawyers have filed a complaint against the EU before the ICC for crimes against humanity,[159] assuming the complaint were to be successful,[160] it would be conceivable that no certain duration was necessary in order to create customary law.

However, the creation of customary law is already hindered by a lack of state practice. As it could be seen in the *Herrou* case, states are reluctant to acknowledge a Right to Solidarity and respectively a duty to solidarity and only apply it in a restrictive way. This is contrasted by the Draft Declaration that explicitly includes the applicability of the right "[…] beyond their territories and national borders […]."[161]

The Right to International Solidarity is therefore neither mirrored in state practice,[162] nor does an expression of *opinio juris* for it to exist.[163] Hence, the Right to International Solidarity is neither reflected in customary law nor can a direct legal effect of the Right to International Solidarity be deduced.

155 Art. 4 (1) Draft Declaration.

156 *ICJ*, Military and Paramilitary Activities (Nicaragua/United States of America), Merits. J. 27.6.1986, I.C.J. Reports 1986, p. 99: "opinion juris may, though with all due caution, be deduced from, inter alia the attitudes of the Parties and the attitudes of States towards certain UNGA resolutions".

157 *Tullio Treves*, Customary International law in: Max Planck Encyclopedia of Public International law, para. 24.

158 Ibid.

159 See e.g. https://www.dw.com/de/menschenrechtler-verklagen-eu-wegen-fl%C3%BCchtlingspolitik/a-49035094 (6/1/2022).

160 *Stine von Förster*, p. 327, qualifies at least certain acts of the EU and ist Member States in this context as crime against humanity.

161 Art. 5 Draft Declaration.

162 The Canadian Supreme Court held that the provision in the Immigration and Refugee Protection Act that prohibited "organizing, inducing, aiding or abetting people to come to Canada" was unconstitutional due to its vagueness, see: *David Matyas*, The Nationality and Borders Bill: Closing Space for Humanitarian Assistance at Sea, EJIL:Talk, 26 August 2021, https://www.ejiltalk.org/the-nationality-and-borders-bill-closing-space-for-humanitarian-assistance-at-sea/ (6/1/2022).

163 The German Constitution for example does not entail a comparable principle of solidarity, see: *Funke/Zölls*, Wachgeküsst: Der französische Verfassungsrat aktiviert erstmals die Fraternité – im Ausländerrecht, VerfBlog, 2018/8/1, https://verfassungsblog.de/wachgekuesst-der-franzoesische-verfassungsrat-aktiviert-erstmals-die-fraternite-im-auslaenderrecht/ (26/7/2021).

E. The Right to International Solidarity as a game changer?

With the prospect of Afghan refugees fleeing to Europe in the coming months, the continuing Greek and Maltese refusal to let migrants enter their territory (and thus European soil)[164] and the migrants stranded between Belarus and its neighbouring EU Member States lends the discussion about a Right to International Solidarity a new impetus. Furthermore, in a recent decision on the Hungarian laws on immigration, the ECJ held that EU law prohibits the criminalisation of persons "who, in connection with an organising activity, provide assistance in respect of the making or lodging of an application for asylum in its territory, where it can be proved beyond all reasonable doubt that that person was aware that that application could not be accepted under the law".[165] This shows that EU law opposes at least certain (extreme) forms of criminalisation.

The examples and cases presented in this article have nonetheless shown the need to find a solution for people fleeing to Europe and those who help them on their way. There are various conceivable ways of achieving this, be it a state-organised sea rescue or the reform of the Common European Asylum System and thus an actual solidarity between the member states, or the creation of legal means and methods of escape that make crimes of solidarity superfluous. However, the existing European legal framework enables the states to punish private actors for "doing good", causing a lack of understanding by the public and waves of expressions of support for the respective private actors. The possibility of introducing a humanitarian clause to the provisions of the national immigration laws, as was proposed by the Facilitation Directive, lacks enforceability as it is part of the discretion that was granted to the MS with regard to the implementation of the Directive. The Draft Declaration's potential as a game changer might nevertheless lie in its effect on the interpretation of other (human) rights and international standards, bearing in mind that until now the Draft is neither soft nor customary law. Even if the Draft Declaration is adopted by the UN General Assembly, the Right to International Solidarity will not become legally binding and therefore not *per se* oblige states to introduce humanitarian clauses in their (immigration) laws. Consequently, it is not (yet) a game changer in law, but it is definitely a moral standard that should be taken into consideration for further action.

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