

## ZEE-MIGRATIE

## MIGRATION MARITIME

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Both in treaty law and in customary international law, it is an international legal obligation for States to render assistance to persons in distress at sea. Unless there is a serious danger to the ship or its crew, every flag State must require the master of a ship flying its flag to proceed with all possible speed to the rescue of persons in distress when informed of their need of assistance.

On the other hand, coastal States shall promote the establishment, operation and maintenance of an adequate and effective search-and-rescue service, for example, through the creation of a Rescue Co-ordination Centre. For this purpose they will cooperate with neighbouring States, when appropriate.

Both the International Convention on Safety of Life at Sea (SOLAS Convention) and the International Convention on Maritime Search and Rescue (SAR Convention) stipulate that States must arrange for the disembarkation of persons rescued at sea as soon as reasonably practicable.

The government in charge of the search-and-rescue region in which the survivors were recovered is held responsible for providing a "place of safety" on its own territory or ensuring that such a place of safety is granted in another country.

A place of safety can be defined as a location where rescue operations are considered to terminate, where the survivors' safety or life is no longer threatened, basic human needs (such as food, shelter and medical needs) can be met and transportation arrangements can be made for the survivors' next or final destination.

Although an assisting ship may only serve as a temporary place of safety, there is no actual duty for States to disembark the persons rescued. In other words, a State can refuse disembarkation onto its own territory or make this dependent on certain conditions.

### The case of the "*Marine I*"

As a result, persons rescued at sea can spend weeks on a ship at sea before a State allows them to go ashore. The case of the "*Marine I*" provides an example. On 30 January 2007, the Spanish Coast Guard received a distress call from the vessel "*Marine I*". It was alleged that over 300 migrants from Guinea were on board.

Although the "*Marine I*" was within the Senegalese SRR, Senegal requested Spain to proceed with a rescue operation, claiming that Senegal did not have the proper means to assist. Because the Mauritanian port of Nouadhibou was closest to the emergency, Senegal also informed Mauritania of the situation.

On 4 February, a Spanish maritime rescue tug reached the "*Marine I*" and provided immediate relief by handing out supplies of water and food.



The Spanish government also commenced negotiations with Senegal and Mauritania on the fate of the migrants. On 12 February (two weeks after the distress call), Spain, Senegal and Mauritania finally reached an agreement regarding the passengers. It was reportedly agreed that Spain would pay EUR 650,000, in return for Mauritania allowing the passengers to disembark. Repatriation commenced the day after the migrants had disembarked. Guinea agreed to readmit thirty-five passengers, all of African origin.

### Reluctant States

In total, Spain reported 18,000 irregular arrivals by sea from West Africa that year. The fact that Spain was prepared to pay as much as EUR 650,000 to prevent the disembarkation of 300 migrants shows that some States are very reluctant to allow disembarkation of rescued persons onto their territory.

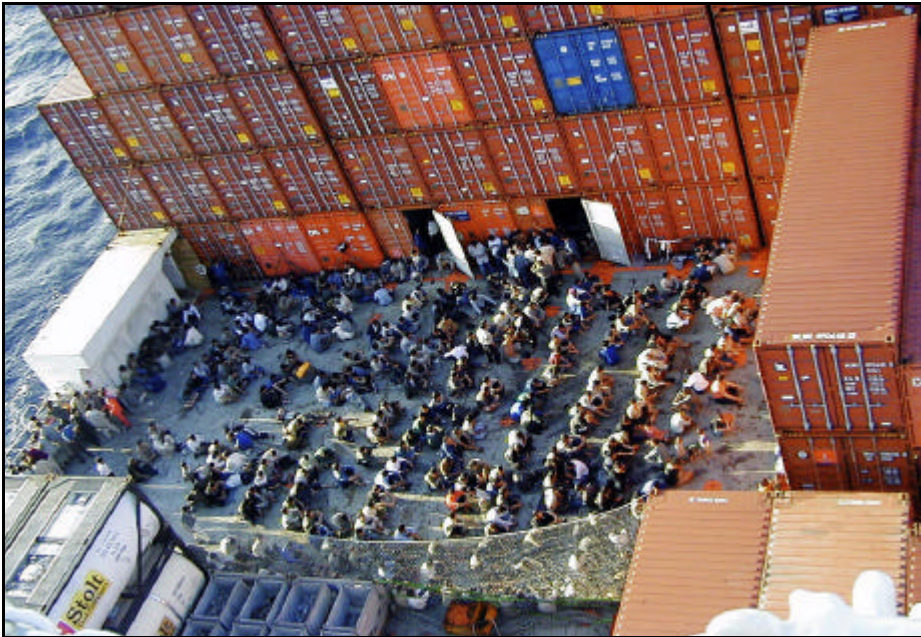
The main reason for this reluctance is that almost all of these persons are migrants requesting asylum. According to the UN High Commission for Refugees (UNHCR), it is very difficult to know the exact percentage of asylum-seekers that arrive by sea, because official statistics in most countries do not state how an asylum-seeker arrived, i.e., by sea, land or air. On average, roughly 70% of those arriving by sea in Malta are asylum-seekers.

In the case of Italy, one-third of those arriving on Lampedusa Island apply for asylum. This amounts to roughly 60% of all applications for asylum in Italy.

Moreover, this migration is often mixed. Not only political migrants or refugees try to reach a safe shore: Most of these people are economic migrants looking for a better life in a developed country. States are therefore reluctant to permit disembarkation unless they receive financial or readmission guarantees.

Negotiations on these conditions can last for days or even weeks. Unfortunately this means that the migrants - often requiring medical care - do not receive this aid immediately.

The shipmaster and his crew are not trained to assist migrants rescued at sea in their special needs. Furthermore, the financial pressure on the master and owner of the ship, due to the delay of the ship, can be enormous. In some cases, compensation for expenses, delay, and diversion - together with consequential losses - can be provided through P&I Clubs. However, with today's ever-increasing emphasis on swift deliveries and fast turn-arounds, the economic pressures on seafarers sometimes override humanitarian principles.



Rescued boat people on board m/v 'Tampa'

In May 2007, a group of 27 boat people were rescued by the Italian Navy after they had spent three days and nights clinging to tuna pens being towed by a Maltese fishing vessel, the "Budafel".

The captain of this vessel told the media that he refused to divert his ship to disembark the men because he was afraid of losing his valuable catch of tuna.

By failing to institute co-ordinated, well-organized systems for receiving and processing asylumseekers and migrants, States are putting seafarers in an intolerable position: damned if they do, and damned if they don't.

Consequently, in practice some shipmasters will ignore migrants at sea - thus violating international

law - because they know that their entrance into ports will be refused. Human Rights Watch, one of the world's leading independent organizations dedicated to defending and protecting human rights, recorded several testimonies of migrants at sea.

In August 2008, Abassi - a 21-year-old Nigerian - drifted on an inflatable boat in international waters for five days: "One side of the boat had sunk and the other was still floating. There were 85 of us clinging to it. There was nothing to eat and by the second day we had no water. People were drinking sea water and got sick. Three people died.

On the fourth day we saw a helicopter. The helicopter saw us and waved. The helicopter did not drop food or water, and no boat came to rescue us. Five hours later we saw a ship. It did not come to help. It stopped and spent a few hours standing there. The boat just watched."

### **New IMO Circular**

In the beginning of 2009 the Facilitation Committee of the International Maritime Organization (IMO) approved a non-binding circular on "Principles relating to administrative procedures for disembarking persons rescued at sea". This circular could lead to more harmonised, efficient and predictable procedures.

However, one of the principles is quite far-reaching. When disembarkation cannot be arranged swiftly elsewhere, the government of the search-and-rescue region where the persons were found should accept to disembark the persons rescued. This means that coastal States have the ultimate responsibility. The biggest advantage is the legal certainty for the ship and the rescued people.

Initially, the ultimate objective was to amend the SOLAS and SAR Conventions, taking into account these principles, as appropriate. However, States indicated that they would not agree with such an obligation. As a matter of fact, this is also the reason why the International Convention relating to Stowaways of 1957 remains unable to obtain the required number of ratifications.

Its Article 2(1) stipulates: "If on any voyage of a ship registered in or bearing the flag of a Contracting State a stowaway is found in a port or at sea, the Master of the ship may, subject to the provisions of paragraph (3), deliver the stowaway to the appropriate authority at the first port in a Contracting State at which the ship calls after the stowaway is found, and at which he considers that the stowaway will be dealt with in accordance with the provisions of this Convention.

### **Places of Refuge**

Maybe the concept of places of refuge for ships in distress could provide a solution to the disembarkation problem. But can a ship that carries persons rescued at sea be seen as a ship in distress? According to the United Nations International Law

Commission, when human life is at stake or when the physical integrity of a person is being threatened, the ship is in distress.

This is not the case when only a few persons are ill, but when an epidemic disease spreads among the persons rescued and the crew, the ship itself can be regarded as being in distress.

Another example is when the shipmaster is being overpowered by the persons rescued, as was the case with the MV "Tampa" in August 2001. The captain of this Norwegian container ship rescued some 438 asylum seekers from drowning in international waters between Australia and Indonesia. The captain first headed towards Indonesia. This reportedly elicited threats from some of the migrants, who insisted on being taken to Australia.

Finally, we must not forget that - according to international law - the shipmaster can decide NOT to provide assistance when there is a serious danger to the ship or its crew. Therefore, only in a few cases the ship will actually be regarded as a ship in distress. If this is indeed the case, the place of refuge should meet the requirements of the "place of safety" as mentioned in the second paragraph.

### **Conclusion**

The disembarkation of persons - and especially migrants - rescued at sea remains a very sensitive issue, because States simply do not have a legally binding duty to grant these people access to their territory. Thus States would have to surrender part of their sovereignty to change the current situation.

The discussions within the IMO show us that this is not likely to happen in the next couple of years. However, States should take steps to improve and amend the legal framework. If States would accept a responsibility to disembark persons in the long term, this responsibility would not only be beneficial to the migrants themselves, but certainly also for the shipmasters and their crew.

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