# Between Life, Security and Rights:

# Framing the Interdiction of 'Boat Migrants' in the Central Mediterranean and Australia

by Violeta Moreno-Lax, Daniel Ghezelbash, and Natalie Klein*

ABSTRACT: This article sets out two case studies to examine the evolving reality of 'boat migration' and the intersecting legal frameworks at play. Our analysis takes a systemic integration approach to reflect on the complex dynamics underpinning responses to the phenomenon in Australia and the Central Mediterranean. The regime that governments purport to act under in any given instance reflects the way they choose to frame incidents and possibly exploit legal gaps in, or contested interpretations of, the relevant rules. The 'closed ports' strategy adopted by Italy and Malta against the *MV Lifeline* and the detention-at-sea policy pursued by Australia are investigated from the competing perspectives of what we call the 'security lens' and the 'humanitarian lens' to demonstrate how a good faith interpretation of the applicable (if apparently conflicting and overlapping) norms can (and should) be mobilised to save lives, and how that goal is unduly undercut when security concerns trump humanitarian interests.

KEYWORDS: Systemic integration; 'boat migration'; search and rescue; Operation Sovereign Borders; Central Mediterranean

## 1. Introduction

In today's globalized world, 'boat migration' has become an especially hazardous form of trans-border movement, with the decline in the seaworthiness of vessels, the conditions on board, and the safety of the sea routes.[1] Over the last five years, it has been estimated that 11,400 people have perished in their attempts to cross the Mediterranean.[2] Other notable

* The authors are respectively: Senior Lecturer in Law, Queen Mary University of London, SAROBMED Coordinator, and lead counsel in ECtHR, *S.S. and Others v. Italy*, Appl. 21660/18 (pending) and *C.O. and A.J. v. Italy*, Appl. 40396/18 (pending) with the Global Legal Action Network (GLAN); Senior Lecturer in Law, Macquarie University; and Professor of Law, University of New South Wales. This research was supported by the HSS Collaborative Fund of Queen Mary University of London, financing the SAROBMED project <https://sarobmed.org/> through which the factual information regarding the *MV Lifeline* was collected, and by a Macquarie Research Development Grant.

[1] For an overview of the phenomenon, see V. Moreno-Lax and E. Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill, 2016).

[2] Missing Migrants, 16 August 2018, <https://missingmigrants.iom.int/region/mediterranean>.

'boat migration' pathways are in the waters north of Australia,[3] and in the Andaman Sea.[4] Across regions, 'boat migrants' have been singled out for particularly harsh treatment, as demonstrated by Italy's current refusals to allow rescue ships to dock, forcing them to voyage to other countries for safe harbour,[5] and by Australia's 'brutal model' of offshore interdiction and push-back at sea.[6]

Against this background, it is vital to assess the approaches of different coastal States against their international legal obligations and understand how different policy lenses are influencing the interpretation and application of binding commitments. In so doing, we intend to demonstrate how countries could better adhere to *all* applicable international duties (simultaneously) when it becomes necessary to save lives at sea, without adopting a self-help, 'pick and chose' approach.

This article sets out two case studies to examine this evolving reality and the legal frameworks that apply. Our analysis reflects the complex dynamics underpinning the decisions and responses to the phenomenon. We particularly seek to highlight the difficulties generated by the intersection of different regimes—and their solipsistic construal—including: law enforcement under the law of the sea; search and rescue requirements; human rights; and

[3] See A. Schloenhardt and C. Craig, 'Turning Back the Boats: Australia's Interdiction of Irregular Migrants at Sea', (2015) 27 IJRL 536; Phillips, 'Boat Arrivals and Boat "Turnbacks" in Australia since 1976: A Quick Guide to the Statistics', 17 January 2017 <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1617/quick_guides/boatturnbacks>.

[4] B.N. Ghráinne, 'Left to Die at Sea: State Responsibility for the May 2015 Thai, Indonesian and Malaysian Pushback Operations', (2015) 10 *The Irish Yearbook of International Law* 109.

[5] See, e.g., 'Italy wants 629 migrants rescued near Libya to disembark in Malta, says its own ports "closed"', *Malta Independent*, 10 June 2018 <http://www.independent.com.mt/articles/2018-06-10/local-news/Italy-wants-629-migrants-rescued-near-Libya-to-disembark-in-Malta-says-its-own-ports-closed-6736191445>; 'Spain offers to take in Aquarius ship carrying over 600 refugees', *Al Jazeera*, 11 June 2018 <https://www.aljazeera.com/news/2018/06/spain-offers-aquarius-ship-carrying-600-refugees-180611133533958.html>; and 'Rescue Boat Open Arms Arrives in Sport Port with 87 Migrants', *Reuters*, 9 August 2018 <https://uk.reuters.com/article/uk-europe-migrants-spain/rescue-boat-open-arms-arrives-in-spanish-port-with-87-migrants-aboard-idUKKBN1KU1H0>.

[6] 'The West's War on Refugees', *Gulf News*, 17 July 2018 <https://gulfnews.com/opinion/thinkers/the-west-s-war-on-refugees-1.2253034>; See also, D. Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP, 2018), ch 7; D. Ghezelbash, 'Forces of Diffusion: What Drives the Transfer of Immigration Policy and Law Across Jurisdictions?' (2014) 1 IJMBS 139.

refugee law principles. The regime governments purport to act under in a given instance reflects the way they choose to frame an issue and possibly exploit legal gaps in, or contested interpretations of, the relevant international obligations.

Our case studies show how the law is interpreted (or instrumentalised) in response to specific incidents of 'boat migration'. First, we assess the legality of State action to migration across the Central Mediterranean, particularly between Italy and Libya, and highlight the resulting treatment of the *MV Lifeline*, which was turned away from a Maltese port on the basis that a contended rescue had occurred in Libya's self-declared rescue zone and that Italy's rescue authorities had directed the vessel to port in Libya. Second, we examine one of the very few instances of Australia's response to migrants at sea that has details in the public domain, concerning *SIEV 885* and the accompanying *CPCF* litigation.[7] The case-study incidents involve different factual scenarios dealing with the application of discrete norms and principles of international law. The purpose of the comparative analysis is not to contrast the implementation of specific legal commitments in detail, but rather to lay bare more general commonalities in the way the governments in each jurisdiction (dis-)engage with their obligations under different (but concurrently applicable) international regimes.

Overall, we argue that the legal justification for the securitised response to each of the case-study incidents involved the cherry-picking of self-serving elements by the States concerned, while ignoring others that may have led to a contrary conclusion as to the legality of government actions. Such an approach—we posit—risks the further fragmentation of international law.[8] And it erodes the *pacta sunt servanda* basis underpinning the entire

[7] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.
[8] For discussion of the problems of fragmentation, see International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission Finalised by Martti Koskenniemi, (2006) A/CN.4/L.682.

system, according to which '*[e]very* treaty in force is binding upon the parties to it and must be performed by them in good faith'.[9] In advocating a more humanitarian-focused approach, we rely on a process of systemic integration, which aims to reconcile the different legal regimes at play.[10] This approach is consistent with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires that account be taken of 'any relevant rules of international law applicable in the relations between the parties' in the interpretation of a State's treaty obligations,[11] and it honours the UN Convention on the Law of the Sea (UNCLOS) commitment to a holistic understanding of states' maritime powers that takes account of 'other rules of international law'.[12]

Prior to our case study analyses, we thus situate the relevant regimes in Section 2. The case studies then disclose how these operated, or should have operated, in specific examples in Sections 3 and 4. Through these case studies we confront the preponderant 'security lens', currently dominating state responses, to the (more comprehensive) 'humanitarian lens' advocated here, to show how a different outcome would have been reached for the migrants concerned, if a good faith reading of the law had been utilised compared to that actually employed. In light of the experiences of *MV Lifeline* and *SIEV 885,* we conclude, in Section 5, that states following a selective approach of the applicable rules are actually in violation of their international legal obligations; they do not account for all relevant factors and principles in their decision-making. At the systemic level, this failure threatens the normative integrity of the legal regimes applicable to 'boat migration' and

---

See also N. Klein, 'A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants', (2014) 63 ICLQ 787, 803-804.

[9] 1969 Vienna Convention on the Law of Treaties ('VCLT'), 1155 *U.N.T.S.* 331, Art 26. For analysis, see, generally, R. Kolb, *Good Faith in International Law* (Hart, 2017).

[10] For a concrete proposal and further references, see V. Moreno-Lax, 'Systematising Systemic Integration: "War Refugees", Regime Relations, and a Proposal for a Cumulative Approach to International Commitments', (2014) 12 JICJ 907. See also Klein (n 8), 807-13.

[11] VCLT, Art 31(3)(c). See also P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (Brill, 2015).

[12] 1982 UN Convention on the Law of the Sea ('UNCLOS'), 1833 *U.N.T.S.* 3, Arts 2(3) and 87(1).

needlessly imperils the lives of many. Rescue, taken as part of the most 'elementary considerations of humanity',[13] constituting 'a manifestation of…the universal juridical conscience' of humankind,[14] provides the normative grounding substantiating this conclusion. Ultimately, our purpose is to demonstrate how a good faith interpretation of the relevant legal frameworks can (and should) be mobilised to save lives, and how that goal is undermined when national security concerns trump or ignore humanitarian interests. Focusing on 'boat migration' as a laboratory in two separate jurisdictions, we thereby aim to contribute to the broader literature on systemic integration.[15]

## 2. Legal Frameworks Applicable to Boat Migration

Migration by sea is regulated under international law and especially pursuant to international treaties, which states have implemented to varying degrees. This section focuses on the foundational texts that may concurrently apply in maritime contexts. It first addresses the law of the sea and the rights and duties that accrue to states for law enforcement purposes. It then considers the legal regime established for search and rescue under the auspices of the International Maritime Organisation (IMO). Finally, it sets out key human rights principles that cut across regimes, and relevant dimensions of international refugee law.

### 2.1 Law of the sea and law enforcement

UNCLOS establishes the primary rights and obligations of states in relation to different maritime areas. The greater the proximity of the maritime area to land the greater the rights of

[13] *The Corfu Channel Case (UK v. Albania)*, [1949] ICJ Rep. 4, 22, para. 215; and *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, [1986] ICJ Rep. 14, 112-114, paras 215 and 218. See, generally, P.-M. Dupuy, 'Les "considérations élémentaires de l'humanité" dans la jurisprudence de la Cour Internationale de Justice', in R.J. Dupuy and L.A. Sicilianos (eds), *Mélanges en l'honneur de N. Valticos – Droit et justice* (Pédone, 1999).
[14] A.A. Cançado Trindade, *International Law for Humankind* (Brill, 2013), at 394.
[15] See, e.g., B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483; C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279; D. French, 'Treaty Interpretation and The Incorporation Of Extraneous Legal Rules' (2006) 55 ICLQ 281; G. Orellana Zabalza, *The Principle of Systemic Integration* (LIT Verlag, 2012); D. Pulkowski, *The Law and Politics of International Regime Conflict* (OUP, 2014).

the coastal state in the area concerned. A coastal state exercises sovereignty over its territorial sea, which may extend up to 12 NM from the state's baselines.[16] However, the coastal state's sovereignty over its territorial sea is not unlimited and is to be exercised in conformity with UNCLOS and 'other rules of international law'.[17]

Among others, state powers are subject to the right of innocent passage enjoyed by 'ships of all states'.[18] This right allows for continuous cruising through a state's territorial sea, including for the purpose of proceeding from or to a port facility.[19] However, the loading or unloading of any persons in violation of a coastal state's customs or immigration laws may constitute an infringement of the right of innocent passage.[20] But, as further discussed in Section 3, there are some caveats, including that passage shall not be impeded in cases where it is rendered necessary due to *force majeure*, distress, danger, or in order to render assistance to persons or vessels in peril.[21]

Beyond the territorial sea, the coastal state has authority within its contiguous zone to exercise the control necessary to prevent violations of its immigration laws 'within its territory or territorial sea' and has also the power to punish any infringement thereof—but only if 'committed within its territory or territorial sea'.[22] This limited capacity to prevent and prosecute responds to the fact that, for all other means and purposes, the contiguous zone lies on the high seas, extending up to 24 NM from the coastline,[23] over which no state can claim sovereignty.[24] The freedoms associated with the high seas attach to 'all states',[25] including

[16] UNCLOS, Art 2.
[17] UNCLOS, Art 2(3).
[18] UNCLOS, Art 17.
[19] UNCLOS, Art 18(1)(a) and (b).
[20] UNCLOS, Art 19(2)(g).
[21] UNCLOS, Art 18(2).
[22] UNCLOS, Art 33.
[23] Ibid.
[24] UNCLOS, Art 89.
[25] UNCLOS, Art 87.

the right of navigation.[26] In this area, the principle of exclusive flag-state jurisdiction applies.[27] Therefore, coastal states have no specific rights over foreign-flagged vessels, in respect of migration or otherwise, unless the flag state expressly consents to it.[28]

With regard to vessels without nationality[29]—typically the situation of migrant boats—there is a special 'right of visit' to undertake a *vérification du pavillon*, including on board the ship. Commentators have taken different positions on what powers may be exercised over a stateless vessel and those on board.[30] UNCLOS does not explicitly provide for a right to seize, arrest, or detain in relation to stateless vessels.[31] Thus, in the absence of an express basis, it may be inferred that the default rule of freedom of navigation continues to apply.[32] Whatever the case, the human rights obligations of officials visiting the stateless vessel remain applicable, as part of the 'other rules of international law' binding on the high seas discussed further below.[33]

States party to the 2000 Migrant Smuggling Protocol may also have authority to board and search vessels flagged to other states party to the Protocol pursuant to the terms of that treaty.[34] The Protocol requires all state parties to criminalize migrant smuggling and

---

[26] UNCLOS, Art 90.
[27] UNCLOS, Art 92(1).
[28] See UNCLOS, Art 110. Another exception is the right of hot pursuit: UNCLOS, Art 111.
[29] A vessel is stateless if it is not flagged to, or registered in, any particular state. In such case, it does not enjoy the protection of any particular state. See UNCLOS, Arts 91 and 92.
[30] One view is that statelessness creates a legal vacuum allowing a boarding state to assert its laws and enforcement jurisdiction over the vessel: D. Guilfoyle, *Shipping Interdiction on the Law of the Sea* (CUP, 2009) 341–2; A. Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (CUP, 2015) 79–82. A second view is that statelessness in itself is not enough, and there must be some sort of jurisdictional nexus in order to enliven enforcement powers: E. Papastavridis, *The Interception of Vessels on the High Seas* (Hart, 2013) 264–7; J. Coppens, 'Interception of Migrant Boats at Sea', in Moreno-Lax and Papastavridis (n 1) 209.
[31] UNCLOS, Art 110. *Cf.* UNCLOS, Art 107, expressly conferring powers of 'seizure on account of piracy' on warships or military aircraft of any state.
[32] *Cf.* Dastyari (n 30) and Guilfoyle (n 30).
[33] UNCLOS, Art 87(1). In addition, the nationality of those on board may give a basis for a state to exercise its right of diplomatic protection. This right accrues to the state rather than the individual, who only enjoys a right to consular assistance. See *LaGrand (Germany v. United States)*, [2001] ICJ Rep. 466. As a result, human rights protections remain paramount.
[34] 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime ('Smuggling Protocol'), 2241 *U.N.T.S.* 480, Art 8(7).

related acts 'when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit'.[35] In such cases, Article 8 of the Protocol allows a warship with reasonable grounds to suspect that a foreign-flagged ship is engaged in illegal migrant smuggling to request the consent of the flag state and take 'appropriate measures' against that ship, 'as authorised by the flag state'. The same applies to stateless vessels, without any prior consent being required, but subject to the 'appropriate measures' being adopted 'in accordance with relevant … international law'.[36] There is, however, no consensus as to whether the 'appropriate measures' provision provides proper legal grounding to detain the ship and/or the persons on board, especially if human rights guarantees are taken into account.[37]

In fact, the Protocol does seek to ensure the compatibility of anti-smuggling provisions with international human rights law, introducing in Article 16 an obligation on states to respect the rights and protect those who are the object of smuggling operations, affording 'appropriate assistance' and 'protection against violence', focusing in particular on preserving 'the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.[38] A savings clause, Article 19(1), further stipulates that the Protocol leave international commitments under other instruments of human rights and refugee law, and especially the principle of *non-refoulement*, intact.

States may further enter into regional or bilateral agreements that provide for additional policing powers against each other's vessels or in each other's territorial sea,

[35] Smuggling Protocol, Art 6. States may also become parties to the Trafficking Protocol, which can also form the basis for action at sea where there are victims of human trafficking: 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime ('Trafficking Protocol'), 2237 *U.N.T.S.* 319. For discussion, see Guilfoyle (n 30), 226-31.
[36] Smuggling Protocol, Art 8(7).
[37] See V. Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea', (2011) 23 IJRL 174, 188-9 and references therein to ECtHR, *Medvedyev v. France*, Appl. 3394/03, 29 March 2010, where the Court concluded a similarly worded provision in the Vienna Convention on Narcotic Drugs to be insufficient to warrant a measure of deprivation of liberty.
[38] Smuggling Protocol, Art 8(1)-(3).

consistent with the core rights and duties recognised in UNCLOS.[39] Such a bilateral agreement between Italy and Libya is discussed below in relation to *MV Lifeline*.

### 2.2 Search and rescue regime

Notable in relation to law enforcement powers under the law of the sea is that there remains an expectation that human rights obligations or obligations derived from other international agreements will continue to operate,[40] including those on search and rescue (SAR). The SAR regime comprises the core obligations under UNCLOS, as well as requirements enshrined in the Safety of Life at Sea (SOLAS) Convention and the Search and Rescue (SAR) Convention.[41] The IMO has also developed Guidelines to assist states in the interpretation and application of their responsibilities under these treaties.[42]

Under UNCLOS, states are to require the masters of their ships to 'render assistance to any person found at sea in danger of being lost' and to 'proceed with all possible speed to the rescue of persons in distress'.[43] However, a master is not required to seriously endanger the ship, its crew or passengers, nor do more than may 'reasonably be expected of him'.[44] Coastal states have, in addition, the obligation to '*promote* the establishment, operation and maintenance of an adequate and effective search and rescue service' as a permanent structure to secure 'safety on and over the sea'.[45]

---

[39] For discussion on these sort of agreements, see Guilfoyle (n 30) 189-191; 196; 209-10; 219; E. Papastavridis 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law', (2009) 36 *Syracuse Journal of International Law and Commerce* 145, 178-87.
[40] UNCLOS, Preamble: 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'. See also Art 2(3) (territorial sea) and Art 87(1) (high seas).
[41] 1974 International Convention for the Safety of Life at Sea ('SOLAS Convention'), 1184 *U.N.T.S.* 278; 1979 International Convention on Maritime Search and Rescue ('SAR Convention'), 1405 *U.N.T.S.* 119.
[42] IMO, Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea* ('IMO Guidelines'), (2004) MSC.167(78), MSC 78/26/Add.2 (Annex 34).
[43] UNCLOS, Art 98(1).
[44] UNCLOS, Art 98(1)(b).
[45] UNCLOS, Art 98(2) (emphasis added).

Besides UNCLOS, the SOLAS Convention imposes an obligation on shipmasters 'to proceed with all speed to the assistance of … persons in distress'.[46] Similarly, the SAR Convention requires parties to participate in the development of SAR services 'to ensure that assistance is rendered to any person in distress at sea'.[47] Under both the SAR and SOLAS Conventions, the obligation to assist applies 'regardless of the nationality or status of such persons or the circumstances in which they are found'—thus including migrants in an irregular situation.[48] Moreover, the SOLAS Convention requires the master to treat rescuees 'with humanity, within the capabilities and limitations of the ship'.[49]

The obligation to assist is put in operation through the establishment of SAR regions and rescue coordination centres. Each SAR region is to be determined through agreement between the parties concerned,[50] and, 'as far as practicable, should not overlap'.[51] SAR services are defined as 'the performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice … assistance or … evacuation, through the use of public and private resources …'.[52]

During the course of a SAR operation, it is the state responsible for the SAR region that has 'primary responsibility' to ensure survivors are disembarked from the assisting ship and 'delivered to a place of safety'.[53] None of UNCLOS, the SOLAS or the SAR Convention provisions explicitly requires a state to accept the disembarkation of rescuees onto their territory. And, as the case studies will illustrate, in deciding on a place for disembarkation, the term 'place of safety' has proven difficult to define.

### 2.3 Human rights and refugee law

[46] SOLAS Convention, Annex, Ch 5, Reg 33(1).
[47] SAR Convention, Annex, para. 2.1.1.
[48] SOLAS Convention, Annex, Ch 5, Reg 33(1); SAR Convention, Annex, para. 2.1.10.
[49] SOLAS Convention, Amendment, MSC 78/26/Add.1, Annex 3, inserting new para. 6.
[50] SAR Convention, Annex, para. 2.1.4.
[51] SAR Convention, Annex, para. 2.1.3.
[52] SAR Convention, Annex, para. 1.3.3.
[53] SAR Convention, Annex, para. 3.1.9.

Beyond entitlements to assistance under the SAR regime, migrants are holders of human rights protections under international treaties, such as the International Covenant on Civil and Political Rights (ICCPR),[54] and the Convention against Torture (CAT).[55] In particular, the obligation of *non-refoulement* prevents any person who may be at risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment from being sent to a particular country.[56] Other human rights violations that may occur during maritime operations include infringements of the rights to life and physical integrity,[57] the prohibition of arbitrary detention, collective expulsion,[58] and denial of an effective remedy.[59] In addition, if a 'boat migrant' claims to be a refugee, she or he is entitled to have that claim assessed,[60] and the various protections flowing from the Refugee Convention and 1967 Protocol become relevant as well, as the case studies below demonstrate.[61] In fact, as the European Court of Human Rights has clarified, 'States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions',[62] in particular, their 'right to gain effective access to the procedure for determining refugee status'.[63]

Debate has previously emerged as to the applicability of human rights and refugee law principles at sea.[64] The relevant test in extraterritorial contexts is whether the state

[54] 1966 International Covenant on Civil and Political Rights ('ICCPR'), 999 *U.N.T.S.* 171.
[55] 1984 Convention against Torture ('CAT'), 1465 *U.N.T.S.* 85.
[56] Ibid., Art 3. Art 7 ICCPR has also been interpreted to similar effect. HRC, 'General Comment No. 20: Article 7', (1994) HRI/GEN/1/Rev.1 at 30, para. 9.
[57] HRC, 'General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), on the right to life', (2018) CCPR/C/GC/36.
[58] 1998 Protocol No. 4 to the [ECHR], *E.T.S.* 46, Art 4.
[59] 1950 European Convention on Human Rights ('ECHR'), *E.T.S.* 005, Art 13.
[60] This right is implicit in the obligation of *non-refoulement*: V. Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017) chs 8, 9 and 10; Papastavridis (n 30) 217.
[61] 1951 Convention relating to the Status of Refugees ('Refugee Convention'), 189 *U.N.T.S.* 150, Art 1(A)(2); 1967 Protocol relating to the Status of Refugees ('Refugee Protocol'), 606 *U.N.T.S.* 267, Art 1(2).
[62] ECtHR, *Amuur v. France*, Appl. 19776/92, 25 June 1996, para. 43.
[63] Ibid. See also ECtHR, *M.S.S. v. Belgium and Greece*, Appl. 30696/09, 21 January 2011, paras 216, 313, and 321.
[64] See, e.g., N. Klein, 'Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 MJIL 414; D. Ghezelbash et al., 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore

exercises jurisdiction *qua* 'effective control' over an area or person abroad.[65] This standard applies in relation to the ICCPR,[66] the CAT,[67] and the European Convention on Human Rights (ECHR).[68] Once state authorities exercise control over a migrant vessel or the individuals on board—which may be 'contactless control' if nonetheless effective[69]—human rights obligations attach and must be observed.

While the legal framework available can thus support the humanitarian dimensions of helping 'boat migrants' in danger at sea, the rights' perspective has not necessarily prevailed in practice over the law enforcement and security concerns intended to protect national borders. The next section discloses how European coastal states in the Central Mediterranean have responded to recent SAR events, adopting a 'closed ports' strategy that criminalizes humanitarian rescues undertaken by civil society. The ongoing case of the *MV Lifeline* is particularly illustrative in this regard.

## 3. The Central Mediterranean 'Closed Ports' Strategy: The *MV Lifeline* Case

The *MV Lifeline* is a Dutch-flagged vessel operated by the NGO Mission Lifeline.[70] It was initially denied access to a Maltese port despite being in distress following the rescue of 234 people. As discussed in this section, the incident may be seen as a catalyst for the new 'closed ports' policy adopted by Italy and Malta. We first provide the general context, before detailing the situation of the *MV Lifeline*. The final objective is to assess state action through

---

Australia' (2018) 67 ICLQ 315; V. Moreno-Lax, The *Interdiction of Asylum Seekers at Sea: Law and (Mal)practice in Europe and Australia*, Kaldor Centre Policy Brief No 4 (UNSW, 2017).

[65] For a monographic elaboration, see Moreno-Lax (n 60).

[66] HRC, 'General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', (2004) CCPR/C/21/Rev.1/Add.13, para. 10. *Cf.* HRC, General Comment No. 36 (n 57), paras 22 and 63, speaking rather of 'a direct and reasonably foreseeable *impact* on the right[s] … of individuals' alongside 'effective control' as a trigger of extraterritorial responsibility. For further commentary, see V. Moreno-Lax and M. Lemberg-Pedersen, 'Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization' (2019) 56 QIL 5.

[67] CAT Committee, 'Concluding Observations: United States of America', (2006) CAT/C/USA/C/2, para. 20.

[68] ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. 27765/09, 23 February 2012, para. 73.

[69] V. Moreno-Lax and M. Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows', in S. Juss (ed.), *Research Handbook on International Refugee Law* (forthcoming) <http://www.unhcr.org/5a056ca07.pdf>.

[70] Mission Lifeline <https://www.betterplace.org/en/projects/46977-mission-lifeline-search-and-rescue>.

a security and a humanitarian lens to bring to light alternative approaches to the legal frameworks, providing guidance on how states could better adhere to their international obligations.

### 3.1 Towards 'Mare Clausum'[71]

The situation in the Central Mediterranean has been problematic for a number of years. Attempts to close it as an access route for 'boat migrants' date back to the early 2000s,[72] culminating in the conclusion of the 2008 Treaty of Friendship between the Gaddafi and Berlusconi governments.[73] Article 19 of that Treaty calls on both parties to intensify their collaboration in the fight against irregular migration and to promote the establishment of an integrated system of border control in Libya, for Italian actors with the required technological competence to administer it, and committing Italy to pay 50% of the cost, with the EU bearing the other 50%. Paragraph 3 of this provision commits parties to jointly define initiatives to 'stem irregular migration flows'. It was under these terms that the 2009 'push-back' campaign was conducted, through joint patrolling operations leading to the interception and return of migrant boats to Libya, which the Grand Chamber of the European Court of Human Rights condemned in *Hirsi*.[74]

The Treaty had been 'dormant' throughout the period of the Arab Spring and ensuing war in Libya.[75] But on 2nd February 2017, a Memorandum of Understanding was concluded with the UN-backed Government of National Accord 'reviving' it, with the

[71] C. Heller and L. Pezzani, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration across the Mediterranean', *Forensic Oceanography* (2018) <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>.
[72] For a detailed reconstruction, see E. Paoletti, *The Migration of Power and North-South Inequalities: The Case of Italy and Libya* (Palgrave Macmillan, 2011).
[73] Trattato di Amicizia, Partenariato e Cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista, 30 August 2008 <https://tinyurl.com/yccpuktb>.
[74] *Hirsi* (n 68).
[75] But see persisting links throughout that period, according to Statewatch: 'Documents unveil post-Gaddafi cooperation agreement on immigration' (September, 2012) <http://www.statewatch.org/news/2012/sep/01italy-libya-immigration-cooperation.html>.

specific purpose of implementing Article 19 of the agreement.[76] This is how Italy has been invested in the re-establishment of the Libyan Coast Guard (LYCG), including through the equipment, financing, and training of its officials. Italy has donated the four main assets of the LYCG and plans for an extra six patrol boats to be gifted to enhance Libyan capacity to coordinate maritime interventions autonomously.[77]

For the time being, the LYCG has been incapable of operating at a 'self-sustaining level', lacking the 'capacity for the minimum level of execution of command and control, including that necessary to coordinate SAR/SOLAS events'.[78] This is why the Italian military mission NAURAS, an extension of the *Mare Sicuro* Operation, active since 2015,[79] was launched in August 2017.[80] It consists of four ships, four helicopters, and 600 servicemen, of which 70% are deployed at sea, with the other 30% stationed in Tripoli harbour.[81] Their key mission is precisely to create the operational conditions and develop the command-and-control capabilities for the LYCG to become autonomous.[82] Moreover, the Italian Navy has assets in Libya to act as the Libyan Navy Communication Centre and main 'logistic assistance/support hub'.[83] Since deployment, an Italian warship has played the role of a floating Maritime Rescue Coordination Centre ('MRCC') in Libya, with the specific function

[76] Memorandum of Understanding of 2 February 2017 (English translation) <http://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf>.
[77] 'Italy gives Libya four patrol boats to help fight illegal immigration', *The Local*, 16 May 2017 <https://www.thelocal.it/20170516/italy-gives-libya-four-patrol-boats-to-bolster-coastguard>. See also European Commission, 'EU Trust Fund for Africa adopts €46 million programme to support integrated migration and border management in Libya', Press Release, 28 July 2017 <http://europa.eu/rapid/press-release_IP-17-2187_en.htm>.
[78] EUNAVFOR MED Op Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 - January 2018, Council doc. 6961/18 EU Restricted, 9 March 2018 (on file with the authors), 24 and 26.
[79] 'Operazione Mare Sicuro', Ministero della Difesa, 12 March 2015 <https://www.difesa.it/OperazioniMilitari/NazionaliInCorso/MareSicuro/Pagine/default.aspx>. See also 'Italy launches Mare Sicuro to monitor Libya's coastline', *Marsad*, 30 March 2015 <https://www.marsad.ly/en/2015/03/30/italy-launches-mare-sicuro-to-monitor-libyas-coastline/>.
[80] 'Il decreto che autorizza la nuova missione navale in Libia', *Analisi Difesa*, 31 July 2017 <https://www.analisidifesa.it/2017/07/il-decreto-che-autorizza-la-nuova-missione-navale-in-libia/>.
[81] *Operation Mare Sicuro*, Marina Militare Italiana, SHADE MED Presentation, Rome 23-24 November 2017. See also EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2017, Council doc. 16013/17 EU Restricted, 22 December 2017 (on file with the authors).
[82] Ibid.
[83] Ibid.

of assuming 'the cooperation and coordination of the joint activities of the Libyan Coast Guard and Navy, with a view to carrying out their command-and-control tasks'.[84] It is 'thanks' to the Italian Navy, rather than to independent action by Libya,[85] that the LYCG has performed 19,452 pullbacks in 2017,[86] arguably on Italy's behalf, for Italy's benefit, and via its pivotal support.[87] This level of control is clearly sufficient to trigger the extraterritorial application of the ECHR to ensure that Italy respects human rights obligations at sea.[88] Equally, this 'effective control' has been found to engage the ICCPR and the CAT in relation to state conduct at sea.[89] Italy, however, denies any connection to LYCG's conduct, thereby disclaiming the applicability of its human rights obligations.[90]

Since the change of government in March 2018, Italy's stance to maritime migration has toughened considerably. Although the number of crossings has fallen by 78% compared to the previous year,[91] drawing on electoral promises,[92] Interior Minister Salvini has set a 'zero arrivals' target.[93] This is to be achieved through a twofold strategy: closing ports to vessels rescuing migrants and discrediting SAR NGOs as 'aiding people

---

[84] Relazione analitica sulle missioni internazionali in corso e sullo stato degli interventi di cooperazione allo sviluppo a sostegno dei processi di pace e di stabilizzazione, deliberata dal Consiglio dei ministri il 28 dicembre 2017, DOC. CCL-bis, N. 1, Scheda 36, 101 <http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf>.
[85] ECtHR, *Chiragov and Others v. Armenia*, Appl. 13216/05, 16 June 2015, para. 178.
[86] IOM, Libya—Maritime Incidents Update (25 October—28 November 2017) <https://displacement.iom.int/reports/libya-—-maritime-incidents-update-25-october-—-28-november>.
[87] The *Politico* revelations come in support of this affirmation. See Z. Campbell, 'Europe's Deadly Migration Strategy: Officials knew EU military operation made Mediterranean crossing more dangerous', *Politico*, 28 February 2019 <https://www.politico.eu/article/europe-deadly-migration-strategy-leaked-documents/>.
[88] Jurisdiction under Art 1 ECHR is a threshold criterion that must be met to 'activate' ECHR obligations. The relevant standard in extraterritorial circumstances is 'effective control', which departs from connotations under general international law. For an elaboration, see M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP, 2011).
[89] (nn 66-67) and accompanying text. See also CATCom, *J.H.A. v. Spain*, Comm. 323/ 2007, 10 Nov. 2008, para. 8.2; and CATCom, *Sonko v. Spain*, Comm. 368/ 2008, 20 Feb. 2012, para. 10.3.
[90] *Cf.* ECtHR, *S.S. and Others v. Italy*, Appl. 21660/18 (pending); and *C.O. and A.J. v. Italy*, Appl. 40396/18 (pending).
[91] 'Over 27,000 migrants to Europe by sea in 2018, 636 victims', *ANSA*, 24 May 2018 (citing IOM figures) <http://www.infomigrants.net/en/post/9447/over-27-000-migrants-to-europe-by-sea-in-2018-636-victims>.
[92] See Lega Nord's manifesto for 2018 Elections <https://www.leganord.org/component/phocadownload/category/5-elezioni?download=1514:programma-lega-salvini-premier-2018>.
[93] 'Salvini vows to end all migrant arrivals to Italy by boat', *The Local*, 6 July 2018, <https://www.thelocal.it/20180706/matteo-salvini-migrant-arrivals-boat>.

traffickers'.[94] In turn, pressure on Malta to accept disembarkations has increased as a result, leading both countries to complicated standoffs over responsibility for the survivors.[95]

One such standoff sparked on account of the *MV Lifeline*, flying the Dutch flag and operated by the German SAR NGO Mission Lifeline. The vessel was carrying 234 migrants rescued between Libya and Lampedusa on 20 June 2018.[96] Apparently, the captain intervened of his own motion, responding to a distress situation he had witnessed and then informing the Italian MRCC of the rescue. Rome assigned a SAR case number and initially coordinated the operation, but it soon informed that the LYCG had 'taken over' and assumed responsibility for the indication of a 'place of safety'[97]—despite it lacking its own MRCC, being fully dependent on Italian instructions and support, and that LYCG interventions happen 'under the aegis of the Italian navy'.[98]

Considering Tripoli an unsuitable port of disembarkation,[99] in line with the widely documented cases of persecution, ill treatment, and enslavement of migrants throughout

[94] 'For the first time, Italy prevents a private Italian ship from docking with rescued migrants', *The Local*, 10 July 2018, <https://www.thelocal.it/20180710/italy-turns-away-private-italian-ship-vos-thalassa-rescued-migrants-libya>.

[95] The first such standoff since Salvini took office regards the *MV Aquarius*, jointly operated by *Médecins Sans Frontières* (MSF) and SAR NGO *SOS Méditerranée*, denied disembarkation both by Italy and Malta, with Spain stepping in several days after, granting permission to land in Valencia, 842 NM away from the vessel's location. See 'Italy fires a fresh warning as migrants sing and pray on stranded ship', *The Times of Malta*, 11 June 2018 <https://www.timesofmalta.com/articles/view/20180611/local/migrants-sing-and-pray-aboard-ship-as-governments-argue-about-their.681443?utm_source=tom&utm_campaign=top5&utm_medium=widget>; 'Malta offers medical assistance to migrants' ship – Muscat', *The Times of Malta*, 11 June 2018, <https://www.timesofmalta.com/articles/view/20180611/local/malta-offers-medical-assistance-to-migrants-ship-muscat.681484>; 'Updated (6): Spain lets migrants' ship dock in Valencia; we cannot let this happen again – Muscat', *Malta Independent*, 11 June 2018, <http://www.independent.com.mt/articles/2018-06-11/local-news/Migrants-stranded-Malta-says-Italy-going-against-international-rules-6736191457>.

[96] 'Malta Says Not Responsible For Lifeline Boat Denied By Italy', *Malaysian Digest*, 23 June 2018, <http://malaysiandigest.com/world/743877-malta-says-not-responsible-for-lifeline-boat-denied-by-italy.html>.

[97] Exchange of emails between *MV Lifeline* and Rome MRCC (on file with authors).

[98] See decision by the judge of Catania adjudicating on the related case of *MV Open Arms*, Tribunale di Catania, 27 March 18, at 22 <http://www.statewatch.org/news/2018/apr/it-open-arms-sequestration-judicial-order-tribunale-catania.pdf>.

[99] Although the LYCG did not immediately reply to requests from the *MV Lifeline*, on 25 June 2018, i.e. 4 days after the rescue, they indicated Tripoli as 'place of safety', where the survivors should be brought to, via email (on file with authors).

Libya,[100] the captain gauged the risks and headed north instead, where 'all ports of safety [were] located … from [the *MV Lifeline*'s] position'.[101] Upon reaching the Maltese SRR—but staying out of the 24 NM of the contiguous zone, the captain contacted RCC Malta, considering Valetta their next port of call and on account of 'difficulties with the weather [and] urgent medical case', making the decision literally on 'safety reasons'.[102] Four members of the crew had become ill and all other members were highly stressed 'after five days with nearly 250 people on board'.[103] Weather conditions were worsening; small riots amongst rescuees broke out, augmenting the risk of persons falling over board.[104] The captain then invoked his right to proceed to Valetta as port of refuge, deeming the situation on the *MV Lifeline* as one of distress.[105]

Malta's response was, however, unappreciative of the captain's difficulties. It considered itself non-responsible for the SAR case, 'having been carried out within the Libyan SRR' and 'with MRCC Rome being the first to intervene'.[106] Moreover, it accused the captain of 'reportedly ignor[ing] instructions of the responsible authority, i.e. the Libyan Coast Guard'.[107] It recommended 'to proceed closer to the authority responsible for issuing instructions on the Place of Safety' and warned the captain that 'RCC Malta will not bear any responsibility for any reckless decisions taken by [his] good self, including the disobedience

[100] UNSMIL/OHCHR, *'"Detained and Dehumanised" Report on Human Rights Abuses against Migrants in Libya*, 13 December 2016 <https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf>; UN Secretary-General's statement on reported news of slavery in Libya, 20 November 2017, <https://www.un.org/sg/en/content/sg/statement/2017-11-20/secretary-general's-statement-reported-news-slavery-libya>; Amnesty International, *Libya's Dark Web of Collusion: Abuses against Europe-bound Refugees and Migrants*, December, 2017 <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>; OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April, 2018; <https://www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf>; Human Rights Watch, 'Libyan Forces Abuse Migrants at Sea', 6 July 2018, <https://www.hrw.org/middle-east/n-africa/libya>.
[101] *MV Lifeline* email to Malta MRCC, 24 June 2018 (on file with authors).
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Malta RCC email to *MV Lifeline*, 24 June 2018 (on file with authors).
[107] Ibid.

to instructions of the coordinating and appropriate authorities'.[108] It added that Maltese authorities '[were] reserving the right to formally address the *Lifeline*'s Flag State authorities for any appropriate action and investigation' and reproached the captain for his 'loitering' and 'unnecessarily and unduly endangering the life of those under [his] responsibility, contrary to the applicable conventions'.[109] The solution, in their view, was to 'await further instructions' by the LYCG closer to Libya.[110]

Ultimately, at an emergency summit, an *ad hoc* agreement was reached for the survivors to be distributed among eight EU Member States, with the ship being permitted to dock in Valetta.[111] However, the captain was brought under investigation, accused of 'entering Maltese territorial waters illegally and without proper registration and a licence', and the *MV Lifeline* was impounded.[112]

Malta, like Italy, has since vowed to no longer allow migrant disembarkations.[113] This includes the withdrawal of landing rights to NGO aircrafts and ships, disallowing them not only to enter but also to leave Maltese ports, *de facto* impounding their assets.[114] Over 600 'boat migrants' were reported dead off the coasts of Libya in the week following the introduction of the 'closed ports' strategy.[115] And, in a final twist of the policy, Italy, for the first time, prevented a private, Italian-flagged commercial vessel, the *Vos Thassala*, from

---

[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] 'Eight EU Member States to take in MV Lifeline immigrants', *TVM News*, 27 June 2018 <https://www.tvm.com.mt/en/news/today-pm-to-give-leight-eu-member-states-to-take-in-mv-lifeline-immigrantsatest-details-on-how-situation-of-mv-lifeline-is-developing/>.
[112] 'MV Lifeline captain charged with entering Maltese waters on unlicensed vessel, bail given', *Malta Independent*, 2 July 2018 <http://www.independent.com.mt/articles/2018-07-02/local-news/MV-Lifeline-captain-arrives-in-court-for-hearing-6736192797>.
[113] 'NGOs fear more deaths in the Mediterranean as Italy and Malta close ports', *Malta Today*, 1 July 2018, <https://www.maltatoday.com.mt/news/national/87915/ngos_fear_more_deaths_in_the_mediterranean_as_italy_and_malta_close_ports#.Wz5oma17F8f>.
[114] 'Malta detains second migrant rescue ship', *Gulf Times*, 3 July 2018, <http://www.gulf-times.com/story/598219/Malta-detains-second-migrant-rescue-ship>.
[115] 'Spike in migrant drownings in Mediterranean blamed on tough new approach by Italy and EU', *The Telegraph*, 12 July 2018, <https://www.telegraph.co.uk/news/2018/07/12/spike-migrant-drownings-mediterranean-blamed-tough-new-approach/>.

docking in Sicily with 66 rescued migrants on board.[116] Interior Minister Salvini, labelling the *Vos Thalassa*'s intervention as 'not necessary', because the LYCG was in the vicinity,[117] announced he would also close Italy's ports to 'ships of international missions' if they were carrying migrants, presumably including warships active within EUNAVFORMed Operation *Sophia* and Frontex-led *Themis* mission.[118]

### 3.2 Security lens

Italy and Malta have adopted a course fuelled by the anti-immigration rhetoric present in the national politics of both countries.[119] This is despite the sharp decline in the amount of arrivals via the Central Mediterranean since the 'refugee crisis' of 2015.[120] Whether on grounds of fear, opportunism or something else, both countries portray 'boat migration' as an extreme national security and existential concern (whatever the numbers). This, in turn, is used to justify extreme policies that seek to completely shut down the maritime entry route. The closure of their ports, the criminal investigations conducted against the crew and/or captains of NGO vessels,[121] and the seizure of their ships,[122] all respond to this line of action. But can any of these measures be justified under international law?

---

[116] 'For the first time, Italy prevents a private Italian ship from docking with rescued migrants', *The Local*, 10 July 2018 <https://www.thelocal.it/20180710/italy-turns-away-private-italian-ship-vos-thalassa-rescued-migrants-libya>.

[117] 'Nave italiana *Vos Thalassa* salva 66 migranti in acque libiche. Salvini: Non può approdare in Italia', *Rai News*, 10 July 2018, <http://www.rainews.it/dl/rainews/articoli/migranti-viminale-blocca-nave-italiana-68de2e9d-7c63-4b4e-a44e-f5e78a437dae.html>.

[118] 'Salvini to demand closure of Italian ports to "international mission" migrant ships', *The Local*, 8 July 2018, <https://www.thelocal.it/20180708/salvini-to-demand-closure-of-ports-to-international-migrant-ships>.

[119] 'Hostility to migrants is not born of rising numbers but a failure of hope', *The Guardian*, 1 July 2018 <https://www.theguardian.com/commentisfree/2018/jul/01/european-union-migration-crisis-survey-on-attitudes-to-migrants>.

[120] *Cf.* 33,400 in 2018; 172,152 in 2017; 373,726 in 2016; 1,011,712 in 2015. See for 2018: <http://migration.iom.int/europe/>; for 2017: <https://reliefweb.int/sites/reliefweb.int/files/resources/missingmigrants-iom-int-region-mediterranean-pdf%20%282%29.pdf>; for 2016: <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/614604/EPRS_BRI%282017%29614604_EN.pdf>; and for 2015: <https://www.iom.int/sites/default/files/situation_reports/file/Mixed-Flows-Mediterranean-and-Beyond-Compilation-Overview-2015.pdf>.

[121] Besides the open investigation in Malta against the captain of the *MV Lifeline*, Italy has served investigation warrants vis-à-vis 20 NGO volunteers of MSF, Save the Children, and Jugend Rettet: 'Inchiesta Ong, 20 nuovi avvisi di garanzia per la Juventa, Msf e Save the children. Procura: "Non fini illeciti, solo scopi umanitari"', *La*

A security lens would centre the assessment around the interdiction powers of coastal states and the near-plenary sovereignty they enjoy within territorial waters. It would consider entry illegal and passage as non-innocent, deeming the intended 'unloading of … person[s] contrary to … the immigration laws … of the coastal state' as 'prejudicial to the peace, good order or security' of the country concerned.[123] The right of the coastal state to 'adopt laws and regulations … relating to innocent passage', particularly 'in respect of … the prevention of infringement of … immigration … laws',[124] would be invoked, and the explicit 'rights of protection of the coastal state' conferred by UNCLOS relied on. Indeed, Article 25 of the Convention allows coastal states to take whatever '*necessary steps* in its territorial sea to prevent passage which is not innocent'.[125] Further, if the conduct of SAR NGOs purporting to enter territorial waters and proceed to port was considered to amount to migrant smuggling or the facilitation of irregular entry, the coastal state could rely on the Smuggling Protocol to adopt such measures as considered necessary to establish criminal liability,[126] possibly including the opening of investigations and the impoundment of NGO ships.

Yet, the question emerges as to whether NGOs requesting access to ports to disembark rescued persons can be characterized as non-innocent passage. It is worth noting, in this connection, that passage 'rendered necessary by *force majeure* or distress or for the

---

*Repubblica*, 10 July 2018 <http://www.repubblica.it/cronaca/2018/07/10/news/juventa_venti_nuovi_avvisi_di_garanzia_ad_un_anno_dal_sequestro_della_nave_della_ong_tedesca-201408731/>. For an overview of SAR NGO criminalisation, see FRA, *Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*, (August, 2018) <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities> and summary table of cases <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-mediterranean_en.pdf>.

[122] In addition to the *MV Lifeline*, impounded in Malta, and *MV Sea Watch 3*, not permitted to depart from Valetta, the *MV IUVENTA*, was the first SAR NGO vessel to be seized by Italy in 2017: 'Migranti, procura Trapani sequestra nave Iuventa: "Intese tra Ong tedesca e trafficanti"', *La Repubblica*, 2 August 2017 <http://www.repubblica.it/cronaca/2017/08/02/news/migranti_codice_ong_in_vigore_fermata_nave_in_mare_per_controlli-172151820/>. For a counter-factual reconstruction, see Forensic Oceanography, *Blaming the Rescuers: The IUVENTA Case* <https://blamingtherescuers.org/iuventa/>.

[123] UNCLOS, Art 19(1) and (2)(g).

[124] UNCLOS, Art 21(1)(h).

[125] For commentary, see R. Barnes, 'Article 25: Rights of protection of the coastal State', in A. Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart, 2017) 223.

[126] Smuggling Protocol, Art 6(2) and (4).

purpose of rendering assistance' ought not to be disqualified as non-innocent.[127] Rescue fundamentally involves such rendering of assistance and thus aligns with the 'elementary considerations of humanity' underpinning the entire law of the sea regime.[128] The 'delivery to a place of safety' is explicitly required by the international maritime conventions regulating SAR (in legally binding form) in accordance with which 'passage *shall* take place'.[129] According to the text of UNCLOS, coastal state powers to regulate non-innocent passage are not unfettered. They must conform not only with the UNCLOS provisions, but also with 'other rules of international law' that may be relevant—including SAR rules.[130] Moreover, after six days adrift, the *MV Lifeline* was itself in a situation that arguably reached the threshold of distress. This triggered a separate (customary) *right* of refuge in the nearest (safe) port in favour of the *MV Lifeline* that Malta was required to respect.[131]

A further doubt arises as to whether subsequent entry to port, as in the *MV Lifeline* case, can be considered as constitutive of the criminal offences of the captain abetting unauthorised immigration or of contributing to migrant smuggling or human trafficking.[132] Since there was no intent on the part of the captain, no financial gain whatsoever, and no discernible connection to any organised crime ring, the constitutive elements of the crime under the Smuggling Protocol cannot be established.[133] The absence of exploitation also disqualifies the applicability of the Trafficking Protocol.[134] Importantly for the captain's liability, because the transposition of these crimes into Maltese law requires similar

[127] UNCLOS, Art 18(2).
[128] *The Corfu Channel Case* (n 13), para. 215. See also T. Treves, 'Human Rights and the Law of the Sea', (2010) 28 *Berkeley Journal of International Law* 1, 3.
[129] UNCLOS, Art 19(1) (emphasis added).
[130] UNCLOS, Art 21(1). See also UNCLOS, Preamble, last paragraph, and Art 293.
[131] *Cf.* A. Chircop, 'Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an Ancien Regime?', (2002) 33 *Ocean Development & International Law* 207; and A. Chircop and O. Linden (eds), *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom* (Brill, 2006).
[132] For the time being there has not been any such accusation by Malta, but this has been the approach taken in similar cases in Italy. See, e.g. the *Open Arms* case (n 98) above.
[133] Smuggling Protocol, Arts 1(3), 3(a), 4 and 6.
[134] Trafficking Protocol, Arts 1(1), 3(a), 4 and 5.

conditions for the *actus reus* and *mens rea* elements to be fulfilled, their commission cannot be established under domestic regulations either.[135]

In addition, as the rescue operations occurred beyond the territorial waters of Italy and Malta, penal jurisdiction over the master or any other crewmember at the service of the ship should be understood as expressly reserved to 'the … authorities either of the flag State or of the State of which such person is a national', pursuant to Article 97 of UNCLOS, on the basis that the rescue could be viewed as an 'incident of navigation' under that provision and not a transnational crime. The emphasis on flag state authority further aligns with the recognition of the diverse duties of the flag state in exercising authority over its vessels, consistent with Article 92 of UNCLOS. Accordingly, neither Italy nor Malta could validly rely on different arrangements adopted under their domestic laws as an excuse not to observe this international provision.[136] As a result, this brings into question Maltese power to prosecute the *MV Lifeline*'s captain for rescue incidents.

Finally, with regard to the impoundment of the *MV Lifeline* in Valetta's port,[137] Article 97 of UNCLOS may also be relied upon, to the extent it provides that 'no arrest or detention of the ship, *even as a measure of investigation*, shall be ordered by any authorities other than those of the flag State'.[138] There is no basis for Malta to claim jurisdiction on this point when the incident is framed as a rescue situation on the high seas and, hence, an 'incident of navigation'. In exercising jurisdiction purely by reference to the Smuggling Protocol, Malta neglects other important international legal principles that are at play.

---

[135] Maltese Criminal Code, Ch 9 of the Laws of Malta, Arts 248A-248E, punishing 'traffic' <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574&l=1>. See also Maltese Immigration Act, Ch 217 of the Laws of Malta, Arts 5-25, regulating the situation of 'prohibited migrants'.
[136] Art 27 VCLT.
[137] 'MV Lifeline arrives, migrants disembark after Malta-brokered 8-nation agreement', *Malta Independent*, 27 June 2018, <http://www.independent.com.mt/articles/2018-06-27/local-news/MV-Lifeline-on-its-way-to-Senglea-will-dock-shortly-6736192557>.
[138] UNCLOS, Art 97(3) (emphasis added).

Any accusation that the *MV Lifeline* was allegedly 'illegally flying the Dutch flag'—an accusation the captain, crew, and NGO headquarters have consistently denied—has no bearing on a coastal state's right to exercise jurisdiction over a vessel that has entered port in distress following a rescue.[139] The contestation of the *MV Lifeline*'s flag seems strategic, as a move by Malta to find an alternative basis upon which to exercise jurisdiction, circumventing flag-state authorisation. In relation to matters regarding registration, it is a duty of the flag state to 'effectively exercise its jurisdiction and control'.[140] It is an exclusive prerogative of each state—the Netherlands in the case of the *MV Lifeline*—to 'fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag'.[141] No other state can interfere. The only thing UNCLOS allows is for '[a] state, which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised, [to] *report the facts to the flag State*'. On receipt of such report, then, 'the flag state *shall* investigate the matter and, *if appropriate*, take any action necessary to remedy the situation'.[142] Yet, this does not appear to be the procedure followed by Maltese authorities, which seem instead to have selectively adhered to its international obligations.[143]

### 3.2 Humanitarian lens

A humanitarian lens would add a different perspective and take account of the SAR regime and human rights and refugee law obligations concurrently applicable to the law of the sea and the Smuggling and Trafficking Protocols. This extra layer of law serves to elucidate the

[139] 'Italy migrant row: "Inhumane" Malta refuses rescue ship', *BBC News*, 22 June 2018 <https://www.bbc.com/news/world-europe-44571150>.
[140] UNCLOS, Art 94(1) and (2)(a).
[141] UNCLOS, Art 91(1).
[142] UNCLOS, Art 94(6) (emphasis added).
[143] For a detailed summary of court proceedings, see 'MV Lifeline captain charged with entering Maltese waters on unlicensed vessel, bail given', *Malta Independent*, 2 July 2018 <http://www.independent.com.mt/articles/2018-07-02/local-news/MV-Lifeline-captain-arrives-in-court-for-hearing-6736192797>.

sustainability of the accusation on the *MV Lifeline* 'of breaking international law by picking up migrants off the Libyan coast'.[144] Are NGOS forbidden from conducting rescues? Can states deliver binding orders on rescuing ships to hand over rescued persons to the authorities of an unsafe country? Can disembarkation be denied without regard to human rights?

The suggestion that rescue by civil-society organisations somehow requires prior approval by coastal states is a relatively new development in the Central Mediterranean. Italy reacted to NGOs' involvement in SAR by requiring them to commit to a controversial Code of Conduct in mid-2017,[145] while Malta has withdrawn landing rights to NGO assets to operate from the island, *de facto* disallowing their rescue activities.[146] No explicit legal argumentation has been made available in either case, which would explicate Italy and Malta's position. Presumably, both countries implicitly rely on the fact that the SAR regime creates duties on coastal states, regarding coast watching and search and rescue of persons in distress, as a basis to invoke a right to control how SAR is performed within their respective SRR. Moreover, they also presumably rely on ambiguities around disembarkation—in the absence of clear rules, they seem to believe they can set any requirements for how and when boats can disembark rescuees in their sovereign territory.

Yet, the obligation under UNCLOS on coastal states is to '*promote* the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea'.[147] There is no wording in support of a reading of this clause to the effect that such 'promotion' need be understood as an *exclusive* power of

---

[144] 'Malta detains second migrant rescue ship as hundreds die at sea', *The New Arab*, 3 July 2018 <https://www.alaraby.co.uk/english/news/2018/7/3/malta-detains-rescue-ship-as-hundreds-die-at-sea>.

[145] *Code of Conduct for NGOs Undertaking Activities in Migrants' Rescue Operations at Sea*, July 2017 (noting that each organisation has agreed its own modifications) <https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf>. For analysis, see C. Gombeer and M. Fink, 'NGOs and Search and Rescue at Sea' (2018) 4 *MarSafeLaw Journal* 1. *Cf.* V. Moreno-Lax, '"Nonsensical", "Dishonest", "Illegal": the Code of Conduct', *Sea Watch Interview*, 24 July 2017 <https://sea-watch.org/en/nonsensical-dishonest-illegal-the-code-of-conduct/>.

[146] (n 122) and FRA table of cases (n 121).

[147] UNCLOS, Art 98(2).

the coastal state to arrange for SAR—and especially not in a manner that may be detrimental to the regime's rationale. To the contrary, UNCLOS explicitly foresees that SAR responsibilities be shared with flag states, on which it places the separate duty to 'require the master of a ship flying its flag … to render assistance to any person found at sea in danger of being lost [and, crucially, also] to proceed with all possible speed to the rescue of persons in distress … in so far as such action may reasonably be expected of him'.[148] The SAR regime does not create any new sovereign powers in favour of coastal states, but rather 'area[s] of responsibility' to be overseen in good faith to preserve the safety of human life at sea.[149]

With that in mind, UNCLOS requires shipmasters to proceed to the rescue of vessels in distress 'if informed of their need of assistance'.[150] How that information is relayed is irrelevant. Both the SAR and SOLAS Conventions make clear that '[t]he master of a ship at sea which is in a position to … provide assistance *on receiving information from any source* that persons are in distress at sea, is bound to proceed with all speed to their assistance'. In so doing, their obligation vis-à-vis coastal states is, 'if possible', to 'inform … the search and rescue service that the ship *is doing so*' (as a matter of fact).[151] There is no prerequisite for shipmasters to seek prior permission to proceed. To the contrary, public authorities have an obligation ('shall') to 'facilitate the arrival and departure of ships engaged in … rescue [activities]'.[152]

---

[148] UNCLOS, Art 98(1).
[149] SOLAS, Annex, Ch V, Reg 7(1); SAR, Preamble, Recitals 1 and 3, and Annex, para. 2.1.1.
[150] UNCLOS, Art 98(1).
[151] SOLAS, Annex, Ch V, Reg 33(1) (emphasis added). SAR, Annex, para. 1.3.11, defining the 'distress phase' as '[a] situation wherein *there is a reasonable certainty* that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance', whatever the source of knowledge or information. This is confirmed by SAR, Annex, para. 2.1.9, establishing that '*[o]n receiving information* [from whatever source] that a person is in distress at sea in an area within which a Party provides for the overall co-ordination of search and rescue operations, the responsible authorities of that Party *shall* take urgent steps to provide the most appropriate assistance available' (emphasis added).
[152] 1965 Convention on the Facilitation of International Maritime Traffic ('FAL Convention'), 591 *U.N.T.S.* 265, Standard 7.8.

Apart from the general accusation 'of breaking international law by picking up migrants off the Libyan coast',[153] one of the objections levelled against the *MV Lifeline*'s conduct, mentioned above, is that the captain purportedly 'ignore[d] instructions of the responsible authority, i.e. the Libyan Coast Guard'.[154] This allegation is based upon the refusal of the Italian MRCC to coordinate the SAR operation, instead referring the captain to the Libyan authorities who ultimately indicated the 'Port of Tripoli'[155] for disembarkation.

Two issues intertwine in this chain of events: first, whether a country, other than the flag state, whether Italy, Libya, or Malta, can deliver (binding) 'instructions' to a vessel on the high seas in the context of a SAR operation; and, second, if so, whether there are any limits as for the subject matter of those instructions and their foreseeable effects. These questions have been addressed with regard to the Italian Code of Conduct for NGOs operating within its SRR.[156] And a similar conclusion can be reached in the current context. Due to the prohibition on any state claiming sovereignty over the high seas, no jurisdictional powers, different from those explicitly recognised by UNCLOS or other relevant international treaties, can validly be established to deliver orders with legal effect to foreign ships.[157] Freedom of navigation and the rule of exclusive flag-state jurisdiction support this interpretation.[158] What is more, in the specific context of SAR interventions, the SOLAS Convention makes clear that no 'other person … shall … prevent or restrict the master of the ship from taking or executing any decision which, *in the master's professional judgement*, is

[153] 'Malta detains second migrant rescue ship as hundreds die at sea', *The New Arab*, 3 July 2018 <https://www.alaraby.co.uk/english/news/2018/7/3/malta-detains-rescue-ship-as-hundreds-die-at-sea>.
[154] Malta RCC email to *MV Lifeline*, 24 June 2018 (on file with the authors).
[155] Libyan Navy email to *MV Lifeline*, 25 June 2018 (on file with the authors).
[156] Gombeer and Fink (n 145), 15 ff.
[157] UNCLOS, Art 89.
[158] UNCLOS, Arts 90 and 92(1).

necessary for safety of life at sea'.[159] Such level of discretion is essential to respond promptly and adequately to changing circumstances.

Therefore, as Gombeer and Fink have noted, on the high seas, contrary instructions could only be considered as 'requests for cooperation', intended to foster compliance with SAR obligations. Indeed, 'the search and rescue service concerned … has the *right to requisition* [assisting] ships [so that they] render assistance' and 'it shall [then] be the *duty* of the master [of the ship] requisitioned to comply with the requisition *by continuing to proceed* with all speed to the assistance of persons in distress'.[160] But that does not seem to allow for the *a contrario* reading of an implicit power to impede or prohibit SAR by NGO vessels—especially where they are objectively 'best able to render assistance'.[161] At most, the state with responsibility for the SAR region in which the vessel is located could seek to issue orders to a master of a vessel on the basis that the state concerned is fulfilling its primary responsibility to ensure cooperation in disembarking survivors and delivering them to a place of safety.[162] In case of any dispute, a MRCC may denounce non-cooperative behaviour on the part of the foreign vessel concerned to its flag state, but can claim no enforcement powers of its own.[163] So, for Italy and Malta to claim disobedience by the *MV Lifeline* captain when on the high seas as the basis for his prosecution has no grounding in international law.

However, this is different from the question of whether orders (intended as such) may amount 'to acts of [the contracting state's MRCC] authorities [adopted onshore but]

[159] SOLAS, Annex, Ch V, Reg 34-1 (emphasis added).
[160] SOLAS, Annex, Ch V, Reg 33(2) (emphasis added). According to SAR, Annex, para. 5.3.3.5: 'Upon the declaration of the distress phase, the rescue co-ordination centre … *shall request* at an early stage *any help* which might be available *from* aircraft, vessels or services not specifically included in the search and rescue organization, considering that, in the majority of distress situations in ocean areas, *other vessels in the vicinity* are important elements for search and rescue operations' (emphasis added).
[161] Ibid.
[162] SAR Convention, Annex, para. 3.1.9 (2004 Amendments).
[163] Gombeer and Fink (n 145) 17.

which produce effects outside its own territory',[164] thus triggering human rights jurisdiction capable of leading to the establishment of responsibility of the state concerned.[165] 'What is decisive in such cases is the exercise of physical power and control over the person in question'.[166] But direct contact is not always necessary—instances of 'contactless control' have been adjudged to be relevant as well.[167] The focus should be on the content and effect of the acts concerned.[168]

As regards the content of instructions, in line with Gombeer and Fink's findings, these cannot be such as to contravene the purpose of the SAR regime—which is to preserve the integrity of human life at sea.[169] Nor can they violate the prohibition of *refoulement*, the right to life, the 'right to gain effective access to the procedure for determining refugee status',[170] and associated procedural protections against arbitrary or collective expulsion—none of which are guaranteed at the hands of Libyan authorities, neither on board LYCG vessels nor on dry land.[171]

The foreseeable effects of the instructions given by MRCC Rome first—relinquishing responsibility and requiring the *MV Lifeline* to liaise with the LYCG instead—and the subsequent instructions by RCC Malta to the same effect, are essential factors in assessing the possible risks of *refoulement* and related guarantees. Both countries 'knew or ought to have known' that such course of action would lead survivors to being taken back to

[164] ECtHR, *Drozd & Janousek v. France and Spain*, Appl. 12747/87, 26 June 1992, para. 91; ECtHR, *Loizidou v. Turkey* (Preliminary Objections), Appl. 15318/89, 23 March 1995, para. 62.
[165] For an elaboration, see Moreno-Lax (n 60) ch 8 and references therein.
[166] ECtHR, *Al-Skeini v. UK*, Appl. 55721/07, 7 July 2011, para. 136.
[167] ECtHR, *N.T. & N.D. v. Spain*, Appls 8675/15 and 8697/15, 7 July 2015, para. 54, on the effect of the Melilla fence; and ECtHR, *Women on Waves v. Portugal*, Appl. 31276/05, 3 February 2009, on a 'contactless' blockade at the rim of Portuguese territorial waters.
[168] *Cf.* The HRC speaks of 'impact' of state conduct on the rights of all persons subject to its jurisdiction, that is, 'all persons over whose enjoyment of the right[s] [concerned] it exercises power', including 'persons located outside any territory effectively controlled by the State, whose [rights are] nonetheless *impacted* by its military and other activities' (emphasis added), in General Comment No. 36 (n 57), para. 63. This provides a much broader scope of actions and omissions that may trigger responsibility under international law.
[169] Gombeer and Fink (n 145), 18.
[170] *Amuur* (n 62), para. 43; *M.S.S.* (n 63), para. 216; *Hirsi* (n 68), para. 133 et seq.
[171] See reports by OHCHR and others (n 100).

Libya.[172] Acting in the knowledge that the life or integrity of persons in distress will be threatened, if delivered to the authorities of an unsafe country, is sufficient to infringe the positive, due diligence obligations attaching to rights of 'boat migrants' directly affected by the instructions at issue.[173] The same applies to a denial of permission to disembark, which may foreseeably endanger those on board the rescuing ship and nullify ancillary procedural entitlements. Although coastal states may not bear full responsibility to provide for a place of safety within their own territory under the SOLAS and SAR Conventions, the need to allow for disembarkation may arise out of the necessity to honour human rights.[174] State SAR obligations intersect with human rights and refugee law responsibilities, which constrain sovereign discretion and limit the options left for choice of action.[175] Neither Italy nor Malta could legitimately indicate (directly or indirectly) a transfer of survivors to the LYCG authorities without thereby violating their human rights obligations.

In sum, the 'closed ports' strategy, as part of the wider criminalisation of solidarity with 'boat migrants' expressed by SAR NGOs and others, is unsustainable under international law. It follows a highly selective understanding of the law of the sea provisions and ignores parallel obligations concurrently applying in situations of distress. A much better approach is the one followed by the French Constitutional Court, recognising in a historic first that 'Fraternity' has constitutional force, alongside 'Liberty' and 'Equality'—the triad of values underpinning the French foundational text binding the French legislator. According to the Court, acts of mutual aid undertaken for humanitarian purposes cannot be punished or

[172] *M.S.S.* (n 63), paras 258-259, 263, 358-359, and 366-367; and *Hirsi* (n 68), paras 118, 123, 125-126, 156-157.
[173] On the importance of knowledge of foreseeable consequences, see Moreno-Lax and Giuffré (n 69), referring to *M.S.S.* (n 63) and *Hirsi* (n 68).
[174] See also ECtHR, *Leray v. France*, Appl. 44617/98, 16 January 2001, where the Strasbourg court concluded that SAR operations are susceptible of judicial review in light of the right to life. For an elaboration, see L.-M. Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?', in Moreno-Lax and Papastavridis (n 1) 236.
[175] S. Trevisanut, 'Is There a Right to be Rescued? A Constructive View', (2004) 4 QIL 3, 9-11. See also Moreno-Lax (n 37). *Cf.* E. Papastavridis, 'Is There a Right to be Rescued? A Skeptical View', (2004) 4 QIL 17.

repressed, irrespective of the status of the persons helped, even where that results in their irregular entry into national territory without authorisation.[176] A similar approach should guide legislators and prosecutors across jurisdictions when confronted with 'boat migration' situations in the Mediterranean and beyond.

## 4. The Australian Containment Approach: The SIEV 885 Case

Australia's experience provides a further example of what happens when a security-framed approach to 'boat migration' is taken to its logical conclusion. The recent moves by Italy and Malta to close their ports to the *MV Lifeline* discussed above echo the Australian government's response to the *MV Tampa* back in 2001.[177] The decision to block the *MV Tampa* from accessing the Australian port of Christmas Island to disembark 433 asylums seekers rescued at sea was the trigger for Australia's introduction of a maritime interdiction and offshore processing policy that survives to this day.[178] The adequacy of related practices in light of international obligations is what we turn to analyse hereunder.

### 4.1 *Operation Sovereign Borders*

The securitised approach has intensified with the introduction of the military-led *Operation Sovereign Borders* in 2013. Thereafter, boats suspected of carrying unauthorised migrants are intercepted at sea by Australian border protection vessels.[179] The priority is blocking access to Australian territory and returning migrants to their point of departure. The way in which

[176] Conseil Constitutionnel, Décision n° 2018-717/718 QPC du 6 juillet 2018. See also 'France's Top Court Shows Us That Helping Migrants Is Not a Crime', *Human Rights Watch*, 10 July 2018 <https://www.hrw.org/news/2018/07/10/frances-top-court-shows-us-helping-migrants-not-crime>.
[177] For a detailed analysis of the incident, see M. Crock and D. Ghezelbash, 'Do Loose Lips Bring Ships?: The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals', (2010) 19 *Griffith Law Review* 238.
[178] Offshore processing and maritime interdiction were used until 2007. Offshore processing was reintroduced in 2012, and maritime interdiction in 2013 as part of Operation Sovereign Borders discussed below. For an analysis of maritime interdiction and offshore processing between 2001 and 2007, see Ghezelbash (n 6) ch 5.
[179] 'The Coalition's Operation Sovereign Borders Policy', Liberal Party of Australia and The Nationals (July 2013) <http://sievx.com/articles/OSB/201307xxTheCoalitionsOSBPolicy.pdf>. Note that this is a cached version as the original policy document was removed from the Party websites at the start of the 2016 election campaign.

this is achieved varies, based on the country to which return is being sought. Push-backs to Indonesia involve leaving migrants on the edge of Indonesian territorial waters, either in their own boat or Australian provided lifeboats.[180] Migrants are then provided with instructions and enough fuel and supplies to make it back to shore in Indonesia.[181] This approach is necessitated by the fact that Indonesia does not consent to the push-back operations and thus any incursion into its waters by Australian authorities would constitute a breach of Indonesian sovereignty.[182] In contrast, cooperation from Sri Lanka and Vietnam is more forthcoming in respect to facilitating returns, with 'consensual' arrangements in place for the return of people from those countries who are intercepted at sea.[183]

As the case study examined in this section explores further, it will, however, not always be possible to return intercepted migrants. Where this is the case, they are brought to Australia and then promptly transported by plane to one of Australia's Pacific offshore processing centres.[184] After a hiatus of approximately five years, Australia reopened the facilities on Manus Island in Papua New Guinea ('PNG') and the tiny Pacific island nation of Nauru in late 2012. Following a PNG Supreme Court decision finding detention at the Manus facility unlawful, Australia announced the closure of that centre and suspension of future transfers to PNG.[185] As such, any future boat arrivals that cannot be returned to their point of

---

[180] Schloenhardt and Craig (n 3) 548.
[181] See the details of push-back operations collated from media reports in Schloenhardt and Craig (n 3), 550-89.
[182] The return of migrants by a warship or coast guard vessel to the territorial sea of another state, without authorisation, does not fall under the exception of innocent passage. See Section 2.1 above.
[183] *Memorandum of Understanding between the Government of Australia and the Government of Sri Lanka concerning Legal Cooperation against the Smuggling of Migrants*, 9 November 2009 <https://www.ag.gov.au/RightsAndProtections/FOI/Documents/MOU%20with%20Sri%20Lanka%20on%20the%20Smuggling%20of%20Migrants.PDF>; The MOU between Australia and Vietnam is not publically available, but see 'Australia and Vietnam further Cooperation to Stamp out People Smuggling', Ministry of Home Affairs Media Release, 12 December 2016 <https://minister.homeaffairs.gov.au/peterdutton/Pages/Australia-and-Vietnam-further-cooperation-to-stamp-out-people-smuggling.aspx>.
[184] For a detailed examination of Australia's offshore processing policies, see B. Opeskin and D. Ghezelbash, 'Australian Refugee Policy and its Impacts on the Pacific', (2016) 36 *Journal of Pacific Studies* 73.
[185] *Namah v Pato* [2016] PJSC 13 (Supreme Court of Justice, Papua New Guinea); M. Turnbull and P. O'Neill Joint Press Conference, 8 April 2017 <https://www.pm.gov.au/media/2017-04-08/joint-press-conference-hon-peter-oneill-cmg-mp-prime-minister-papua-new-guinea>.

departure will be transferred to Nauru.[186] Australia has made it clear that it does not intend to resettle any of the refugees transferred to either of those facilities in Australia. Instead, it has entered into agreements with third countries to provide resettlement options.[187] The sum effect of the push-back and offshore processing policy is to completely block access to asylum procedures in Australia for those who travel by boat without authorisation.

The fate of the passengers on board a vessel labelled as SIEV 885 by the Australian government provides an instructive example on how this policy is implemented in practice.[188] The interdiction and push-back component of Australia's current policies is shrouded in secrecy. The government has an explicit policy of not commenting on what it refers to as on-water 'operational matters' for security reasons.[189] Given this secrecy, the exact details of individual interdiction and push-back operations are difficult to ascertain. Basic questions, including exactly where interdictions take place, the amount of time interdictees are detained at sea, and what powers the government purports to be acting under, remain unanswered.[190] This creates serious impediments to assessing whether the government's actions conform with domestic and/or international law. SIEV 885 is one of the few examples where this veil of secrecy has been pierced. Passengers on board managed to reach a refugee advocate in

[186] Although it should be noted that no arrival has been transferred to PNG or Nauru since July 2014.
[187] See, e.g., *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Settlement of Refugees in Cambodia*, 26 September 2014 <http://www.refworld.org/docid/5436588e4.html>; M. Turnbull and P. Dutton, 'Refugee Resettlement from Regional Processing Centres', Media Release, 13 November 2016 <https://www.liberal.org.au/latest-news/2016/11/14/refugee-resettlement-regional-processing-centres>.
[188] Suspected Irregular Entry Vessels (SIEVs) are allocated an identifying number by the Department in order of date of arrival.
[189] 'Scott Morrison says Government won't reveal when asylum seekers boats turned back', *ABC News*, 24 September 2013 <www.abc.net.au/news/2013-09-23/government-won27t-reveal-when-boats-turned-back/4975742>.
[190] Attempts to have the government release this information through Freedom of Information provisions have proved largely unsuccessful. See *Re Secretary, Department of Immigration and Border Protection and Paul Farrell* [2017] AAT.

Australia who briefed lawyers to launch a legal challenge. Details of their journey and the Australian government's response were revealed in the course of the ensuing litigation.[191]

On 13 June 2014, the Indian vessel set off from Pondicherry with 157 Sri Lankan Tamil asylum seekers aboard.[192] Their plan was to travel to Australia's offshore territory of Christmas Island, 1,550 Km northwest of the mainland.[193] Approximately two weeks into the journey, the vessel began experiencing engine trouble. One of the passengers called the Australian Maritime Safety Authority (AMSA), Australia's search and rescue agency, and requested assistance. AMSA then tracked the boat's progress and maintained regular phone contact over the coming days. Phone calls were also made by a passenger to a number of refugee advocates in Australia, updating them and reiterating that the vessel was in distress. On 28 June 2014, the Australian government dispatched two border protection vessels to respond to the situation. These boats reached the asylum seeker vessel on 29 June 2014. At this point, there was an 'incommunicado' where the refugee advocates could no longer contact the asylum seekers on the vessel, and a refusal from the Minister to confirm the existence or status of the vessel or the people on it.[194] By this time, the SIEV 885 was around 16 NM from Christmas Island, inside Australia's contiguous zone.[195] The engine had been damaged and the vessel was assessed by Australian authorities as being unseaworthy.

Australian maritime officers boarded and detained the SIEV 885 and all 157 people aboard were removed onto the Australian border protection vessel.[196] On 1 July 2014, the

---

[191] *CPCF* (n 7); 'Defendants' Chronology', Submission in *CPCF v Minister for Immigration and Border Protection*, No S169 of 2014, 30 September 2014; 'Plaintiff's Chronology', Submission in *CPCF v Minister for Immigration and Border Protection*, No S169 of 2014, 11 September 2014.
[192] Defendants' Chronology (n 191), 2; Originally there were 37 children and 32 women identified among 153 Tamil asylum seekers on board: Transcript of Proceedings, *JARK v Minister for Immigration and Border Protection* [2014] HCATrans 148, at 12; This was later increased to 157 people including 50 children: Transcript of Proceedings, *CPCF v Minister for Immigration and Border Protection* [2014] HCATrans 164, at 6; See also Schloenhardt and Craig (n 3) 556.
[193] Transcript of Proceedings (n 192) 12.
[194] Transcript of Proceedings (n 192) 12-14.
[195] Defendants' Chronology (n 191), 1; Plaintiff's Chronology (n 191), 25.
[196] Defendants' Chronology (n 191), 2-3; Plaintiff's Chronology (n 191), 1-2.

National Security Committee of Cabinet, the peak decision-making body for national security in Australia, decided that the detainees should be returned to India, pursuant to Australia's boat turn-back policy, and the Australian vessel travelled towards India for the next 10 days with the detainees aboard.[197] It arrived near India on 10 July 2014, and waited there for 12 days, while diplomatic negotiations were carried out to facilitate repatriation.[198] On 23 July, negotiations seem to have broken down, prompting the Australian government to decide to take the passengers to Cocos (Keeling) Islands, an Australian external territory in the Indian Ocean.[199] The passengers disembarked the Australian border protection vessel on 27 July 2014, after 29 days of detention at sea. During this time, the asylum seekers, including 50 children, were kept in windowless rooms on the Australian border protection vessel and were only allowed outside for three hours a day.[200] Families were split up, with fathers held separately from their wives and children.[201] Immediately after their arrival at Cocos Island, the asylum seekers were transferred to the immigration detention facility in Curtin, in remote Western Australia.[202] Late in the evening of 1 August 2014, the passengers were removed from Australia and flown to the regional processing centre on Nauru, where most still remain.[203]

### 4.1 Security Lens

The government's response to the SIEV 885 was carried out pursuant to legislative provisions, which incorporate a number of the security-related enforcement powers found in

[197] Defendants' Chronology (n 191), 3.
[198] Ibid., 4.
[199] Ibid.
[200] 'After Four Weeks at Sea 157 Asylum Seekers Have Landed in Australia', *Vice*, 28 July 2014 <https://www.vice.com/en_au/article/5gkwn8/after-four-weeks-at-sea-157-asylum-seekers-have-landed-in-australia>.
[201] Ibid.
[202] 'Asylum Seekers: A Timeline of the Case Involving 157 Tamil Asylum Seekers Intercepted at Sea' *ABC News*, 14 October 2014 <http://www.abc.net.au/news/2014-08-04/timeline-157-asylum-seekers-intercepted-at-sea/5647852>.
[203] See, e.g., 'Sri Lankan Asylum Seeker Tells of Terror on Nauru: "If I am Sent back I Will Kill Myself"', *The Guardian*, 3 February 2016 <https://www.theguardian.com/australia-news/2016/feb/03/sri-lankan-asylum-seeker-tells-of-terror-on-nauru-if-i-am-sent-back-i-will-commit-suicide>.

UNCLOS into domestic Australian law.[204] The *Maritime Powers Act 2013* (Cth) (*MPA*) authorises the exercise of maritime powers against foreign vessels in Australia's contiguous zone, where there are reasonable grounds to suspect the vessel is involved in a contravention of Australian migration laws.[205] This is modelled on Article 33 of UNCLOS.[206] Once enlivened, the legislative provisions provide wide ranging powers purportedly authorising the actions initially taken against SIEV 884, including intercepting, boarding,[207] searching[208] and detaining the vessel[209] and passengers,[210] and moving them to the Australian Border Protection vessel.[211] Once SIEV 885 had been detained and the passengers transferred to the Australian vessel,[212] the power under s 72(4) was engaged, authorising detention for the purpose of taking a person to a place inside or outside Australia's migration zone.[213]

This was the key legislative provision in dispute when a number of the asylum seekers challenged their treatment in the Australian High Court in *CPCF*.[214] While, initially, the asylum seekers had sought injunctive relief to prevent their return to Sri Lanka or India, the government's decision to move them to Nauru made this point moot. The case was reframed around the issue of wrongful imprisonment. The asylum seekers argued that the decision to take them to India was invalid and their detention at sea for almost a month for the purpose of facilitating this unlawful. The argument turned on the accepted Australian constitutional principle that a statute authorising executive detention must limit the duration of incarceration to what is reasonably seen as necessary to affect an identified statutory

[204] Also note that they later claimed that their actions were also justified under the executive power. For an examination of the ramifications of this argument, see B. Tomasi, 'Variation on a Theme: CPCF v Minister for Immigration and Border Protection [2015] HCA 1', (2015) 39 *University of Western Australia Law Review* 426.
[205] *MPA,* s 9, s 41(1)(c).
[206] Explanatory Memorandum to the Maritime Powers Bill 2012 (Cth), 38.
[207] *MPA* ss 52-53.
[208] Ibid., s 59(1).
[209] Ibid., s 69.
[210] Ibid., s 71, 72(4).
[211] Ibid., s 72(5).
[212] The court found that the geographical limitation in s 41 no longer applied once this factual scenario occurred. This is now provided for in s 75D of the *Migration and Maritime Powers Amendment Act.*
[213] The term 'migration zone' in s 8 of the MPA has the same meaning as in s 5(1) *Migration Act 1958* (Cth).
[214] *CPCF* (n 7).

purpose, which is reasonably capable of being achieved.[215] The fact that there was no agreement with India to accept disembarkation made the duration of detention uncertain.

Yet, in a close 4:3 majority decision, the High Court found that the detention of the plaintiffs was authorised. Reflecting Australia's dualist legal system, the case did not directly deal with international law, but rather the implementing legislation. The majority justices were all of the view that s 72(4) of the *MPA* did not require certainty of disembarkation at a specific destination. Chief Justice French noted that the statute could not be construed as authorising 'futile or entirely speculative taking'. However, it did authorise detention when there is knowledge or reasonable belief that the destination country will allow the person to enter its territory.[216] The ongoing diplomatic negotiations between Australian and Indian officials were sufficient to support this requisite reasonable belief. Justice Crennan concurred, finding that while removal must be to a reasonable place and within a reasonable time, s 72(4) did not require certainty of disembarkation at a specific destination.[217] Justice Gageler adopted a similar approach, finding that the only limitation on the power was that it be exercised reasonably, in good faith, and in accordance with the objects of the Act.[218]

### 4.2 Humanitarian Lens

Both the government's actions against the passengers of SIEV 885 and the ensuing legal challenge centred around security-related interdiction laws. However, as set out above, governments' responses are also regulated by the international SAR regime, and international refugee and human rights law. The *MPA* is clear that the powers in the Act operate independently, and in addition to, any action where the exercise is to ensure the safety of the

[215] *Lim* (1992) 176 CLR 1, 33–4 (Brennan, Deane and Dawson JJ); *CPCF* (n 7), para. 196 (Crennan J).
[216] *CPCF* (n 7), paras 46–50.
[217] Ibid., paras 205–7.
[218] Ibid., paras 360–1.

officers or any other person.[219] What follows is, accordingly, a brief examination of what Australia's response would have looked at, if it had framed its interaction with the passengers through a SAR or refugee and human rights lens, inspired by the systemic integration paradigm.

Australia is a party to both the SOLAS and SAR Conventions.[220] The fundamental duty to rescue persons in distress at sea is implemented in domestic law through the *Navigation Act 2012* (Cth). The duty applies to masters of government and border protection vessels,[221] but certain navy vessels are exempt.[222] AMSA is the statutory authority established to satisfy Australia's obligations to provide rescue services under the SOLAS and SAR Conventions.[223] It was AMSA that initially coordinated the response to SIEV 885, after the authority received a number of distress calls from the vessel. The response thus began as a SAR event, with two border protection vessels deployed to respond to the calls. The government presumably purports that the rescue came to an end when the rescuees were transferred aboard the Australian ship. Details in relation to how rescues are to be performed are not set out in legislation. Rather, they are included in the National Search and Rescue Manual (NATSAR).[224] This is an administrative instrument promulgated by the National Search and Rescue Authority Council. It is recognised by the Australian Defence Force as a 'standard procedure guide' and 'authoritative instruction on SAR best practice'.[225] Reflecting the position in international law, the manual provides that a rescue terminates when the

[219] *MPA* s 29.
[220] The SOLAS Convention and the SAR Convention entered into force for Australia on 17 November 1983 and 22 June 1985 respectively. See IMO, *Status of Multilateral* Conventions, 6 July 2018 <http://www.imo.org/en/About/Conventions/StatusOfConventions/>.
[221] *Navigation Act 2012* (Cth) s 11.
[222] Ibid., s 10.
[223] *Australian Maritime Safety Authority Act 1990* (Cth) ss 6(1), 6(5).
[224] The National Search and Rescue Manual is a reference document of standardised procedures promulgated by the Australian National Search and Rescue Council (NATSAR).
[225] See Letter of Promulgation by Vice Admiral DL Johnston, 21 December 2017, reproduced in National Search and Rescue Manual (AMSA, February 2018) 3.

survivors are removed to a 'place of safety'.[226] However, the meaning of the term is not specified.

The designation of a rescue vessel as a place of safety is questionable under international law, where the concept remains ill-defined and subject to divergent state practice.[227] As noted previously, the IMO Guidelines describe a place of safety as a location where rescue operations are considered to terminate, and where the basic human needs of survivors to food, shelter, and medical treatment can be met.[228] The 2004 amendments of the SAR and SOLAS Conventions state that survivors are to be 'disembarked from the assisting ship and delivered to a place of safety.'[229] This appears to imply that the assisting ship cannot be a 'place of safety'. The IMO Guidelines recognise that a rescue vessel at sea may be deemed as 'a temporary place of safety',[230] fulfilling that function 'until the survivors are disembarked',[231] but making clear that 'an assisting ship *should not* be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship'.[232] This is why many commentators interpret these provisions as requiring that rescuees be taken to landfall.[233] While a rescue ship may be a provisional place of safety, transfer onto that vessel will not terminate the rescue, which only concludes upon disembarkation.[234] On this reading, Australia's enforcement actions against SIEV 885 were

[226] National Search and Rescue Manual, ibid., 7.2.1.
[227] M. Ratcovich, 'The Concept of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever Controversial Question of Where to Disembark Migrants Rescued at Sea?', (2015) 33 AustYBIL 81, 125-6; B. Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception', (2006) 30 *Fordham International Law Journal* 75, 87; Ghezelbash et al. (n 64) 323; Dastyari (n 30) 89-93.
[228] IMO Guidelines (n 42). While not binding, the guidelines are relevant in interpreting the obligations set out in UNCLOS, SOLAS and SAR conventions.
[229] SOLAS, Annex, Ch V, Reg 33(1-1); SAR Convention, Annex, Ch 3, para. 3.1.9.
[230] IMO Guidelines, para. 6.13.
[231] IMO Guidelines, para. 6.14.
[232] IMO Guidelines, para. 6.13 (emphasis added).
[233] Dastyari (n 30), 91; Moreno-Lax (n 37).
[234] IMO Guidelines, 6.13; UNHCR, *Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees* (undated), 7 <http://www.unhcr.org/450037d34.pdf>.

unlawful. And, as such, Australia did not have the authority to exercise interdiction powers until *after* the rescue operation had come to an end.[235]

Assuming a ship cannot be a place of safety, then, where should the Australian government have taken the rescuees for disembarkation? This is again a vexing issue under international law. There is no clear duty on flag or coastal states to accept disembarkation of rescued persons, but international human rights and refugee law obligations impose limits on the choices available. The Australian territory of Christmas Island would have been the most obvious option, given that it was only 16 NM away from the location of rescue. However, there is nothing in the international SAR regime directly mandating such course of action. The 2004 amendments to the SOLAS and SAR Conventions again provide some clarity, but did not go as far as mandating specific modalities. They do require contracting governments to arrange for 'disembarkation to be effected as soon as reasonably practicable' and to do it in a way that 'does not further endanger the safety of life at sea'.[236] Australia's actions in holding the rescuees at sea for 29 days while attempting to disembark them in India are difficult to reconcile with this requirement. One complicating factor is that the waters surrounding Christmas Island in which the rescue of SIEV 885 occurred fall under Indonesia's SRR. This is significant, as the 2004 amendments assign 'primary responsibility' for organising disembarkation to the government responsible for the SRR.[237] This raises the peculiar situation in which Indonesia was responsible for coordinating the disembarkation of rescuees picked up 16 NM from Australia's shores by Australian government vessels.[238]

---

[235] Dastyari (n 30), 91.
[236] SOLAS Convention, Annex, Ch V, Reg 33.1.1, SAR Convention, Annex, Ch 3, para. 3.1.9.
[237] IMO Guidelines, paras 2.3–2.5.
[238] Similar scenarios have arisen in the past in the Mediterranean on account of the overlapping SRRs of Italy and Malta, with Lampedusa, although part of Italian territory, lying in closer proximity to Malta, further compounding rescue coordination activities. See, e.g., the *MV Budafel* tuna pen affair as reported in 'UN rebuke as governments squabble over immigrants found clinging to tuna nets', *The Guardian*, 29 May 2007 <https://www.theguardian.com/world/2007/may/29/libya.johnhooper>.

International human rights and refugee law provides for additional protections that were relevant to Australia's treatment of the rescuees aboard SIEV 885 and the disembarkation decision. The *non-refoulement* obligations contained in the 1951 Refugee Convention and a number of human rights treaties place additional constraints on where rescuees may be taken. These principles have crossed over into the SAR regime, with the IMO Guidelines confirming that asylum seekers rescued at sea should not be disembarked in territories where they may face a well-founded fear of persecution.[239]

Reports indicate that Australia was initially considering returning the rescuees to Sri Lanka. This would have likely breached Australia's *non-refoulement* obligations, given the fears articulated by the rescuees about being returned to that country.[240] The decision to attempt disembarkation in India was also problematic. There is no evidence that any of the rescuees feared direct harm in India. However, that is not in itself enough to absolve Australia of its *non-refoulement* obligations—including concomitant procedural guarantees. For this to happen, prior to any removal action, the Australian government would have to be satisfied—through individual procedures meeting fair trial standards conducted by Australia[241]—that the rescuees would be afforded 'effective protection' in India. In turn, such 'effective protection' requires, in particular, that there be 'guarantees of protection from *refoulement,* fair and efficient procedures for the determination of refugee status, and respect for human rights' in each individual case.[242] It is unlikely that India can be considered to offer such protection because it has not signed the Refugee Convention, nor does it have any

[239] Ibid., para. 6.17.
[240] *CPCF* (n 7), para. 1.
[241] Moreno-Lax (n 60) ch 10 and references therein.
[242] See Schloenhardt and Craig (n 3) 568. See also S.H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', (2003) 15 IJRL 567, 629–64. These principles are also set out in UNHCR, *Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9–10 December 2002)* (February 2003). *Cf.* V. Moreno-Lax, 'The Safe Third Country Notion Contested: Insights from the Law of Treaties', in Goodwin-Gill and Weckel (eds.), *Migration & Refugee Protection in the 21st Century: Legal Aspects* (Brill, 2015) 665.

procedures for processing refugee claims. The application of the principle of *non-refoulement* does not translate to a general right to asylum or entry.[243] However, in order to comply with the principle, states must have procedures in place to identify persons in need of protection—which must be conducted by the competent authorities under proper conditions (on dry land).[244] Evidence tendered in relation to the *CPCF* litigation indicated that Australia failed to provide such procedures.[245] Rescuees were at no stage provided with any effective opportunity to be heard. While they were asked basic biographical details, they were not asked why they left Sri Lanka or if they feared being returned there or to India.[246]

A human rights focused response from Australia would have precluded prolonged detention at sea. This detention was almost certainly arbitrary, in violation of Article 9 of the ICCPR.[247] While detention for immigration related purposes is permissible in certain circumstances, it requires an individualised assessment as to whether detention is 'reasonable, necessary and proportionate' in every given case.[248] This must be reassessed as detention extends in time and remains subject to judicial review.[249] Moreover, in order for detention to not be arbitrary, its duration must be predictable.[250] Given the open-ended nature of discussions relating to disembarkation, this predictability did not exist. In addition, the conditions of the prolonged detention at sea may also have breached the prohibition of 'cruel, inhuman or degrading treatment or punishment' under Article 7 of the ICCPR and the requirement in Article 10(1) that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. As discussed above,

[243] J.C. Hathaway, *The Rights of Refugees Under International Law* (CUP, 2005) 300–1; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (OUP, 2007) 215. *Cf.* Moreno-Lax (n 60) ch 9 on the combined effect of the right to leave any country and the prohibition of *non-refoulement*.
[244] Goodwin-Gill and McAdam (n 243), 277.
[245] *CPCF* (n 7), paras. 2040–70.
[246] Ibid.
[247] ICCPR, Art 9(1).
[248] HRC, 'General Comment No 35: Article 9 (Liberty and Security of Person)', (2014) CCPR/C/GC/35, 18.
[249] Ibid. See further, V. Moreno-Lax, 'Beyond *Saadi v UK*: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law', (2011) 5 HR&ILD 166.
[250] HRC, Comm. 1134/2002, *Gorji-Dinka v. Cameroon*, 17 March 2005, para. 5.1; and Comm. 305/1988, *van Alphen v. Netherlands*, 23 July 1990, para. 5.8.

the migrants were separated from their families and held in windowless rooms for 21 hours a day for the duration of their 29 days of detention at sea.[251]

Australia's response to 'boat migration' is framed almost exclusively as a matter of national security. The government attempts to justify its actions with reference to its security-related interdiction powers under the law of the sea and corresponding domestic legislation. The treatment of the passengers aboard SIEV 885 illustrates how this framing plays out in practice—157 men, women and children detained in unduly harsh conditions at sea for close to a month, while the Australian government deployed all its diplomatic resources in a bid to ensure they would not be brought to Australia. The government's securitised response sidelines the other international legal regimes that are relevant, such as the SAR regime and international human rights and refugee law. While arguably authorised under its security-related interdiction powers, Australia's actions were not in step with its broader obligations under these other regimes. An integrated approach to Australia's obligations under international law would have necessitated the immediate transfer of the rescuees to the Australian territory of Christmas Island. This was the closest place of safety on land at which disembarkation could bring the rescue to an end. Only then could enforcement powers be exercised. It is noteworthy that the fate of the asylum seekers would have most likely been the same in the end, with them being transferred to Australia's offshore processing sites in PNG and Nauru. However, the integrated approach would have prevented their extended detention at sea, which was not only arbitrary, but potentially amounted to inhuman treatment and was contrary to the need to respect the inherent dignity of detainees.

## 5. Conclusion

[251] The High Court did not directly address the conditions of detention in *CPCF* (n 7). The main issue was false imprisonment, and, thus, the analysis focused on whether the government had a legal basis for the detention.

These two case studies place in sharp relief how different bodies of international law interact and may be brought to bear in particular factual scenarios. Fragmentation of international law is at risk when states select which body of international law applies, or prevails, in responding to individual situations on account (only) of security or other national concerns.[252] Beyond risks to the normative structure of international law, far more problematic is that selective application of international law results in the commission of internationally wrongful acts,[253] eroding the good faith foundation of the entire system,[254] and ultimately translating into a life or death difference for 'boat migrants'.

In highlighting the humanitarian lens for each of our case studies, we have shown that it does not have to be this way. The normative structures of international law provide answers in reconciling the different legal regimes at stake, including via systemic integration.[255] Our case studies could have had very different outcomes as a result. In relation to the *MV Lifeline*, we have shown that Malta should have permitted the entry of the vessel into port. Moreover, in pursuing the criminal prosecution of the captain and seizure of the vessel under the Smuggling Protocol and its national law, the requirements and expectations of the SAR regime have been thoroughly undermined. For the SIEV 885 case, Australian decision-making by both government officials and the Australian High Court effectively prioritised border control over any proper regard for human rights.

The policy imperatives of states like Italy, Malta, and Australia clearly do not favour a humanitarian lens as a response to SAR and 'boat migration'. Nonetheless, in highlighting the alternative perspectives, we have sought to ensure that there is a path

[252] On fragmentation, see (n 8) above.
[253] A state commits an internationally wrongful act 'when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State'. Art 2, International Law Commission's Articles on State Responsibility, reprinted in J. Crawford, *The International Law Commission's Articles on State Responsibility* (CUP, 2002) 81.
[254] Kolb (n 9).
[255] For a concrete proposal and further references, see Moreno-Lax (n 10). See also Klein (n 8), 807-13; and (nn 11 and 15) on Article 31(3)(c) of VCLT and systemic integration at large.

forward to integrate all international law obligations that concurrently apply in the maritime context. This shift in focus is essential for any country committed to a rules-based international order, as both Australia and the European Union (as well as its Member States) profess to do.[256] '[T]he special nature of the maritime environment', as asserted by the European Court of Human Rights, 'cannot justify an area outside the law where ships' [captains] crews [and passengers] are covered by no legal system capable of affording them enjoyment of the[ir] rights'.[257] Italy has recognised, in its case against India under the UNCLOS dispute settlement procedures, that 'considerations of humanity and international standards of due process apply to the law of the sea'.[258] And so much is true not only for Italian nationals, but for any person facing danger or distress at sea.

[256] Australian Government, *2017 Foreign Policy White Paper,* chs 4 and 6 <https://www.fpwhitepaper.gov.au/foreign-policy-white-paper>; and Art 3(5), Treaty on European Union, [2010] OJ C 83/1.
[257] *Medvedyev* (n 37), para. 81.
[258] Dispute concerning the 'Enrica Lexie' Incident (Italy v India), Request for Provisional Measures, para. 84 <http://www.pcacases.com/pcadocs/Request/Italys%20Request%20for%20Provisional%20Measures.pdf>.