Dottorato di ricerca in Ordine internazionale e diritti umani, Sapienza, Università di Roma - Intercenter, Università di Messina

Ordine internazionale e diritti umani

International Legal Order and Human Rights
Ordenamiento Jurídico Internacional y Derechos Humanos
Ordre juridique international et Droits de l'Homme

ENRICO ZAMUNER*

SEARCH AND RESCUE OF MIGRANTS IN THE MEDITERRANEAN SEA BETWEEN PUBLIC RESPONSIBILITY AND PRIVATE ENGAGEMENT: AN INTERNATIONAL AND EU LAW PERSPECTIVE

1. *Introduction*

The law of the sea is neither more nor less permeable than other areas of the international legal system to the pervading force of human rights[1]. Such a relationship has actually very long-standing roots: one of the most ancient rules of maritime law – that which requires every ship to provide assistance to human beings in distress at sea – may be indeed considered a human rights norm *ante litteram*.[2] As a norm of customary law[3] it has been codified by the United Nations Convention on the law of the sea (hereinafter:

* Professore associato di Diritto internazionale, Dipartimento di Scienze politiche, giuridiche e studi internazionali, Università di Padova.

[1] ICJ, *The Corfu Channel Case (UK v Albania)*, Merits, Judgment of 9 April 1949, ICJ Reports 1949, p. 22; ITLOS, *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v Guinea)*, Judgment, ITLOS Reports 1999, para 155; ITLOS, *'Juno Trader' Case (Saint Vincent and the Grenadines v Guinea-Bissau)*, Prompt Release, Judgment, ITLOS Reports 2004, para 77; ITLOS, *The M/V Louisa Case (Saint Vincent and the Grenadines v Spain),* Judgment, ITLOS Reports 2013, para 155; ITLOS, *The 'Enrica Lexie' Incident (Italy v India)*, Provisional Measures, Order, ITLOS Reports 2015, para 133. Cfr. L. CAFLISCH, *Law of the Sea and internationally Protected Human Rights*, in J. C. S. BORGO et al. (eds.)*, Liber amicorum in Honour of a Modern Renaissance Man: His Excellency Gudmundur Eiríksson*, Delhi, 2017, pp. 215-238; I. PAPANICOLOPULU, *International Law and the Protection of People at Sea*, Oxford, 2018.

[2] The same may be said about the rule which more than a century ago made its appearance in Europe as a result of the prohibition of slavery, prompting states to secure its application at sea with the result of setting slaves free in case of embarkation aboard a ship flying the flag of a European country.

[3] *ILC Report of the International law Commission: Commentaries to the Articles Concerning the Law of the Sea*, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 27, Art. 36.

UNCLOS)[4] the Convention on the Safety of Life at Sea (hereinafter: SOLAS)[5] and the Convention on Search and Rescue (hereinafter: SAR)[6]. While preserving their separate scope of application, the legal obligations stemming from the joint interpretation of these Conventions may be summarized as follows: State parties have the duty to render assistance to persons in danger of being lost at sea and subsequently take any necessary measure to ensure their disembarkation in a place of safety[7].

It is against this background that the large flows of migrants trying to reach Europe across the Mediterranean Sea over the last decade and the resulting political response at national, European and international level has sparked a fierce debate among international law scholars and practitioners, human rights activists and policymakers on a wide range of legal issues concerning, *inter alia*, coastal as well as flag States' duties under the law of the sea[8], international human rights law[9] and EU law. Such a debate has highlighted a growing tension between the legal framework under which search and rescue operations were originally framed and the current political reality. As a matter of fact, the intersection of international law relating to the protection of people at sea with other regional systems of law, namely the EU Asylum System and the European Convention on Human Rights, has produced far reaching effects on the legal condition of the most affected southern European Countries[10]. No one doubts that unilateral response by Mediterranean coastal States has been and still continues to be inadequate, while there is a wide consensus on the need to provide collective structural measures which only international cooperation is able to assure. Nonetheless, even when conducted collectively (i.e in the framework of regional cooperation within the EU) SAR operations in the Mediterranean Sea have shown their intrinsic weakness. Participating States lack a shared view of the content and scope of the duty to assist persons in distress flowing from a search and rescue operation launched by the State responsible for the SAR region and, in particular, on whether and to what extent

---

[4] *United Nations Convention on the Law of the Sea*, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994).

[5] *International Convention for the Safety of Life at Sea*, 1184 UNTS 278, 1 November 1974 (entered into force 25 May 1980), as amended.

[6] *International Convention on Maritime Search and Rescue*, 1405 UNTS 118, 27 April 1979 (entered into force 22 June 1985), as amended.

[7] M. STARITA, *Il dovere di soccorso in mare e il diritto di obbedire al diritto (internazionale) del comandante della nave privata*, in *Dir. um. dir. int.*, 2019, p. 1-17.

[8] R. BUTTON, *International Law and Search and Rescue*, in J. SCHILDKNECHT, R. DICKEY, M. FINK, L. FERRIS (eds.), *Operational Law in International Straits and Current Maritime Security Challenges* , Cham, 2018, p. 101-141; K. NOUSSIA, *The Rescue of Migrants and Refugees at Sea: Legal Rights and Obligations*, in *Oc. YB*, 2017 p. 155-170; S. TREVISANUT, *Recognizing the Right to be Rescued at Sea*, in *Oc. YB*, 2017, p. 139-154; R. BARNES, *Refugee Law at Sea*, in *Int. Comp. Law Quart.*, 2004, p. 47.

[9] P. STRAUCH, *When Stopping the Smuggler Means Repelling the Refugee: International Human Rights Law and the European Union's Operation to Combat Smuggling in Libya's Territorial Sea (Comment)*, in Yale Law Jour, 2017, p. 2421-2450; V. M. LAX, E. PAPASTAVRIDIS (eds.), *Boat Refugees and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*, Leiden, 2017; A. FISCHER-LESCANO, T. LÖHR, T. TOHIDIPUR (eds.), *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, Cheltenham, Northampton, 2016; I. PAPANICOLOPULU, *Human Rights and the Law of the Sea*, in D. J. ATTARD et al. (eds.) *IMLI Manual on International Maritime Law*, Vol. 1, Oxford, 2014, p. 509-532; T. Treves, *Human Rights and the Law of the Sea*, in *Berk. Jour. Int. Law*, 2010, p. 1-14.

[10] T. GAMMELTOFT-HANSEN, *Access to Asylum: International Refugee Law and the Globalization of Migration Control*, Cambridge, 2011; M. DEN HEIJER, *Europe and Extraterritorial Asylum*, Leiden, 2012; V. MORENO-LAX, *Accessing Asylum in Europe*, Oxford, 2017; ID., *Must EU Borders Have Doors for Refugees?*, in *Eur. Jour. Migr. Law*, 2008, p. 315-364.

such a State is under an obligation to grant rescued individuals a place of safety and a venue for disembarkation.

The present article provides a critical reappraisal of the international and EU legal framework for search and rescue operations in the light of the current mass migration by sea. It focuses on the legal consequences of the increasing involvement of private actors in the fulfilment of an inherently public function, such as any rescue operation should be considered, from the standpoint of international law of the sea. Besides the most debated topics, like the concept of 'place of safety', the problem of disembarkation, the obligations of the coastal State responsible for the SAR region from the standpoint of the law of the sea the paper also try to answer two main questions: whether SAR operations affect the application of the Dublin III Regulation and to what extent Flag States are responsible for search and rescue activities conducted by NGO ships.

2. *The international legal framework: old rules, new challenges*

Coastal States neither possess the necessary means nor are they bound by an absolute duty to exercise permanent jurisdiction and control beyond their territorial sea with the aim of preventing any danger to the life of people at sea. Under article 98 (2) UNCLOS[11], Regulation 15, chapter XV SOLAS[12] and Annex, 2.1.1 to the SAR Convention[13], State parties are required to establish, operate and maintain an adequate and effective search and rescue service for persons in distress at sea around their coasts[14]. The main difference between UNCLOS and SOLAS, on the one hand, and the SAR Convention, on the other

[11] «Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose».

[12] «Each Contracting government undertakes to ensure…the establishment, operation and maintenance of such maritime safety facilities as are deemed practicable and necessary having regard to the density of the seagoing traffic and the navigational dangers and should, so far as possible, afford adequate means of locating and rescuing such persons».

[13] «Parties shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts».

[14] The concept of distress is critical to the proper application of international conventions concerning the safety of life at sea. The issue has been much debated but there still are different views on the threshold beyond which assistance is required. On this point see *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *affair*, in *UNRIIA*, 1990, p. 215 ss., par. 78. See also *YB. Int. Law Comm.*, Vol. II, 1973, p. 134; *Council decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation co-ordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* (2010/252/EU), OJ L 111/20, para. 1.3., part. II, Annex. This decision has been replaced by *Regulation (EU) No 656/2014 of The European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, OJ L 189/93. Article 9 (2) (e), provides that: «A vessel or the persons on board shall be considered to be in a phase of distress in particular: (i) when positive information is received that a person or a vessel is in danger and in need of immediate assistance; or (ii) when, following a phase of alert, further unsuccessful attempts to establish contact with a person or a vessel and more widespread unsuccessful inquiries point to the probability that a distress situation exists; or (iii) when information is received which indicates that the operating efficiency of a vessel has been impaired to the extent that a distress situation is likely».

hand, rests in some procedural aspects. As regards the territorial scope of application of the obligations in question the latter agreement provides for a "region of competence" for which State parties assume – preferably on the basis of agreements with other State parties - the obligation to coordinate search and rescue operations at sea[15] and establish a Rescue Coordination Center (RCC)[16]. According to the SAR Convention, Annex, 2.1.9., «[o]n receiving information 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». Moreover: «Parties shall ensure that assistance be provided to any person in distress at sea…regardless of the nationality or status of such a person or the circumstances in which that person is found»[17].

Adequacy and efficacy of means used for locating and rescuing persons in distress at sea depend on objective circumstances, subject to changing factors. The above mentioned conventions establish a functional link between the dimensioning of the maritime safety facilities, on the one hand, and the density of seagoing traffic and navigational dangers, on the other hand. This shows that the main concern of States Parties was to provide for the safety of life of persons taking to the high seas for legitimate and ordinary purposes: in other words, in cases in which the level of risk of being lost at sea, while not totally unexpected or unpredictable, still cannot be considered as a constituent element of maritime navigation. As a result, the fulfilment of the obligations in question is meant to be effective in the specific context of salvage activity strictly connected to a marine exceptional event, as in the case of a distress situation caused by an incident of navigation[18], where coastal State intervention on the high seas entails the exercise of functional jurisdiction for as long as necessary to accomplish the rescue operation.

On the contrary, a high level of risk of being lost at sea is inherent to the maritime navigation of vessels which are clearly unfit for this purpose for being unseaworthy and overcrowded, with the result that distress situations are not only likely to occur on the high seas but are certainly predetermined by criminal organisations involved in the smuggling of human beings[19]. It is clear that States never seriously considered the potential impact of migration by sea on the functioning of the legal regime provided for in the SOLAS and

---

[15] «Each search and rescue region shall be established by agreement among Parties concerned. The Secretary-General shall be notified of such agreement». *SAR Convention*, Annex, 2.1.4. After the adoption of the SAR Convention the IMO Safety Committee divided the world's ocean in 13 search and rescue areas (IAMSAR Manual vol. I, Organisation and Management, 2013, para 2.3.15). Within each area interested State parties were to define by agreement the respective region of competence on the basis of the previous agreed areas for aeronautical search and rescue services of the ICAO. With respect to the Mediterranean Sea, search and rescue regions have been unilaterally declared by coastal States.

[16] A Rescue Coordination Center is defined as a unit «responsible for promoting efficient organization of search and rescue services and for co-ordinating the conduct of search and rescue operations within a search and rescue region» (Annex to the SAR Convention, para 1.3.5).

[17] *SAR Convention*, Annex, 2.1.10.

[18] See A. C. VELASCO, *The international Convention on Maritime Search and rescue. Legal Mechanisms of Responsibility Sharing and Cooperation in the Context of Sea Migration?*, in *Irish YB. Int. Law*, 2015, p. 64.

[19] In this perspective the need to protect migrants from criminal activities perpetrated by smugglers, regardless of their migration status, has been repeatedly affirmed by the General Assembly of the United Nations: United Nations General Assembly Resolutions 69/167, 18 December 2014 and 70/147, 17 December 2015. See also the Resolution adopted by the Human Rights Council on 22 June 2017, HCR/Res/35/17. As a binding obligation it is envisaged by Articles 16, 18(7), (8), 19(1), *2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 2241 UNTS 507.

SAR Conventions, certainly not with the shape and dimension it has assumed nowadays[20]. It is difficult to say whether the circumstances that existed in the 70's and 80's constituted an essential basis of the consent to be bound by the SOLAS, SAR and UNCLOS Conventions in the meaning of article 62 VCLT but there is no doubt that the profound change determined by migration over the last decade radically transformed the extent of obligations of the Mediterranean coastal States in this respect. Against this background, it may be seriously questioned whether the overall machinery established by the aforementioned Conventions and the search and rescue facilities set up accordingly at national level may be considered today or can ever be placed in the future above the threshold of adequacy and efficacy required by the rules of international law of the sea. The attempt to meet the need of rendering the law of the sea in this field fit for the modern age through some limited amendments to the SOLAS and SAR Convention has proved to be ineffective, as the following paragraph tries to illustrate.

3. *The humanisation of SAR operations*

In 2004 the Committee for Maritime Security of the International Maritime Organisation approved important amendments to SOLAS[21] and SAR[22] Conventions with the aim of adapting the legal regime concerning the safety of life at sea to the increasing pressure of boat migration[23]. The purpose of such amendments was twofold: enhance

---

[20] On 14/10/2015 IMO Secretary-General Koji Sekimizu welcoming the adoption of 2240 (2015) UN Security Council resolution which authorizes Member States to intercept vessels suspected of migrant smuggling off the Libyan coast affirmed that: «There is a clear recognition among IMO Member States that using the SAR system to respond to mass mixed migration was neither foreseen nor intended, and that although Governments and the merchant shipping industry will continue rescue operations, safe, legal, alternative pathways to migration must be developed, including safe, organized migration by sea, if necessary». Available at http://www.imo.org/en/mediacentre/pressbriefings/pages/45-unsc-resolution-.aspx.

[21] International Maritime Organization (IMO), *Resolution MSC.153(78), Adoption of Amendments to the International Convention for the Safety of Life At Sea, 1974*, 20 May 2004, MSC Doc. 78/26Add.1, Annex 3.

[22] International Maritime Organization (IMO), *Resolution MSC.155(78), Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979*, 20 May 2004.

[23] Such amendments were adopted in order to avoid a new MV Tampa incident. On 26 August 2001, after successfully coordinating a search and rescue operation for an Indonesian vessel sinking in the Indian Ocean with 433 asylum-seekers aboard, the Australian authorities, Indonesia and Singapore, refused the rescuing ship MV Tampa to get access to their ports. On this case see the symposium *Australia's Tampa Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim*, in *Pac. Rim Law & Pol. Jour.*, 2003, p. 1-177; D.R. ROTHWELL, *The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty*, in *Pub. Law Rev.*, 2002, p. 118-127; P. MATHEW, *Australian Refugee Protection in the Wake of the Tampa,* in *Am. Jour. Int. Law*, 2002, p. 661-676; D. GUIFOYLE, *Shipping interdiction and the Law of the Sea*, Cambridge, 2009, p. 198-214. Similar incidents occurred in 2004 (*Cap Anamur*: see S. TREVISANUT, *Le Cap Anamur: profils de droit international et de droit de la mer*, in *Ann. droit de la mer*, Vol. 9 (2004), p. 49-64) and in 2006 (*Francisco Catalina*, see D. GUIFOYLE, *Shipping Interdiction*, p. 214-216, 220-221). The problem of the rescue of asylum-seekers at sea was addressed in 1985 by the IMO council which called on «Governments, organisations, and shipowners concerned to intensify their efforts in ensuring that necessary assistance is provided to any person in distress at sea» and by the United Nations High Commissioner for Refugees according which reaffirmed «the fundamental obligation under international law for shipmaster to rescue all persons, including asylum-seekers, in distress at sea». Respectively, C 54/17 (d) (IMO Council, 1985) and

coordination and cooperation between coastal and flag States engaged in search and rescue operations and minimize the inconvenience for the masters of assisting ships releasing them as soon as possible from their obligations. As a consequence, the amended text of both Conventions, in force as from 1 July 2006[24], establishes that: «The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable».

Neither the notion of "place of safety" nor the criteria for detecting the venue for disembarkation are actually addressed in the consolidated texts of SOLAS and SAR Conventions. A definition of the term "place of safety" is only provided by the 2004 IMO *Guidelines on the Treatment of Persons Rescued at Sea*[25] as «a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination».[26]

According to the amended conventions and guidelines one cannot say conclusively that there is one and only one place of safety for each rescue operation nor that IMO established criteria which may be used to uniquely identify such a place. Though the identification of the place of safety falls under the primary responsibility of the coastal State responsible of the SAR region where the rescue operations started there are no clear indications as to whether it should be considered *ipso facto* the State on whose territory the

Addendum to the Report of the UN High Commissioner for Refugees, 40 GAOR, Supplement No. 12A (A/40/12/Add. 1), para 115(3), at 32.

[24] Malta opposed to these amendments with the result that they are non binding on it.

[25] International Maritime Organization (IMO), *Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea*, 20 May 2004.

[26] Para. 6.12. According to point 6.13 of the Guidelines «the 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. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for the survivors. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made». The concern for releasing the assisting ship from its obligations within reasonable time is commendable as it is the emphasis on the temporary character of the assistance, which is usually provided by commercial ships whose structure and intended use are unfit for the needs of search and rescue operations. This is without prejudice to the possibility that, if the particular circumstances so allow, a rescuing commercial ship be able to deliver the rescued people to the next scheduled port of call without significantly deviating from its intended voyage. On 31 May 2005 the *M.V. Clementine Maersk*, a Danish-registered container ship, rescued a boatful of Somalian, Tunisian and Palestinian migrants adrift in the Mediterranean Sea and they were disembarked four days later at its first scheduled port of call at Felixstowe in the United Kingdom. The UK government agreed to allow the group to disembark on its territory and, except for one Tunisian, the other individuals were able to apply for Asylum. See the report by UNCHR available at https://www.unhcr.org/news/latest/2005/6/42a70b5a4/unhcr-thanks-danish-ship-rescuing-asylum-seekers-stranded-sea.html. Anyway, it is questionable whether the same considerations may be applied to NGO's rescuing vessels permanently operating in the Mediterranean Sea. In fact, it's either one thing or the other: Either ONG's rescuing ships are fit for conducting search and rescue operations - which is their declared purpose - and so they may be considered in normal circumstances a place of safety in the meaning of SOLAS and SAR Conventions or they are unfit and their activity threatens to increase rather than decrease the risks inherent in any rescue operation.

survivors should be disembarked. The corresponding *due-diligence* obligation is to be fulfilled in a cooperative manner between the coastal State and the flag State of the rescuing ship provided that the State's responsible for the SAR region request for cooperation triggers the obligation of other interested States to cooperate in the search of a place of safety.

A prominent criterion to identify the place of safety comes from human rights law rather than the law of the sea. According to the guidelines, the «need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea».[27] There is no question that the principle of *non refoulement*[28] fully applies to the treatment of migrants rescued by ships flying the flag of a State party to the ECHR[29] wherever the operation takes place, including the high seas[30]. The point is no more disputable after the decision of the ECtHR in the *Hirsi* case[31]. However, the proper application of such a principle presupposes a *prima facie* ascertainment of the legal status of migrants through an individualised procedure in order to verify whether the interested person meets the requirements provided for by the relevant rules and principles of international refugee law. For that reason «[i]f survivor status or other non-SAR matters need to be resolved, the appropriate authorities can often handle these matters once the survivors have been delivered to a place of safety».[32] So, the question is: how can the SAR responsible State find a place of safety for Asylum-seekers and refugees in conformity with the need of avoiding the persons recovered at sea be delivered to a *non* place of safety if the ascertainment of their status can only be made in a place of safety? Assuming that the screening aboard a ship is far from being a viable solution, if only for the time needed[33], disembarkation in the territory of an EU member State, save in exceptional cases[34], has been so far and will continue to be the only remaining option.

---

[27] Point 6.17.

[28] M. GIUFFRÉ, *Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations*, in V. MORENO-LAX, E. PAPASTAVRIDIS (eds.), *Boat refugees and migrants at s*ea, *cit.*, p. 248-275; R. VIRZO, *Il coordinamento di norme di diritto internazionale applicabili allo status dei rifugiati e dei bambini migranti via mare*, in *Riv. dir. nav.*, 2016, p. 143-173.

[29] On whether and to what extent public and private ships may be assimilated in this respect see E. ZAMUNER, *La tutela delle navi private nel diritto internazionale*, Napoli, 2015, p. 77-83. See also *infra*, par. 6.

[30] A. FISCHER-LESCANO, T. LÖHR, T. TOHIDIPUR, *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, in *Int. Jour. Refug. Law*, 2009, p. 256-296.

[31] *Hirsi Jamaa and Others v Italy*, App 27765/09 (ECtHR, 23 February 2012). See I. PAPANICOLOPULU, *Hirsi Jamaa v Italy* (2013), in *Am. Jour. Int. Law*, 2013, p. 417-423; M. GIUFFRÉ, *Watered-Down Rights on the High Seas: Hirsi Jamaa and Others v. Italy*, in *Int. Comp. Law Quar.*, 2012, p. 728-750; M. DEN HEIJER, *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, in *Int. Jour. Refug. Law*, 2013, p. 265-290; V. MORENO-LAX, *Hirsi v Italy or the Strasbourg Court v Extraterritorial Migration Control?*, in *Hum. Rights Law Rev.*, 2012, p. 574-598.

[32] Point 6. 19. According to the IMO Facilitation Committee: «It should also be ensured that any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress are to be carried out after disembarkation to a place of safety». *Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, IMO Doc. FAL.3/Circ.194, 22 January 2009, point 2.2.

[33] Point 6.20 of the Guidelines provides that: «Any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation of survivors from the assisting ship(s)».

[34] *Khlaifia and Others v. Italy*. App. No. 16483/12 (ECtHR, Grand Chamber, December 15, 2016). In the judgment the Court held that Italy's return of migrants to Tunisia did not violate the prohibition of collective expulsion under Article 4 of Protocol 4 of the ECHR.

4. *The weak link in the chain: the problem of disembarkation of migrants at the crossroads between the law of the sea and EU law*

The natural accomplishment of any rescue operation consists in the disembarkation of migrants. Yet, the identification of the State in whose territory disembarkation should take place has proven to be even more troubled than the research of a place of safety[35]. States are reluctant to open their ports and enabling migrants to get ashore[36], for the impact that their reception is likely to have on their immigration policy[37], financial sustainability and political consensus[38]. Nonetheless, disembarkation, as the last step of a rescue operation triggered by the obligation of assistance, cannot be seen as a separate phase. It means that the State in whose SAR region the operation started has the primary responsibility to identify, amongst the potential places of safety, the most suitable venue for disembarkation. But whilst the selection of a place of safety can be made according to objective criteria, the identification of the place of disembarkation depends also on a subjective element: the consent of the host State[39].

---

35 K. GOMBEER, *Human Rights Adrift? Enabling the Disembarkation of Migrants to a Place of Safety in the Mediterranean*, in *Irish YB Int. Law*, 2013, p. 25-27.

36 It is worth noting that Malta has objected to the 2004 amendments. Council of Europe, Parliamentary Assembly, Report of the Committee on Migration, Refugees and Population, The interception and rescue at sea of asylum seekers, refugees and irregular migrants, Doc. 12628, June 1, 2011, at 16 (para. 49). See J. COPPENS, *The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin*, in *Jour. Mar. Law Comm.*, 2013, p. 100; S. KLEPP, *A Double Bind : Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea*, in *Int. Jour. Refug. Law*, 2011, p. 538-557.

37 For the relationship between irregular migration and security concern see UNGA, *Oceans and the Law of the Sea: Report of the Secretary-General* (10 March 2008) A/63/63, para 89-97; *The European Agenda on Security*, COM(2015) 185 final, 28 April 2015, p. 4

38 The Phenomenon is not limited to the Mediterranean Sea. For other experiences see S.H. LEGOMSKY, *The USA and the Caribbean Interdiction Program*, in *Int. Jour. Refug. Law*, 2006, p. 677-695; S. D. Watson, *Manufacturing Threats: Asylum Seekers as Threats or Refugees?*, in Jour. Int. Law Int. Rel., 2007, p. 95-117; V. MITSILEGAS, *Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens, Strengthening the State*, in *Ind. Jour. Glob. Leg. Stud.*, 2012, p. 3-60; A. NEVE, T. RUSSELL, *Hysteria and Discrimination: Canada's Harsh Response to Refugees and Migrants Who Arrive by Sea*, in *Univ. New Brunswick Law Jour.*, p. 37-50.

39 In this perspective it is interesting to mention a recent case entertained by a chamber of the ECtHR concerning the refusal by Italy to grant access to the harbour of Syracuse to the vessel SeaWatch 3, flying the flag of Netherlands, which had 47 migrants on board. As it can be read in the press release circulated by the Registrar of the Court reporting a summary of the decision adopted on 29 January 2019 at the request of interim measures under Rule 39 of the Rules of the Court: «The applicants complain that they are detained on board without legal basis, suffering inhuman and degrading treatment, with the risk of being returned to Libya without evaluation of their individual situation. In its decision, the Court did not grant the applicants' requests to be disembarked. It requested the Italian Government «to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary. As far as the 15 unaccompanied minors are concerned, the Government are requested to provide adequate legal assistance (e.g. legal guardianship)». https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/newsletter-february-2019/-/asset_publisher/cVKOAoroBOtI/content/echr-grants-an-interim-measure-in-case-concerning-the-seawatch-3-vessel. In the same vein the ECtHR, on 25 June 2019, «sitting as a Chamber, decided not to indicate to the Italian Government under Rule 39 the interim measure requested by the applicants, namely authorisation to disembark in Italy from the ship Sea-Watch 3». https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6443361-8477507%22]}. See P.

In fact, on the one hand, the 2004 amendments were not able to seriously challenge the customary right of the coastal State to grant or refuse access to its ports to foreign ships[40]. On the other hand, neither the SOLAS and SAR Conventions nor the *Guidelines* allow to conclusively determine the State in whose territory migrants are to be delivered: as a result, neither the nearest port rule, nor the rule under which migrants should be delivered to the port of the State responsible of the SAR region[41] seem to have a clear legal basis in international law[42]. In the absence of an agreement between the States directly or indirectly involved in the search and rescue operation there is no residual[43] rule whereby the place of final destination can be identified[44].

Once it has been established on the basis of legal as well as practical considerations that migrants rescued at sea, save in exceptional circumstances, should be delivered to a place of safety in the territory a EU member State the issue remains as to whether or not EU law may somehow limit the right enjoyed by member States under international law to refuse access to their ports. In fact, EU institutions have adopted a number of secondary legislative instruments in the field of borders and migration management which are relevant to the issue of disembarkation, the most important being the Frontex maritime surveillance Regulation[45] which establishes rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Border and Coast Guard Agency (Frontex)[46].

Two aspects should be stressed from the outset. Firstly, Frontex is not a search and rescue body and its operation does not prejudice the division of competence between the EU and member States under UNCLOS, SOLAS and SAR Conventions[47]. So, any related

---

DE SENA, M. STARITA, *Navigare fra "istanze stato-centriche" e "cosmopolitiche": il caso "Sea-Watch" in una prospettiva conflittuale*, in *Sidi-Blog*, available at http://www.sidiblog.org/2019/07/14/navigare-fra-istanze-stato-centriche-e-cosmopolitiche-il-caso-sea-watch-in-una-prospettiva-conflittuale/.

40 A. T. GALLAGHER, F. DAVID, *The International Law of Migrant Smuggling*. New York, 2014, p. 460-461. See also ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) Merits*, Judgment, ICJ Reports 1986, para. 213: «It is…by virtue of its sovereignty that the coastal State may regulate access to its ports».

41 These default rules have been maintained, respectively, by Malta and Italy. See M. DI FILIPPO, *Irregular Migration and Safeguard of life at sea. International Rules and Recent developments in the Mediterranean Sea*, in A. DEL VECCHIO (ed.), *International Law of the Sea. Current Trends and Controversial Issues*, The Hague 2014, p. 21.

42 The only reference to this latter residual rule can be found in the above mentioned 2009 Circular adopted by the IMO Facilitation Committee (see note 32) but the document does not have any binding effect. Point 2.4 provides that: «If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support».

43 See E. PAPASTAVRIDIS, *Is there a right to be rescued at sea? A skeptical view,* in *Quest. Int. Law*, 4, 2014, p. 17.

44 V. MORENO-LAX, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, in *Int. Jour. Refug. Law*, 2011, p. 193 and 197; *Contra* S. TREVISANUT, *Is there a Right to be Rescued at Sea? A constructive view*, in *Quest. Int. Law*, 4, 2014, p. 7.

45 *Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, OJ L 189, 27 June 2014, p. 93-107.

46 *Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council*, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16 September 2016, p. 1-76.

47 *Regulation (EU) No 2016/1624*, Recital 45.

activity in which Frontex is involved forcefully has an incidental character[48]. In this perspective, its functions are limited to assist Member States in fulfilling their obligation under international law - in compliance with the *non-refoulement* principle[49] - to render assistance to persons in distress in the context of maritime operations primary aimed at monitoring the common external frontiers. It has been correctly pointed out that: «in relation to maritime operations, it appears that search and rescue *per se* cannot constitute the overarching objective of a joint mission…border surveillance remain the primary goal»[50].

Secondly, the general scope of application of EU Regulation 656/2014 is limited to the operations carried out by EU member States with the assistance and coordination of Frontex (like in Joint Operation Triton and, arguably, Themis[51]), to the exclusion of any other search and rescue activity carried out by member States individually (i.e. in the event of a "pure" SAR operation)[52] as well as (in strict legal terms) in the case of operations conducted in the framework of EUNAVFOR Med Operation Sophia[53]. To the extent that

[48] As *Regulation (EU) No 656/2014*, Recital 1, states: «The purpose of border surveillance is to prevent unauthorised border crossings, to counter cross-border criminality and to apprehend or take other measures against those persons who have crossed the border in an irregular manner. Border surveillance should be effective in preventing and discouraging persons from circumventing the checks at border crossing points. To this end, border surveillance is not limited to the detection of attempts at unauthorised border crossings but equally extends to steps such as intercepting vessels suspected of trying to gain entry to the Union without submitting to border checks, as well as arrangements intended to address situations such as search and rescue *that may arise during a border surveillance operation at sea* and arrangements intended to bring such an operation to a successful conclusion». [Emphasis added]. On the same vein see art. 4 of *Regulation (EU) 2016/1624*.

[49] According to article 34.2, «In performing of its tasks, the European Border and Coast Guard shall ensure that no person is disembarked in, forced to enter, conducted to, or otherwise handed over or returned to, the authorities of a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle».

[50] D. GHEZELBASH, V. MORENO-LAX, N. KLEIN, B. OPESKIN, *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, in *Int. Comp. Law Quar.*, 2018, p. 324-325.

[51] To the author's knowledge, documents concerning operational plans regarding Joint operations Triton and Sophia have not been disclosed. Nonetheless, relevant details concerning disembarkation may be found in the Annual report on the practical application of Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (2017), where it is stated that: «Upon the decision of Italy, with Frontex Agreement, it was stated in the Operational Plan that coordination and cooperation would be ensured, with all the relevant search and rescue authorities, in order that all persons rescued by the units participating in the Joint Operation would be disembarked in a place of safety in Italy, within the operational area. At the same time it was decided that no rescued person by a participating maritime asset, independently of the area where the rescue would take place, could be handed over to Third Country authorities or disembarked in the territory of that Third Country… All migrants intercepted or rescued by Frontex assets were disembarked in Italy» (p. 7, point 2.1.3) https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-11129-2018-INIT.

[52] As in the case of operation *Mare Nostrum* established by the Italian Government on 18 October 2013 and ended on 31 October 2014: http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx.

[53] *Council Decision (CFSP) 2015/778* of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122, 19.5.2015, p. 31–35. See also *Managing the Refugee Crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration*, COM (2015) 510 final, 14 October 2015, p. 13-24; D. GHEZELBASH, V. MORENO-LAX, N. KLEIN, B. OPESKIN,, *Securitization of search and rescue at sea*, cit., p. 337. This is without prejudice to the possibility that member State participating in the operation could agree upon a residual rule on disembarkation. It seems that this is the case with respect to Italy. Otherwise it would be difficult to explain why the Italian Ministry for Foreign Affairs, on 17/07/2018, issued the following press release: «The Foreign Ministry confirms that, in line with the announcement made yesterday, this morning the Minister of Foreign Affairs and International Cooperation,

this preliminary condition is satisfied, with respect to disembarkation related to a search and rescue operation,[54] art. 10 (c) provides that: «the host Member State and the participating Member States shall cooperate with the responsible Rescue Coordination Centre to identify a place of safety and, when the responsible Rescue Coordination Centre designates such a place of safety, they shall ensure that disembarkation of the rescued persons is carried out rapidly and effectively». The same paragraph goes further by introducing a residual rule for disembarkation in the absence of an agreement between the interested States which provides that: «If it is not possible to arrange for the participating unit to be released of its obligation referred to in Article 9(1) as soon as reasonably practicable, taking into account the safety of the rescued persons and that of the participating unit itself, it shall be authorised to disembark the rescued persons in the host Member State».

Essentials for the proper understanding, interpretation and application of this paragraph are the concepts of "Host member State" and "Participating unit". A definition of all these terms may be found in art. 2. The joint reading of article 2, paragraphs 3, 5 and 13 and art. 10 (c) makes it clear that disembarkation is mandatory in the territory of a Member State in which a sea operation takes place or from which it is launched (the host State) on condition that is carried out by maritime, land or aerial unit under either the responsibility of the host Member State or of another member State participating in the operation. In the light of the foregoing it may be inferred that rescue operations of migrants at sea operated by private ships, either commercial, fishing or NGO's vessels, do not fall *as such* (i.e. when they are carried out outside an operational plan coordinated by Frontex) under the scope of application of this Regulation.

Anyway, it may be argued that the entry of a ship carrying migrants on board in the territory of a EU member State as a result of a rescue operation, i.e. when a member State of the EU has been identified as the relevant place of safety, does not necessary entail that such a State is automatically responsible under the Dublin system for examining any application for international protection which may be lodged by the migrants concerned. In fact, according to art. 13 (1) of the EU Regulation 604/2013[55] the criteria and mechanisms for determining the Member State responsible for examining an application for

---

Enzo Moavero Milanesi, had a letter delivered to the Vice President of the European Commission and High Representative of the Union, Federica Mogherini, which states that, in the light of the conclusions of the European Council meeting of 28 June, the provisions presently contained in the "operating plan" of the EUNAVFOR Med Sophia operation are no longer deemed to be applicable as they identify Italy as the only place to disembark the migrants rescued by its units. Thus, Minister Moavero gave instructions to the Italian Representative to the Political and Security Committee to raise the need to amend the part of "operating plan" of the EUNAVFOR Med Sophia operation that identifies the port of disembarkation in tomorrow's meeting». https://www.esteri.it/mae/en/sala_stampa/archivionotizie/comunicati/2018/07/eunavformed-sophia-posizione-italiana-sulle-disposizioni-sui-porti-di-sbarco-del-piano-operativo.html

[54] Actually, art. 10 envisages two other different hypothesis in the event that there are reasonable grounds to suspect that a vessel may be carrying persons intending to circumvent checks at border crossing points or is engaged in the smuggling of migrants by sea. According to art. 10 (1) (a), «in the case of interception in the territorial sea or the contiguous zone disembarkation shall take place in the coastal Member State». According to art. 10 (1) (b), «in the case of interception on the high seas disembarkation may take place in the third country from which the vessel is assumed to have departed. If that is not possible, disembarkation shall take place in the host Member State».

[55] *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, OJ L 180, 29 June 2013, p. 31-59.

international protection apply whenever migrants have irregularly crossed the border into a Member State. Since this provision focuses on the objective situation of irregular entry rather on the subjective condition of irregular migrants, it is far from clear how the entry of migrants on board a ship in the territory of a EU member State with its consent and support as a result of a search and rescue operation may be qualified as 'irregular border crossing' in the meaning of art. 13 (1). The issue has been emphasised in the general conclusion of the Advocate General Sharpston in relation to a request for a preliminary ruling from the Verwaltungsgericht Minden (Germany) regarding the interpretation of various aspects of the Dublin III Regulation. In his view «it is clear that the intersection of international law of the sea, international humanitarian law (in the shape of the 1951 Geneva Convention) and EU law does not provide a ready and evident answer to the question of whether those rescued during a Mediterranean crossing and disembarked in a coastal EU Member State (typically, but not exclusively, Greece or Italy) should be regarded as having crossed the border of that Member State 'irregularly' for the purposes of Article 13(1) of the Dublin III Regulation».[56]

In that case the issue was not addressed by the EU Court of Justice because the interpretation of Article 13(1) of the Dublin III Regulation had not been expressly requested. However the same Court dealt with the interpretation of that article in relation to two different requests of preliminary ruling made by the Supreme Court of Slovenia and by the Administrative Court of Austria in the course of national proceedings concerning the applicability of the Dublin III Regulation in the case of the crossing of land borders by third-country nationals. The Court held that «a third-country national whose entry has been tolerated by the authorities of a first Member State faced with an exceptionally large number of third-country nationals wishing to transit through that Member State in order to make an application for international protection in another Member State, without fulfilling the entry conditions in principle required in that first Member State, must be regarded as having 'irregularly crossed' the border of that first Member State, within the meaning of art. 13 (1) of the EU regulation 604/2013»[57]. However, tolerance towards the crossing of land borders by individuals and the consent to the entry of a foreign ship in the internal waters are hardly comparable situations. Consequently, there are good reasons to believe that, under different factual circumstances, the Court might reach a different conclusion.

5. *Flag State responsibility for NGO vessels involved in search and rescue operations in the Mediterranean Sea*

Under the current international and European regulatory framework the majority of the relevant rules address to sea bordering States, being those capable either to start and

[56] Opinion of Advocate General Sharpston delivered on 20 June 2017, Case C-670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, para. 54.

[57] Judgment of the Court (Grand Chamber), 26 July 2017, Case C-490/16, *Request for a preliminary ruling under Article 267 TFEU from the Vrhovno sodišče (Supreme Court, Slovenia)*, operative part of the judgment. On the same vein see Judgment of the Court (Grand Chamber), 26 July 2017, Case C-646/16, *Request for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria)*, operative part of the judgment.

lead effective search and rescue operations or to accomplish them with the potential disembarkation of rescued people in their own territory. In this context, the role played by the rescuing ship, provided that it flies the flag of the State responsible for the SAR region, is definitely functional to the proper fulfilment of the coastal State obligations. However, this ideal pattern only rarely corresponds to reality: actually, rescue activities on the high seas are often carried out by ships flying the flag of a State other than the coastal State responsible for the SAR Region.

Since Mediterranean coastal States have shown to be incapable to adequately and effectively cover with their rescue units the whole area falling under their SAR region of competence, NGOs started to fill the gap by engaging in privately founded search and rescue operations. Their positive contribution is in no way questionable: without their support the gruesome statistics on the number of deaths at sea over the last years would have been even more humiliating[58]. That being said, NGOs cannot become on a permanent basis a substitute for States' responsibilities. Search and rescue operations are (and should be) the expression of a public function which may be assumed (and must be assumed) by private individuals and entities outside the effective control of public authorities only in exceptional circumstances: that is exactly the typical case envisaged by UNCLOS, SOLAS and SAR Conventions whenever they require the master of a private ship, by way of exception, to deviate from the vessel's route in order to provide assistance to persons in distress at sea. In such a case the 2004 IMO guidelines underline the need to release the master of the ship from its obligations as soon as possible. Moreover, rescue operations need to meet the requirements of transparency and accountability that only public authorities are able to provide.

Against this background, the attempt to regulate the activity of NGOs operated vessels regardless of the flag they are entitled to fly as well as of the area in which their operations take place either through the enactment of national legislation or the adoption of codes of conduct whose legal nature and effects are, to say the least, uncertain[59] (not to mention the option of criminalising the master[60] and the crews operating aboard such ships[61]), cannot but collide with the golden principles and rules of international law of the sea[62]. Rather, it would be more appropriate to go back to some basic rules of international

---

[58] According to the last available annual report issued by the Italian Coast Guard the number of migrants rescued by vessels operated by NOGs in 2017 equals the number of migrants rescued by Italian public Authorities and ships operating under the coordination of Frontex put together: http://www.guardiacostiera.gov.it/attivita/ricerca.

[59] F. MUSSI, *Sulla controversa natura giuridica del codice di condotta del Governo italiano relativo alle operazioni di salvataggio dei migranti in mare svolte da organizzazioni non governative*, in *Oss. sulle fonti*, n. 3/2017, http://www.osservatoriosullefonti.it; F. FERRI, *Il Codice di condotta per le ONG e i diritti dei migranti: fra diritto internazionale e politiche europee*, in *Dir. um. dir. int.*, 2018, p. 189-198.

[60] Tribunale di Agrigento, Uff. GIP, Ordinanza n. 3169/19, 2 July 2019, available at http://www.giurisprudenzapenale.com/2019/07/04/lordinanza-del-gip-del-tribunale-di-agrigento-nei-confronti-di-carola-rackete-sea-watch-3/.

[61] https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities; L. MASERA, *La criminalizzazione delle ONG e il valore della solidarietà in uno Stato democratico*, in Federalismi.it, 2, 2019, p. 18-43; I. PAPANICOLOPULU, *The Duty to Rescue at Sea, in Peacetime and in War: A General Overview*, in *Int. Rev. Red Cross*, 2016, p. 503.

[62] On the questions whether NGOs operated ships enjoy freedom of navigation in order to render assistance to persons in distress at sea and whether the competent coastal State authority is entitled to issue binding instructions to the master of these ships when it comes to find a place of safety and a venue for

law of the sea in order establish the proper conduct that the flag State should adopt towards ships operated by NGOs.

Firstly, according to article 92 UNCLOS, save in exceptional cases, ships on the high seas are subject to the exclusive jurisdiction of the State whose flag they are entitled to fly. This provision has certainly been conceived with the aim of preserving ships exercising the freedom of navigation on the high seas from any interference by third States so as to ensure the orderly development of maritime commerce. However, as a corollary to the *jus excludendi alios* dimension, the flag State is under an obligation to exercise those sovereign powers stemming therefrom. In this respect, Article 94 (1) UNCLOS provides that «[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag» and «take such measures for ships flying its flag as are necessary to ensure safety at sea»[63] requiring that «the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea».[64] On the same vein, Article 98 (1) UNCLOS establishes that «[e]very State shall require the master of a ship flying its flag…to render assistance to any person found at sea in danger of being lost»[65] and «to proceed with all possible speed to the rescue of persons in distress».[66] On the high seas no action against a ship and its crew is allowed to third States without the express consent of the flag State, except in the circumstances envisaged by Article 110 UNCLOS or under applicable treaties in force between the costal and flag States concerned. Yet, nothing in this provision may be construed to authorize a State other than that of nationality to exercise prescriptive and/or enforcement jurisdiction neither to give effect to its own immigration laws nor to avoid the infringement of any relevant rule of international law in this field.[67]

---

disembarkation see K. GOMBEER, M. FINK, *Non-Governmental Organisations and Search and rescue at Sea*, in *Mar. Saf. Sec. Law Jour.*, 4/2018, p. 1-25.

[63] Article 94 (3).

[64] Article 94 (4)(b)

[65] The fact that this provision is contained in part X on the High seas does not rule out its applicability to other maritime zones beyond national jurisdiction according to Article 58 (2) UNCLOS. Moreover, under Article 18(2) a ship exercising the right of innocent passage through the territorial sea may stop or anchor for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress. In other words the duty applies to all maritime areas.

66 See also art. 11 of the *International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea* (Brussels, 23 September 1910): «Every master is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost». Article 8 of the *Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels* provides that: «After a collision, the master of each of the vessels in collision is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to the other vessel, her crew and her passengers». Regulation 10, Chapter V SOLAS provides that: «The master of a ship at sea, on receiving a signal from any source that a ship or air craft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress». Article 10 of the *International Convention on Salvage*, 28 April 1989, UNTS, 16, provides that: «1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea. 2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1».

[67] It is of particular importance here to point out that in accordance with Art. 8 (2) of the Protocol against the smuggling of migrants when a State party has reasonable grounds to suspect that a foreign ship exercising the freedom of navigation is engaged in the smuggling of migrants may notify the flag State in order to request

Secondly, in the framework of the above mentioned provisions State-owned ship used only on government non-commercial service and privately-owned vessels are placed on the same footing in the sense that the link of nationality represents a necessary and sufficient condition to trigger due diligence obligations for the flag State under Articles 94 and 98 UNCLOS. It is also irrelevant that the master of a private ship is considered an organ with capacity to perform governmental function or exercise sovereign powers on behalf of the flag State, let alone that the occasional activity of rescuing persons in distress at sea is subject to its prior authorization. In other words, the flag State is required to fulfil the corresponding obligation either directly through the official activity of its organs on board a public vessel or indirectly by exercising *ex antea* or *ex post* effective jurisdiction and control over the activity of private ships.

Thirdly, the treatment to be accorded to persons on board a ship on the high seas should be primarily, if not exclusively, regarded as within the internal sphere of the flag State jurisdiction. Accordingly, the existence, content and extent of human rights enjoyed by migrants rescued at sea may be drawn from the flag State's municipal law, subject to the applicable customary law as well as treaty law rules to which that State is a party, even though the nature of the obligations which may give rise to State responsibility is different[68]. In the case of public vessels, by virtue of the effective control exercised by the flag State's officials, the conduct of any organ exercising public authority over the vessel must be regarded as an act of the flag State[69] and the protection human rights entails immediately enforceable binding commitments. In the case of private ships, the relevant conduct of the flag State may only consist of an omission, namely when the flag State has

---

authorization to take any appropriate measures. So, the principle of consent is confirmed even in the context of an agreement whose purpose is exactly that of fostering cooperation to the fullest extent possible in the fight against transnational organized crime in the field of migrations. *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, New York, 15 November 2000, 2241 UNTS 507. On the same vein see Art. 17 (3) *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Vienna, 19 December 1988, in 1582 UNTS, p. 95 ss.; Article 8 *bis* of the *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,* London, 14 October 2005, IMO Doc. LEG/CONF.15/21; Article 6 and 8 (1) of the *Council of Europe Agreement on Illicit Traffic by Sea implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, CETS n. 156, http://conventions.coe.int/Treaty/en/Treaties/Html/156.htm; Article 1 and 3 (a) of the *International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,* Brussels, 29 November 1969, 970 UNTS, p. 211; Article 21 of the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,* New York, 4 August 1995, 2167 UNTS, p. 3.

[68] E. PAPASTAVRIDIS, *Rescuing Migrants at Sea and the Law of International Responsibility*, in H. GAMMELTOFT-HANSEN, J. VEDSTED-HANSEN (eds.), *Human rights and the Dark side of Globalisation: Transnational Law Enforcement and Migration Control*, Abingdon, Oxon, New York, 2017, p. 161-190; S. TREVISANUT, *Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict*, in *Int. Jour. Mar. Coast. Law*, 2010, p. 523-542.

[69] Article 4 of the ILC Articles. The text of "effective jurisdiction and control" is particularly relevant from the standpoint of the European Convention of Human Rights. The Strasbourg Court have ruled in several cases that for the purposes of Article 1 the scope of application of the ECHR is not limited *stricto sensu* to the territory of the contracting parties recognizing that responsibility for violation of the ECHR may arise even when the State exercises effective jurisdiction and control over persons outside its territory, including aboard a national or foreign ship irrespective of whether, in this latter case, the flag state is a party to the ECHR. *Ex multis* see *Medvedyev and Others v. France* App 3394/03 (ECtHR, 29 March 2010); *Women on Waves and Others v Portugal* App 31276/05 (ECtHR, 3 February 2009), *Xhavara and Others v Italy and Albania*, App 39473/98 (ECtHR, 11 January 2001).

not taken the necessary prescriptive or enforcement measures to require the master and the crew of the ship to comply with international law.

Even though the flag State's obligations under Articles 94 and 98 UNCLOS are usually fulfilled through the enactment of a specific legislation[70], the need to ensure full compliance with international rules on human rights of people rescued at sea requires the flag State to take a proactive approach whenever migrants are boarded on a private vessel whose declared intended use is precisely that of search and rescue of people at sea. Since States cannot ignore "considerations of humanity" under the law of the sea to the same extent they cannot ignore the intended and actual operation of ships flying their flag which by virtue of their activities are likely to have an impact – whether positive or negative is immaterial for the purposes of the present argument - on the protection of human rights. When private ships are permanently rather than incidentally engaged in search and rescue operations like in the case of NGO rescue ships[71], the flag states' positive obligation to respect human rights entails also the duty to hold a virtuous link with the ship in addition to the default genuine one which in normal circumstances substantiates the nationality of ships in the law of the sea.

Fourthly, since search and rescue operations in the context of the Mediterranean Sea have proven to be a major challenge for European coastal States' immigration policy[72] the flag State should seriously consider the legal implications of any failure to exercise prescriptive and enforcement jurisdiction in relation to NGO's rescue ships for the sovereign right of the coastal State to grant or deny the admission of aliens in its territory and the right to grant or refuse the admission of foreign vessels in its ports. Even though the need to protect migrants' human rights[73] may affect the exercise of sovereign powers of the coastal State[74], the master of a private ships cannot, on the one hand, freely determine the conditions for admission in the territory of the State where he or she believes migrants should be taken under international law and, on the other hand, it lies in the first instance with the coastal State to determine in good faith, as the case may be, whether people rescued are in need of immediate assistance and whether human rights considerations should then prevail over the right to refuse access to its ports.

---

[70] A. E. CHIRCOP, E. GOLD, H. M. KINDRED, W. MOREIRA (eds.), *Maritime Law*, Toronto, 2003, p. 618-619; I. A. MARTÍNEZ, *Curso de derecho marítimo*, Madrid, 2005, p. 721-722.

[71] M. RAMACCIOTTI, *Sulla utilità di un codice di condotta per le organizzazioni non governative impegnate in attività di search and rescue (SAR)*, in *Riv. dir. int.*, 2018, p. 213-223; F. MUSSI, *Countering migrant smuggling in the Mediterranean Sea under the mandate of the UN Security Council: what protection for the fundamental rights of migrants?*, in *Int. Jour. Hum. Rights*, 2018, p. 488-502.

[72] N. MÜLLER, *Spannungsfeld zwischen Grenzschutz und völkerrechtlichen Verpflichtungen auf hoher See*, Zürich, 2017; G. BEVILACQUA, *Exploring the Ambiguity of Operation Sophia between Military and Search and Rescue Activities*, in G. ANDREONE (ed.), *Future of the law of the sea: bridging gaps between national, individual and common interests*, Cham, 2017, p. 165-189; A. C. VELASCO, *The International Convention on Maritime Search and Rescue: Legal Mechanisms of Responsibility Sharing and Cooperation in the Context of Sea Migration?*, in *Irish YB. Int. Law*, 2015, p. 57-86.

[73] For exceptions in case of *distress* see A.V. LOWE, *The Right of Entry into Maritime Ports in International Law*, in *San Diego Law Rev.*, 1977, p. 597-622; A. CHIRCOP, *The Customary Law of Refuge for Ships in Distress*, in A. CHIRCOP, O. LINDEN (eds.), *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom*, Leiden/Boston, 2006, p. 163-229.

[74] This is the case if the seriousness and urgency of the situation so require. See Tribunale Amministrativo Regionale per il Lazio, Sezione prima Ter, Decreto n. 5479/2019, 14 August 2019 available at https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=tar_rm&nrg=201910780&nomeFile=201905479_06.html&subDir=Provvedimenti.

It is worth recalling that the International Court of Justice in the *Corfu Channel case* highlighted the «State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States»[75]. For sure ships cannot be considered as a portion of the territory of the flag State, but there are good reasons to argue that the flag State might be held responsible for acts performed by the master of a private rescue ship contrary to the rights of other States whenever it would have been able (at least potentially) to prevent them or, as the case may be, prevent their future repetition either by giving official notice to the owner/operator and the master of the ship to refrain from any act entailing a potential infringement of the coastal State's sovereign rights, by suspending/revoking the authorization to fly its flag or, finally, by instituting judicial or administrative proceedings against the owner/operator or the master of the ship.

Indeed, flag State responsibility for non-compliance with the obligation to exercise effective jurisdiction and control over ships may be invoked by any State, since the legal duties in question are envisaged by articles 91 (2) and 94 UNCLOS as laying down obligations *erga omnes partes*. As a result, specially affected coastal States wishing to implement flag State responsibility for the breach of the above mentioned provisions should firstly report the facts to the flag State in conformity with article 94 (6) which provides that «[u]pon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation». The legal effect of reporting is twofold: it enables the flag State to be fully aware of the conduct of a private ship flying its flag - thus avoiding that lack of knowledge may be relied upon as a circumstance precluding wrongfulness[76] - and it is a preliminary condition for the adoption of any further action against either the ship or the Flag State.

Most importantly, in the event that the flag State were to consider inappropriate the adoption of any measure in that respect or the actions taken were considered insufficient by the reporting State a legal dispute might arise over the interpretation and application of the Convention which may be settled according to the rules enshrined in part XV UNCLOS[77]. In particular, the dispute would concern *inter alia*: a) to what extent a State party to the UNCLOS should exercise effective jurisdiction and control in order to avoid the freedom of the high seas be enjoyed by ships flying its flag without regard to the rights of coastal States protected by "other rules of international law" in the meaning of article 87 (1) UNCLOS; b) what kind of situations are encompassed by art. 94 (6) as to render the flag State intervention mandatory and what kind of measures such a State is supposed to take to remedy the situation; c) whether the genuine link requirement as established by article 91 (1) UNCLOS implies a strengthened duty of control over private ships permanently engaged in search and rescue operations.

It goes without saying that the importance of a judicial interpretation of UNCLOS and other relevant rules of international law triggered by the dispute settlement mechanism under Chapter XV would be paramount both in the interest of international law as such and ultimately for the future governance of boat migration.

---

[75] *Corfu Channel Case*, Judgment, cit., p. 22.

[76] In this respect see *In the matter of the South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case N° 2013-19, Award, 12 July 2016, paras. 754-755.

[77] A. CALIGIURI, *L'arbitrato nella Convenzione delle Nazioni Unite sul diritto del mare*, Napoli, 2018; I. V. KARAMAN, *Dispute Resolution in the Law of the Sea*, Leiden, 2012; R. VIRZO, *Il regolamento delle controversie nel diritto del mare: rapporti fra procedimenti*, Cedam, 2008; N. KLEIN, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge, 2005.

6. *Final remarks*

The salvage of people in danger of being lost at sea, the finding of a place of safety and the identification of a venue for disembarkation, while being constitutive elements of the same phenomenon, are envisaged by distinct sources and rules of the law of the sea which certainly contributed to challenge the unity, coherence and quality of the political response at national and international level. In such a fragmented framework, the claim according to which the State responsible for the SAR region where a salvage operation takes place must be considered *ipso facto* bound to grant the disembarkation of the rescued people in its own territory lacks a legal foundation in customary law nor it may be argued that it has been accepted by State parties to SOLAS, SAR and UNCLOS. Moreover, anytime a member State of the EU allows disembarkation in its own territory it is far from clear that it is also bound to process any request for international protection according to the EU Asylum System. In particular, it is questionable whether the entry of migrants on board a ship in the territory of an EU member State with its consent and support may be qualified as 'irregular border crossing' in the meaning of art. 13 (1) of the EU Regulation 604/2013. Recognizing that there is no automatic linkage between (or automatic effects stemming from) the obligations concerning rescue and disembarkation in accordance with international law, on one hand, and the obligations relating to the international protection of Asylum seekers under EU law, on the other hand, might represent a turning point for the overall management of boat migration which could enlarge the room for an effective revision of the Dublin system.

That being said, one final point needs to be emphasised. The idea that «considerations of humanity must apply to the law of the sea as they do in other areas of international law»[78] is absolutely worthy of support as it is the need to harmonize the relevant rules of the law of the sea with the imperative of preserving in any situation the dignity of human beings. Such an assumption may instead become a misleading starting point if it is actually used as a generic "fit for all" clause[79] placed at the highest level of a hierarchical system of sources. If so, the risk is that of cultivating the idea that existing human rights law is, whenever needed, capable of filling any normative gap in the international legal system with the result of weakening the perception that international law is in this field lacking (and it is!) a set of rules fit for the modern age. Such a misconception could hinder rather than favour a further (necessary) development of the human dimension of the law of the sea.

[78] See note 1; F. DELFINO, *Considerations of Humanity' in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals*, in A. DEL VECCHIO, R. VIRZO, *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, Cham, 2019, p. 421.

[79] A. CANNONE, *The Provisional Measures in the "Enrica Lexie" Incident Case*, *Ibid.*, p. 164-165.