

Migrants at Sea

A Legal Analysis of a Maritime Safety and Security Problem



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*“What men, what monsters, what inhuman race,
What laws, what barb’rous customs of the place,
Shut up a desart shore to drowning men,
And drive us to the cruel seas again?”*

(Virgil, *Aenid I*, 539-540)¹

¹ KEENER, Frederick M. (Ed.), *Virgil’s Aenid – Translated by John Dryden* (London: Penguin Classics, 1997).

Preface

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List of abbreviations

ABM Treaty	Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems Sea
AFM	Armed Forces of Malta
Appl.	Application
ARAMCO	Arabian American Oil Company
ASEAN	Association of Southeast Asian Nations
CARICOM	Caribbean Community
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CHS	Convention on the High Seas
Cir.	Circuit
Circ.	Circular
CMI	Comité Maritime International
CoE	Council of Europe
COLREGs	Convention on the International Regulations for Preventing Collisions at Sea
COMSAR	Sub-Committee on Radiocommunications and Search and Rescue
COP	Conference of the Parties
Corr.	Corrigendum
CPA	Comprehensive Plan of Action
DCA	Department of Civil Aviation
DISERO	Disembarkation Resettlement Offers Scheme
e.g.	exempli gratia
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ed.	edition
Ed.	Editor
Eds.	Editors
EEZ	Exclusive Economic Zone
etc.	etcetera
EU	European Union
EUREMA	European Relocation Malta
EUROSUR	European Border Surveillance System
EUSC	European Union Satellite Centre
ExCom	Executive Committee
F/V	Fishing Vessel
FAL	Facilitation Committee
FAL Convention	Convention on Facilitation of International Maritime Traffic
FIDH	La Fédération Internationale des ligues des Droits de l'Homme

FIR	Flight Information Region
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
FSI	Sub-Committee on Flag State Implementation
GISTI	Groupe d'Information et de Soutien des Immigrés
GMDSS	Global Maritime Distress and Safety System
GMT	Greenwich Mean Time
HCA	High Court of Australia
HRC	Human Rights Committee
HRW	Human Rights Watch
IAMSAR Manual	International Aeronautical and Maritime Search and Rescue Manual
ICAO	International Civil Aviation Organization
ICAT	Inter-agency Coordination Group against Trafficking in Persons
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICS	International Chamber of Shipping
ICTY	International Criminal Tribunal for the former Yugoslavia
i.e.	id est
ILC	International Law Commission
ILM	International Law Materials
ILO	International Labour Organization
ILR	International Law Reports
IMO	International Maritime Organization
Inter-Am. C.H.R.	Inter-American Court of Human Rights
IOM	International Organization for Migration
IRO	International Refugee Organization
ITF	International Transport Workers' Federation
ITLOS	International Tribunal for the Law of the Sea
ITS	Italian Ship (NATO designation)
LEG	Legal Committee
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
LNTS	League of Nations Treaty Series
LOSC	Law of the Sea Convention
LTTE	Liberation Tigers of Tamil Eelam
M/V	Motor Vessel
Migreurop	European Programme for Integration and Migration
MoU	Memorandum of Understanding
(M)RCC	(Maritime) Rescue Co-ordination Centre
MSC	Maritime Safety Committee
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
No.	Number
OAU	Organisation of African Unity
OFFRA	French Office for the Protection of Refugees and Stateless Persons

OHCHR	Office of the High Commissioner for Human Rights
OJ C	Official Journal of the European Union – Information and Notices
OJ L	Official Journal of the European Union – Legislation
OLA	United Nations Office of Legal Affairs
OPV	Optional Piloted Vehicles
P&I Clubs	Protection and Indemnity Clubs
PACE	Parliamentary Assembly of the Council of Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PSI	Proliferation Security Initiative
RABIT	Rapid Border Intervention Teams
RASRO	Rescue-at-Sea Resettlement Offers Scheme
RCF	Regional Cooperation Framework
SAR	Search and Rescue
SAR Convention	International Convention on Maritime Search and Rescue
SCIP	Sub-Committee of the Whole on International Protection
SOLAS Convention	International Convention for the Safety of Life at Sea
SOPs	Standard Operating Procedures for Shipmasters
SRR	Search-and-Rescue-Region
STC	Safe Third Country
SUA Convention	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
TIAS	Treaties and Other International Acts Series
TRNC	Turkish Republic of Northern Cyprus
UAS	Unmanned Aircraft System
UAV	Unmanned Aerial Vehicle
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKTS	United Kingdom Treaty Series
UN	United Nations
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNDOALOS	United Nations Division for ocean affairs and the Law of the Sea
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNRIAA	United Nations Reports of International Arbitral Awards
UNSC	United Nations Security Council
UNTOC	United Nations Convention Against Transnational Organized Crime
UNTS	United Nations Treaty Series
US	United States
UST	United States Treaties and Other International Agreements
v.	versus
VCLT	Vienna Convention on the Law of Treaties
VDR	Voyage Data Recorders
WMD	Weapons of Mass Destruction

Purpose of the research and methodology

The phenomenon of people taking to the seas in search of safety, refuge or better economic conditions is certainly not new. The mass exodus of Vietnamese boat people throughout the 1980s was followed in the 1990s by large-scale departures from Albania, Cuba and Haiti. Recently, international attention has focused on the movement of Somalis and Ethiopians across the Gulf of Aden, increasing numbers of sea arrivals in Australia as well as the outflow of people from North Africa to Europe in the aftermath of the Libya crisis. Beyond these situations, irregular maritime movements are a reality in all regions of the world.² A uniform legal definition of the terms ‘migrant’ or ‘migration’ does not exist at the international level.³ The International Organization for Migration (IOM) – the leading international organization for migration established in 1951⁴ – stressed the variety of terms used to describe the same or similar phenomenon. For example, the terms ‘illegal migration’, ‘clandestine migration’, ‘undocumented migration’ and ‘irregular migration’ are to a large extent used loosely and often interchangeably.⁵ In this dissertation, the terms ‘irregular migration’ and ‘illegal migration’ will be used.

There is no clear or universally accepted definition of irregular migration. On the definition of irregular migration, KOSER states: “*Irregular is itself a complex and diverse concept that requires careful clarification ... [I]t is important to recognize that there are lots of ways that a migrant can become irregular.*”⁶ Irregularities in migration can arise at various points – departure, transit, entry and return – and they may be committed either against the migrant or by the migrant’.⁷ IOM defined irregular migration as a movement that takes place outside

² UNHCR, “Refugees and Asylum-Seekers in Distress at Sea – How Best to Respond?”, Background paper (8-10 November 2011), para. 1, available online: <<http://www.unhcr.org/4ec1436c9.html>>.

³ TÜRK, Volker, “Freedom from Fear: Refugees, the Broader Forced Displacement Context and the Underlying International Protection Regime”, in CHETAIL, Vincent (Ed.), *Globalization, Migration and Human Rights: International Law under Review* (Brussels: Bruylant, 2007), Vol. II, 483, fn. 16.

⁴ Constitution of the International Organization for Migration (adopted 19 October 1953, entered into force 30 November 1954), 207 *UNTS* 189. In 1996, IOM concluded a cooperation agreement with the United Nations: Cooperation Agreement between the United Nations and the International Organization for Migration (adopted 25 June 1996), 1928 *UNTS* 315.

⁵ PERRUCHOUD, Richard (Ed.), *Glossary on Migration* (Geneva: IOM, 2004), 4, available online: <http://publications.iom.int/bookstore/free/IML_1_EN.pdf>.

⁶ KOSER, Khalid, *International Migration: a Very Short Introduction* (Oxford: Oxford University Press, 2007), 55.

⁷ ILO, “Towards a Fair Deal for Migrant Workers in the Global Economy”, Report VI presented at the International Labour Conference, 92nd sess, Report VI, Agenda Item 6, Geneva, 1-17 June 2004, 11.

the regulatory norms of the sending, transit and receiving countries. From the perspective of destination countries it is illegal entry, stay or work in a country, meaning that the migrant does not have the necessary authorization or documents required under immigration regulations to enter, reside or work in a given country. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country.⁸ Thus, irregular migrants are people that cross international borders outside of formal, regularized migration channels.⁹ Although there is a tendency to restrict the use of the term 'illegal migration' to cases of smuggling of migrants and trafficking in persons,¹⁰ in this thesis the term is being used in its broader sense, namely migration to a destination country in violation of the immigration laws and sovereignty of that country.¹¹ Migration can be categorized as either voluntary or forced, with the latter category usually describing refugees. Nevertheless, as the term refugee has a very specific meaning, it does not include all forced migrants.¹²

Nowadays, most maritime movements are so-called 'mixed' movements, involving individuals or groups travelling in an irregular manner along similar routes and using similar means of travel, but for different reasons. This means that the people on board have various profiles and needs, as opposed to being primarily refugee outflows.¹³ However, all of these movements include at least some refugees, asylum-seekers or other people of concern to the United Nations High Commissioner for Refugees (UNHCR). The 1951 Convention

⁸ PERRUCHOUD, Richard (Ed.), *Glossary on Migration* (Geneva: IOM, 2004), 34, available online: <http://publications.iom.int/bookstore/free/IML_1_EN.pdf>.

⁹ BETTS, Alexander, "Soft Law and the Protection of Vulnerable Migrants", 24 *Georgetown Immigration Law Journal* 533 (2010), 536.

¹⁰ PERRUCHOUD, Richard (Ed.), *Glossary on Migration* (Geneva: IOM, 2004), 34, available online: <http://publications.iom.int/bookstore/free/IML_1_EN.pdf>.

¹¹ Some authors consider the term 'illegal' as being quite controversial since it names a person not only as an outsider to a particular nation, but as an outsider to any nation. As such, the other is outside the law itself, and, in a word, 'illegal'. They suggest not to use this term as it is imperative to avoid labels that suggest a lack of legal existence which is both discriminatory and counterfactual. See for example: DAUVERGNE, Catherine, "Making People Illegal", in FITZPATRICK, Peter & TUITT, Patricia (Eds.), *Critical Beings: Law, Nation and the Global Subject* (London: Ashgate Press, 2003), 84; BERG, Laurie, "At the Border and between the Cracks: The Precarious Position of Irregular Migrant Workers under International Human Rights Law", 8 *Melbourne Journal of International Law* 1 (2007), 6.

¹² KOSER, Khalid, *International Migration: a Very Short Introduction* (Oxford: Oxford University Press, 2007), 16-17.

¹³ UNHCR, "All in the Same Boat: The Challenges of Mixed Migration", available online: <<http://www.unhcr.org/pages/4a1d406060.html>>.

relating to the Status of Refugees defines a refugee as someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.¹⁴ An asylum seeker is a person seeking to be admitted into a country as refugees, but whose claim for refugee status – under relevant international and national instruments – has not yet been definitively evaluated.¹⁵ However, among seaborne migrants, there are also people who are economic migrants looking for a better life in a developed country. Therefore, States are quite reluctant in permitting these persons onto their territory.

These mixed movements frequently take place without proper travel documentation and are often facilitated by smugglers. The vessels used for the journey are generally overcrowded, unseaworthy and not commanded by professional seamen. Therefore, distress at sea situations are common, raising grave humanitarian concerns for those involved. Search and rescue operations, disembarkation, processing and the identification of solutions for those rescued are re-occurring challenges for States, international organizations as well as the shipping industry.¹⁶ Next to this, illegal migration by sea is often treated by States as a security threat. In order to cope with this problem, States are taking interception measures to prevent people from arriving at their territory by sea. The problem of migrants at sea therefore poses both maritime safety issues (search and rescue) as well as maritime security issues (interception). The problem of stowaways is also a maritime security problem. A stowaway is “[a] person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the ship owner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities.”¹⁷

¹⁴ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 *UNTS* 137 [Refugee Convention], Art. 1. The 1967 Protocol relating to the Status of Refugees removed geographical and temporal restrictions from the Refugee Convention. Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 *UNTS* 267.

¹⁵ PERRUCHOU, Richard (Ed.), *Glossary on Migration* (Geneva: IOM, 2004), 8, available online: <http://publications.iom.int/bookstore/free/IML_1_EN.pdf>.

¹⁶ UNHCR, “Refugees and Asylum-Seekers in Distress at Sea – How Best to Respond?”, Background paper (8-10 November 2011), para. 2, available online: <<http://www.unhcr.org/4ec1436c9.html>>.

¹⁷ Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967), 591 *UNTS* 265, as amended [FAL Convention], Annex: Section 1 – Definitions and general provisions. See also: FAL, “Revised Guidelines on the Prevention of Access by Stowaways and the Allocation of Responsibilities to Seek the Successful Solution of Stowaway Cases”, FAL Resolution 11(37) (9 September 2011).

However, in this dissertation we will only deal with migrants who travel with their own means.

The central research question is whether the law of the sea provides enough tools to deal with migrants at sea both as a safety and as a security problem and if not, how we can improve the law in order to meet the current needs. Although this research does not focus on human rights or humanitarian law, these are mentioned where appropriate or deemed necessary in the light of an evaluation of the law of the sea. Regional legal instruments, initiatives and developments will be used to illustrate how certain areas deal with the problem of migrants at sea. Therefore, not every region will be covered in every part, nor will there be a comparative approach between regions. As we will focus on the law of the sea, we will merely deal with the actual sea journey of migrants. Therefore, the following elements will only be important when they influence the rights and obligations of the parties involved at sea: (1) the question why persons migrate: whether they have economic or political reasons is often not as important as the fact that they are at sea – being therein either voluntarily or not – with the aim of migrating; (2) what happens to the migrants after disembarkation (asylum procedure, reception condition *etc.*).

With the aim of answering the central research question, the following methodology will be used:

1. describe and analyze the current legal framework and highlight the legal gaps – based on the practical needs and problems – in law of the sea instruments relating to the maritime safety aspects of migrants at sea, namely search and rescue
2. describe and analyze the current legal framework and highlight the legal gaps – based on the practical needs and problems – in law of the sea instruments relating to the maritime security aspects of migrants at sea, namely interception
3. consider the common concerns of both maritime safety and maritime security aspects of migrants at sea as well as the confusion between the two legal regimes

4. explore a mechanism for re-interpreting and/or adapting the existing law of the sea instruments in order to provide for a workable and realistic solution for States and seafarers as well as for a stronger protection of migrants at sea

In order to reach the above-mentioned objectives, three major parts have to be discerned: maritime safety (search and rescue), maritime security (interception) and common concerns and abuses. The results of these three parts will provide the necessary basis on which the conclusions will be founded. This dissertation applies a unique approach as it does not only deal with safety and security as two different legal regimes, but also takes a look at the problems that may arise when combining them with each other or when confronting them with other fields of law, such as human rights.

CHAPTER I.
MARITIME SAFETY: SEARCH AND RESCUE

Introduction

The Arab Spring recently highlighted the problem of migrants at sea and the shortcomings of the international legal framework. Due to the social uprisings in Tunisia and Libya, thousands of people tried to reach Europe by sea. This is a dangerous journey, as these asylum seekers often travel in unseaworthy vessels. As a result of the Arab Spring, it is estimated that more than 1.500 people drowned or went missing while attempting to cross the Mediterranean to reach Europe in 2011.¹⁸ In 2012, UNHCR also expressed its concerns on the loss of life in maritime incidents in the Caribbean among people trying to escape – often in unseaworthy vessels – difficult conditions in Haiti following the 2010 earthquake.¹⁹ For example, in summer 2012, several persons lost their lives in Bahamian and US waters while trying to reach the shores of Florida. US Coast Guard data show that as of December 2011 over 900 people have been found on boats in rescue operations including some 652 Haitians, 146 Cubans and 111 people from the Dominican Republic.²⁰

These events are a reminder of the extremes that people in difficult situations sometimes resort to. Although no firm statistics exist, it is estimated that hundreds of deaths occur yearly as a result.²¹ The international community is aware that this problem has to be tackled as soon as possible in order to prevent further loss of life. This chapter will first deal with the search and rescue obligations of flag States and their shipmasters as well as those of coastal States. Secondly, we will take a look at the problem of disembarkation. As most rescued persons are asylum seekers, States are reluctant to let them disembark onto their own territory. Recently, there is a regional initiative for the Mediterranean Basin to solve the disembarkation problem. This will be discussed in a next part. Finally, we will discuss State responsibility as well as criminal sanctions for shipmasters in case international obligations are not being met.

¹⁸ UNHCR, “Mediterranean Takes Record as Most Deadly Stretch of Water for Refugees and Migrants in 2011”, Briefing Note (31 January 2012), available online: <<http://www.unhcr.org/4f27e01f9.html>>.

¹⁹ UNHCR, “More People are Risking Lives in the Caribbean to Reach Safety”, Statement (13 July 2012), available online: <<http://www.unhcr.org/refworld/docid/50001c5a2.html>>.

²⁰ US Coast Guard, “US Coast Guard Maritime Migrant Interdictions”, available online: <<http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/currentstats.asp>>.

²¹ UNHCR, “More People are Risking Lives in the Caribbean to Reach Safety”, Statement (13 July 2012), available online: <<http://www.unhcr.org/refworld/docid/50001c5a2.html>>.

1. Search and rescue

1.1. *The duty to render assistance*

The moral obligation to render assistance to persons in peril or lost at sea is one of the oldest and most deep-rooted maritime traditions. The early maritime law was concerned with the preservation of maritime property, rather than with the protection of seafarers.²² However, by the mid-19th century, one in five British mariners died at sea. Among sailors, mortality was higher than in any other occupation. Between 1861 and 1870, as much as 5,826 ships were wrecked off the British coast with the loss of 8,105 lives.²³ In 1880, the legal obligation of rendering assistance at sea was recognized in the *Scaramanga v. Stamp Case*, where it was decided: “*To all who have trust themselves to the sea it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations which may result to a ship or cargo from the rendering of needed aid.*”²⁴

In 1897, the Comité Maritime International (CMI) held its first international conference in Brussels to advance issues regarding collisions and salvage, as well as the duty to render assistance at sea. As a result, the Brussels Convention on Salvage was signed on 23 September 1910.²⁵ In 1989, the Brussels Convention was replaced by the International Convention on Salvage.²⁶ The provisions in these conventions expressly articulate an unqualified duty to render assistance to ‘persons’ or to ‘any person’ ‘in distress’ or ‘in danger of being lost at sea’.²⁷ Article 10 of the 1989 Salvage Convention stipulates: “(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. (3) The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.*” Also, Article 98 of the 1982 Law of the

²² GOLD, Edgar, CHIRCOP, Aldo E. & KINDRED, Hugh M., *Maritime Law* (Toronto: Irwin Law, 2003), 193-195.

²³ See JONES, Nicolette, *The Plimsoll Sensation: The Great Campaign to save Lives at Sea* (London: Little Brown, 2006).

²⁴ *Scaramanga v. Stamp*, 5 C.P.D. 295 (1880), 304.

²⁵ International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at Sea and Protocol of Signature (adopted 23 September 1910, entered into force 1 March 1913), 4 *UKTS* 6677.

²⁶ International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996), 1953 *UNTS* 194 [1989 Salvage Convention].

²⁷ CACCIAGUIDI-FAHY, Sophie, “The Law of the Sea and Human Rights”, 9 *Panoptica* 1 (2007), 6.

Sea Convention (LOSC)²⁸ contains a similar provision. However, the 1989 Salvage Convention and the LOSC have a different purpose. While the 1989 Salvage Convention aims to develop uniform international rules regarding salvage operations,²⁹ the LOSC creates a legal order for the seas and oceans.³⁰ Nevertheless, both conventions place the obligation to give effect to the duty to render assistance on States, rather than on masters.³¹

Nowadays, it is a legal obligation for shipmasters and States under customary international law, as well as under Articles 58(2) and 98(1) LOSC to render assistance to persons in danger of being lost and to proceed with all possible speed to the rescue of persons in distress. Article 98(1) LOSC states: *“Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.”*

Although the LOSC only mentions this duty in the exclusive economic zone (EEZ) and on the high seas, a State cannot rely on its sovereign powers to disregard this obligation in its territorial sea.³² Article 18(2) LOSC stipulates that – for the purpose of rendering assistance to persons, ships or aircraft in danger or distress – passage may include stopping and anchoring. Furthermore, the provision in Article 98(1) LOSC mentions ‘any person found at sea’ and not ‘any person found on the high seas’. As assistance must be given to ‘any’

²⁸ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 *UNTS* 3 [LOSC].

²⁹ 1989 Salvage Convention, Preamble.

³⁰ LOSC, Preamble.

³¹ SEVERANCE, Arthur Alan, “The Duty to Render Assistance in the Satellite Age”, 36 *California Western International Law Journal* 377 (2006), 382.

³² MSC, “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, para. 6; BARNES, Richard A., “Refugee Law at Sea”, 53 *International and Comparative Law Quarterly* 47 (2004), 50-52.

person³³, the obligation applies regardless of the persons' nationality or status or the circumstances in which they are found.³⁴ Therefore, migrants cannot be excluded from this.

First of all, there is a duty to render assistance to persons in danger of being lost. There is a variety of acts that may constitute assistance, for example to tow the vessel to safety, extricate a grounded vessel, fight a fire aboard a ship, provide food and supplies, embark crewmen aboard to replace the tired or the missing, secure aid or assistance from other nearby ships, or simply stand-by to provide navigational advice.³⁵ Secondly, there is an obligation to proceed with all possible speed to the rescue of persons in distress. However, the LOSC does not mention what 'distress' is. In the case of *The Eleanor*, it was submitted that distress must entail urgency, but that 'there need not be immediate physical necessity'.³⁶ The decision in the *Kate A. Hoff* case established that it is not required for the vessel to be 'dashed against the rocks' before a claim of distress can be invoked.³⁷ In the *Rainbow Warrior case*, the tribunal took a broader view of the circumstances justifying a plea of distress, accepting that a serious health risk would suffice.³⁸ Finally, the International Law Commission (ILC) confirmed that a situation of distress 'may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned'.³⁹

The actual distress phase is defined by the 1979 International Convention on Maritime Search and Rescue (SAR Convention)⁴⁰ – a treaty monitored by the International Maritime Organization (IMO) that imputes multi-State coordination of search and rescue systems – as:

³³ LOSC, Art. 98(1).

³⁴ International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 [SOLAS Convention], Chapter V Regulation 33 para. 1.

³⁵ NORRIS, Martin J., *The Law of Salvage* (Mount Kisco NY: Baker/Voorhis, 1958), 15-31; WILDEBOER, Ina H., *The Brussels Salvage Convention: Its Unifying Effect in England, Germany, Belgium, and The Netherlands* (Leiden: A.W. Sijthoff, 1965), 95; KENNEY, Frederick J. & TASIKAS, Vasilios, "The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea", 12 *Pacific Rim Law & Policy Journal* 143 (2003), 151-152.

³⁶ *The Eleanor Case*, Edw. 135 (1809), 135.

³⁷ General Claims Commission United States and Mexico, *Kate A. Hoff v. The United Mexican States*, 2 April 1929, 4 UNRIAA 444 (1929), reprinted in 23 *American Journal of International Law* 860 (1929).

³⁸ Arbitral Award, 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, *New Zealand v. France*, 30 April 1990, 10 UNRIAA 215 (1990), para. 79.

³⁹ ILC, *Yearbook of the International Law Commission* (New York: ILC, 1973), Vol. II, 134, para. 4, available online: <http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1973_v2_e.pdf>.

⁴⁰ International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 405 UNTS 97 [SAR Convention].

“A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.”⁴¹ When exactly a situation is identified as requiring immediate assistance, can be different according to which State is handling the situation. For some States the vessel must really be on the point of sinking.⁴² However, the ILC stated that – although a situation of distress may at most include a situation of serious danger – it is not necessarily one that jeopardizes the life of the persons concerned.⁴³ In contrast, for other States it is sufficient for the vessel to be unseaworthy.⁴⁴ MORENO-LAX even suggests that unseaworthiness *per se* entails distress.⁴⁵

Council Decision 2010/252⁴⁶ adopted additional guidelines that must be respected by European Member States during search and rescue situations at sea when operating within a Frontex – European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union⁴⁷ – joint operation at sea. When deciding whether a vessel is in distress or not, search and rescue units should take all relevant elements into account, in particular: “(a) the existence of a request for assistance; (b) the seaworthiness of the ship and the likelihood that the ship will not reach its final destination; (c) the number of passengers in relation to the type of ship (overloading); (d) the availability of necessary supplies (fuel, water, food, etc.) to reach a shore; (e) the presence of qualified crew and command of the

⁴¹ SAR Convention, Annex Chapter 1 para. 1.3.13.

⁴² European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final, Explanatory Memorandum, para. 2.

⁴³ ILC, *Yearbook of the International Law Commission* (New York: ILC, 1979), Vol. II, Part II, 135, para. 10, available online:

<http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1979_v2_p2_e.pdf>. Although this definition was given during the discussions on the concept of ‘distress’ as one of the grounds for excluding wrongfulness with regard to the Draft Articles on State Responsibility, the definition is often being used to describe the situation of distress of persons at sea. See for example: BARNES, Richard A., “Refugee Law at Sea”, 53 *International and Comparative Law Quarterly* 47 (2004), 60.

⁴⁴ European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final, Explanatory Memorandum, para. 2.

⁴⁵ MORENO-LAX, Violeta, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, 23 *International Journal of Refugee Law* 174 (2011), 195.

⁴⁶ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, OJL 111/20 of 4 May 2010.

⁴⁷ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, OJL 349/1 of 25 November 2004.

ship; (f) the availability of safety, navigation and communication equipment; (g) the presence of passengers in urgent need of medical assistance; (h) the presence of deceased passengers; (i) the presence of pregnant women or children; and (j) the weather and sea conditions.”⁴⁸

Thus – according to these guidelines – although unseaworthiness is certainly an element to take into consideration when assessing the situation, it does not automatically imply a distress situation. As every situation is different, the fact whether persons at sea are in distress or not will depend on the specific circumstances. Therefore, an assessment can only be made on a case-by-case basis. Although the definition of distress is quite vague, this allows shipmasters and States to take all relevant elements into account. Their margin of appreciation to decide whether persons are in distress or not is regarded as being essential. However, one element that is indisputable, is that the existence of an emergency should not be exclusively dependent on or determined by an actual request for assistance.⁴⁹

1.2. The obligation to cooperate

Coastal States shall establish adequate and effective search-and-rescue (SAR) services (for example, through the creation of a Rescue Co-ordination Centre (RCC) and, where circumstances so require, cooperate with neighbouring States for this purpose.⁵⁰ The basic elements for a search and rescue service are a legal framework, the assignment of a responsible authority, the organization of available resources, communication facilities, coordination and operational functions and processes to improve the service including planning, domestic and international cooperative relationships and training.⁵¹ In the SAR Convention, rescue is described as *“an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.”⁵²*

⁴⁸ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010, Annex Part II para. 1.3.

⁴⁹ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010, Annex Part II para. 1.4.

⁵⁰ LOSC, Art. 98(2); SAR Convention, Annex Chapter 2 para. 2.1.1.

⁵¹ SAR Convention, Annex Chapter 2 para. 2.1.2.

⁵² SAR Convention, Annex Chapter 1 para. 1.3.2.

Until the adoption of the SAR Convention, there was actually no international system covering search and rescue operations. Consequently, in some areas there was a well-established organization able to provide assistance promptly and efficiently, in others there was nothing at all. The SAR Convention thus aims at developing an international search and rescue plan. As a result, no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a search and rescue organization and – when necessary – by co-operation between neighbouring search and rescue organizations.⁵³ Basically, the world's oceans are divided into 13 search and rescue areas, in each of which the countries concerned have delimited search and rescue regions for which they are responsible.⁵⁴ The 13 maritime SAR areas are: Area 1 - North Atlantic; Area 2 - North Sea; Area 3 - Baltic Sea; Area 4 - Eastern South Atlantic; Area 5 - Western South Atlantic; Area 6 - Eastern North Pacific; Area 7 - Western North Pacific; Area 8 - Eastern South Pacific; Area 9 - Western South Pacific; Area 10A - North West Indian Ocean; Area 10B - South West Indian Ocean; Area 10C - East Indian Ocean; Area 11 - Caribbean Sea; Area 12A - Mediterranean Sea; Area 12B - Black Sea; Area 13 - Arctic Ocean.⁵⁵

States must ensure that sufficient Search and Rescue Regions (SRR) are established within each sea area. These regions should be contiguous and – as far as practicable – not overlap.⁵⁶ Each SRR shall be established by agreement among parties concerned.⁵⁷ The delimitation of SRR's is not related to and shall not prejudice the delimitation of any boundary between States.⁵⁸ Parties are required to ensure the closest practicable coordination between maritime and aeronautical services.⁵⁹ The International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual) – which was jointly published by IMO and

⁵³ IMO, "Search and Rescue", available online:

<<http://www.imo.org/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/Default.aspx>>.

⁵⁴ IMO, "SAR Convention", available online:

<<http://www.imo.org/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/SARConvention.aspx>>.

⁵⁵ COMSAR, "Matters Concerning Search and Rescue Including Those Related to the 1979 SAR Conference and the Introduction of the GMDSS", *IMO Doc. COMSAR 5/INF. 2* (17 April 2000), 7.

⁵⁶ SAR Convention, Annex Chapter 2 para. 2.1.3.

⁵⁷ SAR Convention, Annex Chapter 2 para. 2.1.4.

⁵⁸ SAR Convention, Annex Chapter 2 para. 2.1.7.

⁵⁹ SAR Convention, Annex Chapter 2 para. 2.4.

the International Civil Aviation Organization (ICAO) – provides guidelines for a common aviation and maritime approach to organizing and providing search and rescue services.⁶⁰

According to Article 98(2) LOSC, where circumstances so require, coastal States have to cooperate with neighbouring States. What exactly is ‘cooperation’? The concept of ‘cooperation’ can be seen as the active and practical expression from the notion of ‘interdependence’.⁶¹ Already in 1625, Hugo GROTIUS stated: “*There is no State so powerful that it may not some time need the help of others outside itself, either for purposes of trade, or even to ward off the forces of many foreign nations united against it. In consequence we see that even the most powerful peoples and sovereigns seek alliances [...]*.”⁶² In its individual opinion in the *Anglo-Norwegian Fisheries case* (1951), Judge ALVAREZ suggested that the traditional individualistic regime – on which social life was founded – was being substituted by a new regime, namely the regime of interdependence. As a result, the law of social interdependence was more and more taking the place of the individualistic law.⁶³ Although his opinion was not followed by the International Court of Justice (ICJ), the term ‘interdependence’ began to be heard with increasing frequency in political forums in the early 1970’s.⁶⁴

This 1970’s trend inspired many countries represented at the Third United Nations Conference on the Law of the Sea (UNCLOS III, 1973-1982). Consequently, the LOSC contains many undertakings to cooperate in a great variety of contexts. As a result of the principle *pacta sunt servanda*, a duty of cooperation created by the LOSC would actually require a Party to act cooperatively in respect of all Parties or a prescribed category of such

⁶⁰ IMO/ICAO, “International Aeronautical and Maritime Search and Rescue Manual”, London/Montreal (2003). For an extensive discussion on the IMO-ICAO search and rescue regions and the IAMSAR Manual see: VASILOGEORGI, Isavella Maria, “Delimitation of IMO-ICAO Search and Rescue regions – A Case of Jurisdictional Compilation and Complication”, 36 *Annals of Air and Space Law* 251 (2011), 251-278.

⁶¹ PINTO, Christopher W., “The Duty of Co-operation and the United Nations Convention on the Law of the Sea”, in BOS, Adriaan & SIBLESZ, Hugo (Eds.), *Realism in Law-Making – Essays on International Law in Honour of Willem Riphagen* (Dordrecht: Martinus Nijhoff Publishers, 1986), 133.

⁶² GROTIUS, Hugo, *De Jure Belli ac Pacis* (1925) trans. KELSEY, Francis W. (New York: Prolegomena, 1964), paras. 21-22.

⁶³ ICJ, *Fisheries Case, United Kingdom v. Norway*, 18 December 1951, Individual Opinion of Judge ALVAREZ, *ICJ Reports* 116 (1951), 149.

⁶⁴ The term ‘interdependence’ was used in several UNGA document, such as: UNGA, “Declaration on the Establishment of the New International Economic Order”, *UN Doc. A/RES/S-6/3201* (1 May 1974), available online: <<http://www.un-documents.net/s6r3201.htm>>; UNGA, “Charter of Economic Rights and Duties of States”, *UN Doc. A/RES/29/3281* (12 December 1974), available online: <<http://www.un-documents.net/a29r3281.htm>>; UNGA, “Development and International Economic Co-operation”, *UN Doc. A/RES/S-7/3362* (16 September 1975), available online: <<http://www.un-documents.net/s7r3362.htm>>.

Parties, as directed by the particular provision.⁶⁵ ‘Cooperation’ derives from the Latin verb *co-operari*, which means working or acting together or jointly, or uniting to produce and effect. Therefore, the duty to cooperate implies action. This action could for example exist of entering into negotiations in good faith at the request of any interested party, the creation at national level of institutions designed to foster international cooperation or the conclusion of bilateral, regional or global agreements. As a result, the refusal to respond to a request to negotiate for example could amount to a breach of the obligation and as a result justify appropriate remedial action.⁶⁶ However, taking countermeasures for instance would prove to be difficult. In the *Gabcikovo-Nagymaros Project case*, the ICJ accepted that countermeasures may justify otherwise unlawful conduct “*taken in response to a previous international wrongful act of another State and [...] directed against that State*”.⁶⁷ Yet, certain conditions have to be met. It is for example not very likely that there will be an actual injured State.⁶⁸ While discussing the obligation to cooperate in suppressing piracy, GUILFOYLE notes: “*While a duty to cooperate to the fullest possible extent may seem a strong obligation, the international community has not agreed that it has any specific minimum content. Identifying a breach of a duty to cooperate is notoriously difficult.*”⁶⁹

It is thus clear that a number of loopholes seriously impair the effectiveness of the duty to cooperate.⁷⁰ First of all, in public international law there is no general customary law-based obligation for States to cooperate. Therefore, duties to cooperate are treaty-based and as such the cooperative relationship is being artificially created. Secondly, provisions on

⁶⁵ VCLT, Preamble and Artt. 26, 27 and 31(1).

⁶⁶ PINTO, Christopher W., “The Duty of Co-operation and the United Nations Convention on the Law of the Sea”, in BOS, Adriaan & SIBLESZ, Hugo (Eds.), *Realism in Law-Making – Essays on International Law in Honour of Willem Riphagen* (Dordrecht: Martinus Nijhoff Publishers, 1986), 145.

⁶⁷ ICJ, *Gabcikovo-Nagymaros Case*, *Hungary v. Slovakia*, 25 September 1997, *ICJ Reports* 7 (1997), 55-56.

⁶⁸ For a discussion on the concepts ‘countermeasures’ and ‘injured State’, see: ALLAND, Denis, “The Definition of Countermeasures”, in CRAWFORD, James, PELLET, Alain & OLLESON, Simon (Eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 1127-1136; GAJA, Giorgio, “The Concept of an Injured State”, in CRAWFORD, James, PELLET, Alain & OLLESON, Simon (Eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 941-948.

⁶⁹ GUILFOYLE, Douglas, “The Challenges in Fighting Piracy”, in VAN GINKEL, Bibi & VAN DER PUTTEN, Frans-Paul (Eds.), *The International Response to Somali Piracy* (Leiden: Martinus Nijhoff Publishers, 2010), 130.

⁷⁰ DELBRÜCK, Jost, “The International Obligation to Cooperate – An Empty Shell or a Hard Law Principle of International Law? – A Critical Look at a Much Debated Paradigm of Modern International Law”, in HESTERMEYER, Holger P. *et al.* (Eds.) *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum* (Leiden: Martinus Nijhoff Publishers, 2012), 13-14; PINTO, Christopher W., “The Duty of Co-operation and the United Nations Convention on the Law of the Sea”, in BOS, Adriaan & SIBLESZ, Hugo (Eds.), *Realism in Law-Making – Essays on International Law in Honour of Willem Riphagen* (Dordrecht: Martinus Nijhoff Publishers, 1986), 1337-138.

cooperative conduct are often not manifestly demonstrably based on reciprocity or mutuality of benefit. Thirdly, the wordings of the obligation leaves it unclear as to the specific conduct required in fulfilment of that obligation. Therefore, the proof of such a breach would be very difficult. Fourthly, treaties that include an obligation to cooperate, often include a margin of appreciation. For example, Article 98(2) LOSC asks coastal States to cooperate “*where circumstances so require*”. Lastly, the effectiveness of a cooperation duty can also be impaired by non-cooperation. A particular problem is unilateral actions by States. For example, powerful States may turn to unilateralism when they decide that they may achieve their foreign policy goals by unilateral action rather than cooperation. As the international system is based upon sovereign equality of States, the system is in fact characterized by gross inequalities in power that are a structural obstacle to cooperation and thus encourages powerful States “*to go it alone*”.⁷¹ On the one hand, there are a growing number of obligations to cooperate in international law, for example to suppress drug trafficking by sea⁷² or to prevent the proliferation of weapons of mass destruction and their transport by sea.⁷³ On the other hand, there exists an unsatisfactory degree of implementation of these duties because of non-compliance.⁷⁴

In April 2009, the Turkish owned and Panamanian flagged ship *M/V Pinar E* rescued 142 African migrants off the coast of Lampedusa. The ship and the rescued migrants were the subject of an ensuing stand-off between Italy and Malta regarding who would receive the migrants. While Malta insisted that the *M/V Pinar E* would take the migrants to Lampedusa because it was the nearest port to where the stricken boats were found, Italy maintained that the persons were rescued in the Maltase SRR and thus fell under Malta’s responsibility. Although Italy finally agreed to allow disembarkation in Sicily, the decision was made

⁷¹ SCHREUER, Christoph H., “State Sovereignty and the Duty of States to Cooperate – Two Incompatible Notions?”, in DELBRÜCK, Jost (Ed.), *International Law of Cooperation and State Sovereignty: Proceedings of an International Symposium of the Kiel Walther Schücking Institute of International Law* (Berlin: Duncker & Humblot, 2002), 177.

⁷² United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990), 95 *UNTS* 1582 [Drugs Convention], Art. 17(1).

⁷³ Interdiction Principles for the Proliferation of Security Initiative (adopted 4 September 2003), available online: <<http://www.state.gov/t/isn/c27726.htm>>.

⁷⁴ DELBRÜCK, Jost, “The International Obligation to Cooperate – An Empty Shell or a Hard Law Principle of International Law? – A Critical Look at a Much Debated Paradigm of Modern International Law”, in HESTERMEYER, Holger P. *et al.* (Eds.) *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum* (Leiden: Martinus Nijhoff Publishers, 2012), 15.

exclusively in consideration of the painful humanitarian emergency aboard the cargo ship. Italy made clear that its acceptance of the migrants must not in any way be understood as a precedent nor as a recognition of Malta's reasons for refusing them.⁷⁵ This is one of the many incidents that highlight the lack of cooperation and coordination between SAR services of these two States.

As already mentioned, the SAR Convention aims to create an international system for coordinating rescue operations and therefore State parties are invited to conclude SAR agreements with neighbouring States to regulate and coordinate SAR operations and services in the agreed maritime zone.⁷⁶ Such agreement do not only technically and operatively implement the obligation laid down in Article 98(2) LOSC, they also diminish the risk of non-rescue incidents. Next to this, they can offer an economic advantage to the extent that the contracting parties can share costs arising from organizing and carrying out SAR operations.⁷⁷ For the moment, several States in the Mediterranean have for example unilaterally declared a SRR. However, there is no regional agreement yet on the coordination among them.⁷⁸

In 2004, Australia and Indonesia did conclude such an agreement. These countries designated their RCC's for the agreed SAR region and defined the modalities by which the RCC's should interact, exchange information and execute cross-border SAR operations. During these operations, the rescue unit of one State can enter the territorial sea of the other State after a notification. In order to determine the RCC that will be responsible for carrying out a certain operation, the area where the vessel is located will be decisive. The RCC responsible for this area organizes the operation. In case the exact location is unknown, the

⁷⁵ BBC, "Italy takes in stranded migrants" (20 April 2009), available online: <<http://news.bbc.co.uk/2/hi/europe/8007379.stm>>; Times of Malta, "Migrants standoff: PM insists Malta did its duty" (20 April 2009), available online: <<http://www.timesofmalta.com/articles/view/20090420/local/migrants-standoff-pm-insists-malta-did-its-duty.253648>>.

⁷⁶ SAR Convention, Chapter 3.

⁷⁷ TREVISANUT, Seline, "Search and Rescue Operations in the Mediterranean: Factor for Cooperation or Conflict?", 25 *International Journal of Marine & Coastal Law* 523 (2010), 528-529.

⁷⁸ See TREVISANUT, Seline, "Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?", 25 *International Journal of Marine & Coastal Law* 523 (2010), 523-542.

RCC that received the distress call is responsible.⁷⁹ Although Australia and Indonesia disagree on several other points of their maritime policies, this agreement has definitely become an important tool for operational cooperation between the two States, thus enhancing the efficiency of SAR services and the safety of life at sea.⁸⁰ Nevertheless, there may be negative consequences resulting from such an agreement. When a SAR operation occurs in the zone under Indonesian competence, people will be disembarked in this country. However, asylum seekers often prefer Australia instead of Indonesia. For example, in October 2009, the *Ocean Viking* wanted to bring some rescued Sri Lankan Tamil asylum seekers to Indonesia.⁸¹ However, these people refused to disembark in this country.⁸²

On 13 August 2012, the *Australian Expert Panel on Asylum Seekers* – a panel lead by former Australian Defence Force chief Angus HOUSTON – issued a report stating that Australia and Indonesia should cooperate even more closely.⁸³ The report was drafted after an invitation of the Prime Minister and the Minister for Immigration and Citizenship to provide a document on the best way forward for Australia to prevent asylum seekers risking their lives on dangerous boat journeys to Australia. On 14 August 2012, a day after the report was made available, Home Affairs Minister Jason CLARE declared to fear that 67 people – presumed to be asylum seekers – on board a boat that was missing since it left Indonesia in July, probably had sunk.⁸⁴ That same month, only six persons were rescued after a boat – believed to be carrying 150 asylum seekers attempting to reach Australia – sank in the Sunda Strait between Java and Christmas Island. At the time of rescue by a merchant ship, the

⁷⁹ Arrangement between Australia and Indonesia for the co-ordination of search and rescue services (adopted 5 April 2004), *IMO Doc. SAR.6/Circ.22* (13 April 2004), Annex, available online: <http://www.imo.org/blast/blastDataHelper.asp?data_id=9310&filename=22.pdf>.

⁸⁰ TREVISANUT, Seline, “Search and Rescue Operations in the Mediterranean: Factor for Cooperation or Conflict?”, *25 International Journal of Marine & Coastal Law* 523 (2010), 539.

⁸¹ Tamil are an ethnic group native to the north-eastern region of Sri Lanka.

⁸² ROTHWELL, Donald R., “Howard’s way still figures large in asylum-seeker policy”, *The Australian* (10 November 2009), available online: <<http://www.theaustralian.com.au/news/opinion/howards-way-still-figures-large-in-asylum-seeker-policy/story-e6frg6zo-1225795886606>>.

⁸³ Australian Expert Panel on Asylum Seekers, “Report of the Expert Panel on Asylum Seekers” (13 August 2012), available online: <<http://expertpanelonasylumseekers.dpmc.gov.au/report>>.

⁸⁴ *The Independent*, “67 asylum-seekers drown trying to reach Australia by boat” (14 August 2012), available online: <<http://www.independent.co.uk/news/world/australasia/67-asylumseekers-drown-trying-to-reach-australia-by-boat-8046638.html>>.

survivors had already been in the water for about 24 hours. The boat's passengers included women and children and were believed to have been Afghan asylum seekers.⁸⁵

1.3. Conclusion

It is a legal obligation for shipmasters and States under customary international law, as well as under Articles 58(2) and 98(1) LOSC to render assistance to persons in danger of being lost and to proceed with all possible speed to the rescue of persons in distress. Although the definition of distress is quite vague, this allows shipmasters and States to take all relevant elements into account. Their margin of appreciation to decide whether persons are in distress or not is regarded as being essential. As every situation is different, the fact whether persons at sea are in distress or not will depend on the specific circumstances. Therefore, an assessment can only be made on a case-by-case basis. However, one element that is indisputable, is that the existence of an emergency should not be exclusively dependent on or determined by an actual request for assistance.⁸⁶

Coastal States shall establish adequate and effective SAR services (for example, through the creation of an RCC and, where circumstances so require, cooperate with neighbouring States for this purpose.⁸⁷ However, there is no specific minimum content of this duty to cooperate. Identifying a breach is therefore notoriously difficult.⁸⁸ However, the SAR Convention aims to create an international system for coordinating rescue operations and therefore State parties are invited to conclude SAR agreements with neighboring States to regulate and coordinate SAR operations and services in the agreed maritime zone.⁸⁹ For the moment, several States in the Mediterranean have for example unilaterally declared a SRR.

⁸⁵ Migrants at Sea, "140+ Feared Dead After Migrant Boat Sinks Off Indonesia" (30 August 2012), available online: <<http://migrantsatsea.wordpress.com/2012/08/30/140-feared-dead-after-migrant-boat-sinks-off-indonesia/>>.

⁸⁶ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJ L* 111/20 of 4 May 2010, Annex Part II para. 1.4.

⁸⁷ LOSC, Art. 98(2); SAR Convention, Annex Chapter 2 para. 2.1.1.

⁸⁸ GUILFOYLE, Douglas, "The Challenges in Fighting Piracy", in VAN GINKEL, Bibi & VAN DER PUTTEN, Frans-Paul (Eds.), *The International Response to Somali Piracy* (Leiden: Martinus Nijhoff Publishers, 2010), 130.

⁸⁹ SAR Convention, Chapter 3.

However, there is no regional agreement yet on the coordination among them.⁹⁰ Nevertheless, such agreements are an important tool for operational cooperation between States, thus enhancing the efficiency of SAR services and the safety of life at sea.

⁹⁰ See TREVISANUT, Seline, “Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?”, 25 *International Journal of Marine & Coastal Law* 523 (2010), 523-542.

2. Disembarkation

2.1. No disembarkation duty for States

Neither treaty law nor customary international law requires States to let rescued persons disembark onto their territory. Both the International Convention on Safety of Life at Sea (SOLAS Convention)⁹¹ – a treaty seeking to ensure protection of passengers aboard ships in distress through the prevention of situations of distress – and the SAR Convention⁹² only provide that States must arrange for the disembarkation of persons rescued at sea as soon as reasonably practicable.⁹³ Accepting an obligation to disembark would thus mean that States voluntarily surrender part of their sovereignty. Coastal ports are in the internal waters of a State and therefore they are subject to domestic law.⁹⁴ Nevertheless, treaty rules make it possible to restrict this sovereignty. The judgement in the *Aramco Case* (1958), which deals with a dispute between Saudi Arabia and the Arabian American Oil Company (ARAMCO), stated: “According to a great principle of public international law the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require”.⁹⁵

This would also imply the existence of a right to access for merchant vessels carrying persons rescued at sea, even when these are migrants. Nevertheless, as there is no proof of such a principle of international customary law, this statement is not correct.⁹⁶ It is true that most States have permitted merchant ships to enter their ports on economic grounds. However, first of all, bilateral agreements between States do not possess a 'norm-creating character'.⁹⁷ Second, such an agreement does not imply that coastal States could not refuse the

⁹¹ International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 *UNTS* 278 [SOLAS Convention].

⁹² International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 405 *UNTS* 97 [SAR Convention].

⁹³ SOLAS Convention, Chapter V Regulation 33; SAR Convention, Chapter 3 para. 3.1.9.

⁹⁴ ICJ, Case concerning Military and Paramilitary Activities In and Against Nicaragua, *Nicaragua v. United States of America*, 27 June 1986, *ICJ Reports* 14 (1986), paras. 212-213.

⁹⁵ Arbitral Award, *Aramco v. Saudi Arabia*, 23 August 1958, 27 *International Law Reports* 117 (1958), para. 27.

⁹⁶ SOMERS, Eduard, *Inleiding tot het Internationaal Zeerecht* (Mechelen: Kluwer, 4th ed. 2004), 36.

⁹⁷ BARNES, Richard A., “Refugee Law at Sea”, 53 *International and Comparative Law Quarterly* 47 (2004), 58.

right to access.⁹⁸ Third, when no international agreement deals with the matter, the coastal State can freely regulate this access. The Statute on the International Regime of Maritime Ports of 1923 provides for a non-discrimination principle concerning access to coastal ports, but the latter depends on the reciprocity rule, hence no absolute right of access exists.⁹⁹

The only exception to this rule could be for ships in distress.¹⁰⁰ The situation of distress must result from a *bona fide* emergency or *force majeure* and not, for example, from insufficient precaution at the beginning of the journey. Thus, can a ship that carries persons rescued at sea be seen as a ship in distress? This could perhaps be the case if, for example, an epidemic disease breaks out or the ship becomes unseaworthy due to the large number of people on board. The SOLAS Convention states that it is possible for a ship to become unseaworthy as a result of a rescue operation. Nevertheless, this can never be a reason to apply the SOLAS Convention rules on ships in distress.¹⁰¹ On the other side, according to the ILC, when human life is at stake or when the physical integrity of a person is being threatened, the ship is in distress.¹⁰² This is not the case when only a few persons are ill, but when an epidemic disease spreads among the persons rescued and the crew, the ship itself can be regarded as being in distress.

But even if this were the case, does a ship in distress have an absolute right to enter foreign ports in order to attain safety? The Statute on the International Regime of Maritime Ports of 1923 is silent on this matter. Most academics rely on the *Rebecca Case* to conclude that a right of access for ships in distress does exist.¹⁰³ However, according to SOMERS, no right of

⁹⁸ CHURCHILL, Robin & LOWE, Alan V., *The Law of the Sea* (Manchester: Manchester University Press, 3rd ed. 1999), 62; DE LA FAYETTE, Louise, "Access into Ports in International Law", 11 *International Journal of Marine & Coastal Law* 1 (1996), 1.

⁹⁹ Convention and Statute on the International Regime of Maritime Ports (adopted 9 December 1923, entered into force 26 July 1926), 515 *UNTS* 350.

¹⁰⁰ COLOMBOS, Constantine J., *Higgins and Colombos on the International Law of the Sea* (Longmans, London, 1951), 329.

¹⁰¹ SOLAS Convention, Art. IV(b).

¹⁰² ILC, *Yearbook of the International Law Commission* (New York: ILC, 1973), Vol. II, 134, para. 4, available online: <http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1973_v2_e.pdf>.

¹⁰³ General Claims Commission United States and Mexico, *Kate A. Hoff v. The United Mexican States*, 2 April 1929, 4 *UNRIAA* 444 (1929); See, for example, CHURCHILL, Robin & LOWE, Alan V., *The Law of the Sea* (Manchester: Manchester University Press, 3rd ed. 1999), 63.

entry for ships in distress exists in customary law.¹⁰⁴ This is a logical deduction from the existence of coastal sovereignty over internal waters, and appears to be the position generally adopted in State practice.¹⁰⁵ Article 11 of the Salvage Convention¹⁰⁶ confirms this by providing the right for a coastal State to refuse the vessel in distress entry into its port when there is a risk to that port (e.g., pollution). Article V(b) of the SOLAS Convention also states that a State has the right to decide who enters its own ports, even in case of emergency. State practice is in line with these provisions.

It is important to note that the 2003 IMO Guidelines on Places of Refuge for Ships in Need of Assistance detach the rescue of persons from the issue of refuge to the ship itself. The Guidelines identify two situations that can occur: (1) the ship, according to the master's assessment, is in need of assistance but not in a distress situation (about to sink, fire developing, etc.) that requires the evacuation of those on board and (2) those on board have already been rescued, with the possible exception of those who have stayed on board or have been placed on board in an attempt to deal with the situation of the ship.¹⁰⁷ Historically, the two issues – a ship in distress and the persons aboard in distress – were indeed intertwined.¹⁰⁸ However, with today's modern technology, persons in distress can for example be removed from a vessel by helicopter. Access to a port is not *per se* necessary to save lives.

As a result, persons rescued at sea can spend weeks on a ship at sea before a State allows them to go ashore. The case of the *Marine I* provides an example. On 30 January 2007, the

¹⁰⁴ SOMERS, Eduard, *Inleiding tot het Internationaal Zeerecht* (Mechelen: Kluwer, 4th ed. 2004), 38-40. Contra: VON GADOW-STEPHANI, Inken, *Der Zugang zu Nothäfen und sonstigen Notliegeplätzen für Schiffe in Seenot* (Berlin/Heidelberg: Springer, 2006), 479 p.

¹⁰⁵ See for example the disasters involving the ships *Erika* in 1999 (see SOMERS, Eduard & GONSAELES, Gwendoline, "The Consequences of the Sinking of the M/S ERIKA in European waters: Towards a Total Loss for International Shipping Law?", 41 *Journal of Maritime Law & Commerce* 57 (2010), 57-84), *Tampa* in 2001 (see DERRINGTON, Sarah & WHITE, Michael, "Australian Maritime Law Update 2001", 33 *Journal of Maritime Law & Commerce* 275 (2002), 275-291) and *Prestige* in 2002 (see FRANK, Veronica, "Consequences of the *Prestige* Sinking for European and International Law", 20 *International Journal of Marine & Coastal Law* 1 (2005), 1-64).

¹⁰⁶ International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 *UNTS* 193 [1989 Salvage Convention].

¹⁰⁷ IMO, "Guidelines on Places of Refuge for Ships in Need of Assistance", Resolution A.949 (23) (5 March 2004), para. 1.13.

¹⁰⁸ CHIRCOP, Aldo, "The IMO Guidelines on Places of Refuge for Ships in Need of Assistance", in CHIRCOP, Aldo & LINDEN, Olof (Eds.), *Places of Refuge for Ships – Emerging Environmental Concerns of a Maritime Custom* (Leiden: Martinus Nijhoff Publishers, 2006), 37.

Spanish Coast Guard received a distress call from the vessel *Marine I*. It was alleged that over 300 migrants from Guinea were on board. Although the *Marine I* was within the Senegalese SRR, Senegal requested Spain to proceed with a rescue operation, claiming that Senegal did not have the proper means to assist. Because the Mauritanian port of Nouadhibou was closest to the emergency, Senegal also informed Mauritania of the situation. On 4 February, a Spanish maritime rescue tug reached the *Marine I* and provided immediate relief by handing out supplies of water and food. The Spanish government also commenced negotiations with Senegal and Mauritania on the fate of the migrants. On 12 February (two weeks after the distress call), Spain, Senegal and Mauritania finally reached an agreement regarding the passengers. It was reportedly agreed that Spain would pay €650,000, in return for Mauritania allowing the passengers to disembark. Repatriation commenced the day after the migrants had disembarked. Guinea agreed to readmit thirty-five passengers, all of African origin.¹⁰⁹ In total, Spain reported 18,000 irregular arrivals by sea from West Africa that year.¹¹⁰ The fact that Spain was prepared to pay as much as €650,000 to prevent the disembarkation of 300 migrants shows that some States are reluctant to allow disembarkation of rescued persons onto their territory.

The main reason for this reluctance is that almost all of these persons are migrants requesting asylum. According to the UNHCR, it is very difficult to know the exact percentage of asylum-seekers that arrive by sea, because official statistics in most countries do not state how an asylum-seeker arrived, i.e., by sea, land or air. On average, roughly 70 % of those arriving by sea in Malta are asylum-seekers. In the case of Italy, one-third of those arriving on Lampedusa Island apply for asylum. This amounts to roughly 60 % of all applications for asylum in Italy.¹¹¹ Moreover, this migration is often mixed. Not only political migrants or refugees try to reach a safe shore. Most of these people are economic migrants looking for a better life in a developed country. States are therefore reluctant to permit disembarkation unless they receive financial or readmission guarantees. Negotiations on these conditions can last for days or even weeks.

¹⁰⁹ WOUTERS, Kees & DEN HEIJER, Maarten, “The Marine I Case: A Comment”, 22 *International Journal of Refugee Law* 1 (2010), 2-3.

¹¹⁰ UNHCR, “All in the Same Boat: The Challenges of Mixed Migration”, available online: <<http://www.unhcr.org/pages/4a1d406060.html>>.

¹¹¹ UNHCR, “Irregular Migration by Sea” (28 May 2009), available online: <<http://www.unhcr.org/4a1e48f66.html>>.

Unfortunately this means that the migrants – often requiring medical care – do not receive this aid immediately. The shipmaster and his crew are not trained to assist these migrants in their special needs. Furthermore, the financial pressure on the master and owner of the ship, due to the delay of the ship, can be enormous. In some cases, compensation for expenses, delay, and diversion – together with consequential losses – can be provided through Protection and Indemnity Clubs (P&I Clubs). However, with today’s ever-increasing emphasis on swift deliveries and fast turn-arounds, the economic pressures on seafarers sometimes override humanitarian principles.¹¹² In May 2007, a group of 27 boat people were rescued by the Italian Navy after they had spent three days and nights clinging to tuna pens being towed by a Maltese fishing vessel, the *Budafel*. The captain of this vessel told the media that he refused to divert his ship to disembark the men because he was afraid of losing his valuable catch of tuna.¹¹³ By failing to institute co-ordinated, well-organized systems for receiving and processing asylum-seekers and migrants, States are putting seafarers in an intolerable position: damned if they do, and damned if they don’t.¹¹⁴

Consequently, in practice some shipmasters will ignore migrants at sea because they know that their entrance into ports will be refused. Human Rights Watch (HRW), one of the world’s leading independent organizations dedicated to defending and protecting human rights, recorded several testimonies of migrants at sea. In August 2008, Abassi – a 21-year-old Nigerian – drifted on an inflatable boat in international waters for five days: *“One side of the boat had sunk and the other was still floating. There were 85 of us clinging to it. There was nothing to eat and by the second day we had no water. People were drinking sea water and got sick. Three people died. On the fourth day we saw a helicopter. The helicopter saw us and waved. The helicopter did not drop food or water, and no boat came to rescue us. Five hours later we saw a ship. It did not come to help. It stopped and spent a few hours standing there. The boat just watched.”*¹¹⁵

¹¹² International Transport Workers’ Federation, “Damned If They Do...” (2006), available online: <<http://www.itfseafarers.org/damned.cfm>>.

¹¹³ UNHCR, “Between the Devil and the Deep Blue Sea”, 148 *Refugees Magazine* 4 (2007), available online: <<http://www.unhcr.org/refmag/148/index.html>>.

¹¹⁴ International Transport Workers’ Federation, “Damned If They Do...” (2006), available online: <<http://www.itfseafarers.org/damned.cfm>>.

¹¹⁵ Human Rights Watch, “Pushed Back, Pushed Around” (21 September 2009), available online: <http://www.hrw.org/en/node/85582/section/11#_ftn104>.

Already in the mid-1970s, disembarkation was a problem as many boat people fled from the communist regime in Vietnam. On the initiative of UNHCR and in cooperation with many States, the Disembarkation Resettlement Offers Scheme (DISERO) was completed in 1979,¹¹⁶ followed by the Rescue-at-Sea Resettlement Offers Scheme (RASRO) in 1985.¹¹⁷ The coastal States of Indochina were prepared to allow disembarkation and to grant temporary protection in exchange for guarantees that other – often developed – States would grant permanent protection to the refugees.¹¹⁸ By the end of the 1980s the number of people fleeing Vietnam was increasing, and the willingness of host States in the region to offer protection and of third countries outside the region to offer resettlement was declining. As a result the pool of ‘long-stayers’ in first asylum camps grew and the countries in the region began to identify resettlement as a ‘pull factor’ attracting increasing numbers of economic migrants instead of political refugees.¹¹⁹ In 1989 the Steering Committee of the International Conference on Indo-Chinese Refugees therefore drafted the Comprehensive Plan of Action 1989-1997 (CPA).¹²⁰ One of the goals of this CPA was to identify the status of the migrants and to resettle only persons who were granted the status of refugee according to the Convention relating to the Status of Refugees of 1951.¹²¹ Those found not to be refugees were repatriated and reintegrated in their home countries. The big difference with the DISERO programme was that the countries of origin were also involved. The CPA ended in 1996, because it was considered to have met its objectives.¹²²

¹¹⁶ United Nations, International Conference on Indo-Chinese Refugees, 20-21 July 1979, Geneva; UNGA, “Report of the Secretary-General on the Meeting on Refugees and Displaced Persons in South East Asia and Subsequent Developments”, *UN Doc. A/34/627* and Corr. 1 (7 November 1979), available online: <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae68f420&skip=0&query=A/34/627#hit1>>.

¹¹⁷ As described in: Sub-Committee of the Whole on International Protection (SCIP), “Problems Related to the Rescue of Asylum-Seekers in Distress at Sea”, *UN Doc. EC/SCP/30* (1 September 1983), available online: <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae68ccf8&query=EC/SCP/30>>.

¹¹⁸ ExCom, “Problems Related to the Rescue of Asylum-Seekers in Distress at Sea”, Conclusion No. 23 (XXII) (1981), available online: <<http://www.unhcr.org/3ae68c4344.html>>.

¹¹⁹ BETTS, Alexander, “Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA” UNHCR Working Paper No. 120 (January 2006), 32, available online: <<http://www.unhcr.org/43eb6a152.html>>. See also ROBINSON, Courtland W., “The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck”, 17 *Journal of Refugee Studies* 319 (2004), 319-333.

¹²⁰ United Nations, International Conference on Indo-Chinese Refugees, 13-14 June 1989, Geneva; UNGA, “Report of the Secretary-General on the International Conference on Indo-Chinese Refugees [Annex: Declaration and Comprehensive Plan of Action (CPA)]”, *UN Doc. A/44/523* (22 September 1989), available online: <<http://www.unhcr.org/refworld/docid/3dda17d84.html>>.

¹²¹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 *UNTS* 137 [Refugee Convention].

¹²² UNHCR, “Report of the United Nations High Commissioner for Refugees, 1996”, *UN Doc. A/51/12* (4 September 1996), available online: <<http://www.unhcr.org/refworld/docid/3b00f4940.html>>.

Although a mechanism like the CPA – linking the disembarkation duty to financial arrangements and/or burden-sharing agreements¹²³ – could be used to face the disembarkation problem today, several circumstances have changed in the last couple of years. Two big differences can be identified. First of all, the problem of migrants at sea has geographically spread and their objective has changed. Where in the past the Vietnamese boat people arrived in neighbouring developing countries, current migrants often have developed States as their destination. A second difference is the fact that States have changed their opinion on migrants at sea. In the 1980s, the division between communists and non-communists still existed. As a result, the Vietnamese received a lot of support from developed countries. After big disasters like 9/11, States began to consider migrants as a possible threat to their security.¹²⁴ Although the CPA focused on controlling migration, its overall effect was not so much to halt movement, as to redirect the outflow.¹²⁵ However, because the current interception measures have the opposite aim and thus do want to halt movement, States will be reluctant to accept an identical plan of action for the situation as it is now. Furthermore, the late Mr. Sergio VIEIRA DE MELLO – then UNHCR Bureau Chief for Asia and Oceania – noted in 1996 that *“UNHCR cannot continue indefinitely to spend for one Vietnamese non-refugee nearly eight times as much as we spend for a Rwandan refugee. UNHCR cannot justify continuing its care and maintenance expenditure...for a caseload not in need of international protection.”*¹²⁶ Nevertheless, the burden-sharing principles found in the CPA can be used again to set up a new plan of action.

¹²³ ExCom, “Protection of Asylum-Seekers in Situations of Large-Scale Influx”, Conclusion No. 22 (XXXII) (1981), available online: <<http://www.unhcr.org/41b041534.html>>; ExCom, “Rescue of Asylum-Seekers in Distress at Sea”, Conclusion No. 38 (XXXVI) (1985), available online: <<http://www.unhcr.org/3ae68c4358.html>>.

¹²⁴ Migration Policy Institute (MPI), “Report on the New ‘Boat People’. Ensuring Safety and Determining Status” (January 2006), 19-21, available online: <http://www.migrationpolicy.org/pubs/Boat_People_Report.pdf>; ExCom, “Proposals for an Executive Committee Conclusion on Rescue at Sea” (10 January 2007), para. 4, available online: <<http://www.unhcr.org/excom/EXCOM/45a752d12.pdf>>.

¹²⁵ ROBINSON, Courtland W., “The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck”, *17 Journal of Refugee Studies* 319 (2004), 324.

¹²⁶ UNHCR, “Report of the United Nations High Commissioner for Refugees, 1996”, *UN Doc. A/51/12* (4 September 1996), available online: <<http://www.unhcr.org/refworld/docid/3b00f4940.html>>.

2.2. 2004 SOLAS and SAR Amendments

2.2.1. 2001 Tampa incident

In August 2001 the Tampa incident highlighted the problem of disembarkation of migrants at sea. The master of the Norwegian container ship *M/V Tampa* rescued some 438 asylum seekers from drowning in international waters between Christmas Island (Australia) and Indonesia. The master first headed towards Indonesia, as he was technically in the Indonesian SRR. This reportedly elicited threats from some of the migrants, who insisted on being taken to Christmas Island. As the captain prepared to enter Australian territorial waters, the Australian Special Air Services intercepted and boarded the ship. The incident gave rise to a very complex international political situation. The Australian government claimed that the port facilities on Christmas Island could not accommodate a vessel of the *Tampa's* size. The UNHCR called upon the States to share the burden. Although the Norwegian government's reaction was positive, the Australian government rejected this arrangement and contacted New Zealand, Nauru, and later Papua New Guinea, all of which agreed to receive a number of migrants.¹²⁷

It took weeks for all the countries involved to solve the disembarkation problem, thereby painfully demonstrating the insufficiency of the international legal framework.¹²⁸ In Resolution A.920(22) of November 2001, the IMO General Assembly asked the Maritime Safety Committee (MSC), the Legal Committee (LEG) and the Facilitation Committee (FAL) to review the existing legal instruments to identify and eventually eliminate all legal inconsistencies, ambiguities and gaps concerning persons rescued at sea.¹²⁹ Mr. William O'NEIL – the IMO Secretary-General in 2001 – stated that the implementation of new measures for safety at sea would not suffice, because the problem of migrants at sea is not

¹²⁷ See DERRINGTON, Sarah & WHITE, Michael, "Australian Maritime Law Update 2001", 33 *Journal of Maritime Law & Commerce* 275 (2002), 275-291; BAILLIET, Cecilia, "The *Tampa* Case and its Impact on Burden Sharing at Sea", 3 *Human Rights Quarterly* 741 (2003), 741-774; Migration Policy Institute (MPI), "Report on The New "Boat People". Ensuring Safety and Determining Status" (January 2006), 21-23, available online:

<http://www.migrationpolicy.org/pubs/Boat_People_Report.pdf>.

¹²⁸ MATTHEW, Penelope, "Australian Refugee Protection in the Wake of Tampa", 96 *American Journal of International Law* 661 (2002), 661-676.

¹²⁹ Under the authority of the IMO Secretary-General.

only a maritime issue. In a situation involving asylum-seekers instead of “ordinary” persons in need at sea (an example of the latter is, e.g., the passengers of a cruise ship that is sinking), certain principles of refugee law and human rights must be respected.¹³⁰

Therefore an Interagency Group was set up in July 2002 to deal with the problem of migrants at sea.¹³¹ The IMO, the UNHCR, the United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS), the United Nations Office on Drugs and Crime (UNODC), the United Nations Office of the High Commissioner for Human Rights (OHCHR) and IOM are all participating in this Interagency Group. The competences of the IMO and of UNDOALOS extend to the search-and-rescue part at sea, as well as to the provision of a place of safety afterwards.¹³² In addition, UNDOALOS deals with the coordination and cooperation in the field of the law of the sea within the framework of the UN General Assembly.¹³³ The competences of the UNHCR,¹³⁴ UNODC,¹³⁵ OHCHR,¹³⁶ and IOM¹³⁷ with

¹³⁰ O’NEIL, William, Speech at the IMO Headquarters London (19 November 2001), available online: <http://www.imo.org/Newsroom/mainframe.asp?topic_id=82&doc_id=1703>.

¹³¹ First Interagency Group Meeting ‘The Treatment of Persons Rescued at Sea’, Geneva (2-3 July 2002); MSC, “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”.

¹³² Convention on the International Maritime Organization (adopted 6 March 1948, entered into force 17 March 1958) 289 *UNTS* 48 [IMO Convention], Artt. 1 and 15(j); Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967) 591 *UNTS* 265 [FAL Convention]; SOLAS Convention; SAR Convention.

¹³³ UNGA, “Law of the Sea”, *UN Doc. A/RES/49/28* (6 December 1994), available online: <<http://www.un.org/documents/resga.htm>>; MSC, “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, para. 26.

¹³⁴ UNHCR, “Background Note Concerning the Competence of the United Nations High Commissioner for Refugees in Relation to Rescue at Sea Matters” (18 February 2002), Annex 14, available online: <<http://www.unhcr.org/home/RSDLEGAL/3cd14e3b4.pdf>>; UNGA, “Refugees and Stateless Persons”, *UN Doc. A/RES/319* (IV) (3 December 1949), available online: <<http://www.un.org/documents/resga.htm>>; UNGA, “Statute of the Office of the United Nations High Commissioner for Refugees”, *UN Doc. A/RES/428* (V) (14 December 1950), available online: <<http://www.un.org/documents/resga.htm>>.

¹³⁵ MSC, “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, para 27; UNGA, “UN Convention against Transnational Organized Crime”, *UN Doc. A/RES/55/25* (15 November 2000), available online: <<http://www.un.org/documents/resga.htm>>.

¹³⁶ UNGA, “High Commissioner for the promotion and protection of all human rights”, *UN Doc. A/RES/48/141* (20 December 1993), available online: <<http://www.un.org/documents/resga.htm>>; MSC, “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, paras. 19-21.

¹³⁷ Constitution of the International Organization for Migration (adopted 19 October 1953, entered into force 30 November 1954), 207 *UNTS* 189; IOM, “Persons Falling Under the Mandate of the International Organization of Migration (IOM) and To Whom the Organization May Provide Migration Services” (January 1992), available online: <<http://www.iom.int>>; IOM, “Strategic Objectives”, available online: <<http://www.iom.int>>; MSC,

respect to migrants at sea are considered to be multi-disciplinary and worldwide, as these relate to asylum, transnationally organized crime such as human trafficking, human rights and migrants.¹³⁸ The UN General Assembly highly welcomed this initiative to cooperate¹³⁹ and in 2004¹⁴⁰, 2007¹⁴¹ and 2008¹⁴² three other interagency meetings were organized.

2.2.2. 2004 SAR and SOLAS Amendments and Associated Guidelines

2.2.2.1. Content

The conclusions of the Interagency Group meetings were the basis for the 2004 SOLAS and SAR Amendments,¹⁴³ the IMO Guidelines on the Treatment of Persons Rescued at Sea¹⁴⁴ and the IMO/UNHCR practical guide on rescue at sea.¹⁴⁵ These instruments try to safeguard the rights and interests of all the parties involved, e.g., the persons rescued, the flag States, the coastal States, the shipmaster, etc. Although the amendments – when ratified – are binding, the guidelines aim to help States and shipmasters in the execution of their duties. The objective of the practical guide is to form a kind of useful manual for shipmasters, insurance companies, ship owners, government authorities, etc., during the post-rescue phase. It contains the procedures that must be followed, the applicable international law

“Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, para. 18; IOM, “Contribution of the International Organization for Migration to the Report of the Secretary General on Oceans and the Law of the Sea” (30 January 2003), available online: <http://www.un.org/depts/los/general_assembly/contributions58.htm>.

¹³⁸ MSC, “Report-Record of decisions on the second United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 79/22/6* (15 September 2004), para. 22.

¹³⁹ UNGA, “Oceans and the law of the sea”, *UN Doc. A/RES/57/141* (12 December 2002), para. 34, available online: <<http://www.un.org/documents/resga.htm>>.

¹⁴⁰ Second Interagency Group Meeting ‘The Treatment of Persons Rescued at Sea’, London (12 July 2004).

¹⁴¹ Third Interagency Group Meeting ‘The Treatment of Persons Rescued at Sea’, Geneva (11 December 2007).

¹⁴² Fourth Interagency Group Meeting ‘The Treatment of Persons Rescued at Sea’, New York (23-27 June 2008).

¹⁴³ 2004 Amendments Relating to the International Convention for the Safety of Life at Sea, 1974 (adopted 20 May 2004, entered into force 1 July 2006), MSC Resolution 153(78) (20 May 2004) and 2004 Amendments Relating to the International Convention on Maritime Search and Rescue, 1979 (adopted 20 May 2004, entered into force 1 July 2006), MSC Resolution 155(78) (20 May 2004).

¹⁴⁴ MSC, “Guidelines on the Treatment of Persons Rescued at Sea”, MSC Resolution 167(78) (20 May 2004).

¹⁴⁵ IMO/UNHCR, “Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees”

(2006), available online:

<http://www.imo.org/includes/blastDataOnly.asp/data_id=15282/UNHCRIMOLEAFLETPERSONSRESCUEDATSEA.PDF>.

principles (not only rules under the law of the sea, but also principles of refugee law), contact information and other relevant advice.¹⁴⁶

The 2004 SOLAS Amendments stipulate that the owner, the charterer, the company operating the ship or any other person may not influence (for example, because of financial motives) the shipmaster's decision which – in his professional judgement – is necessary for the safety of life at sea.¹⁴⁷ The inconvenience of and the financial burden for the assisting ship will be reduced due to the obligation on the Contracting Parties to cooperate in a way that minimizes further deviation from the ship's intended voyage. In addition, disembarkation will be arranged as soon as reasonably practicable.¹⁴⁸ With regard to rescued persons, the 2004 SOLAS Amendments stipulate that the obligation of assistance applies, regardless of the rescued persons' nationality or status or the circumstances in which they are found.¹⁴⁹ Furthermore, within the capabilities and limitations of the ship, all embarked persons must be treated with humanity.¹⁵⁰

Although the SAR Convention states that rescue implies that persons in distress have to be delivered to a place of safety,¹⁵¹ it does not define what a place of safety is. The 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea state that a place of safety can be defined as a location where rescue operations are considered to terminate, where the survivors' safety or life is no longer threatened, basic human needs (such as food, shelter and medical needs) can be met and transportation arrangements can be made for the survivors' next or final destination.¹⁵² Disembarkation of asylum-seekers recovered at sea, in territories where their lives and freedom would be threatened, must be avoided¹⁵³ in order to prevent the violation of the *non-refoulement* principle.¹⁵⁴ The government in charge of the SRR in

¹⁴⁶ MSC, "Report-Record of decisions on the second United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea", *IMO Doc. MSC 79/22/6* (15 September 2004), paras. 23-27.

¹⁴⁷ SOLAS Convention, Chapter V, Regulation 33 para. 34-1.

¹⁴⁸ SOLAS Convention, Chapter V, Regulation 33 para. 1-1; SAR Convention, Chapter 3, para. 3.1.9.

¹⁴⁹ SOLAS Convention, Chapter V, Regulation 33 para. 1.

¹⁵⁰ SOLAS Convention, Chapter V, Regulation 33 para. 6.

¹⁵¹ SAR Convention, Annex Chapter 1 para. 1.3.2.

¹⁵² MSC, "Guidelines on the Treatment of Persons Rescued at Sea", MSC Resolution 167(78) (20 May 2004), para. 6.12.

¹⁵³ MSC, "Guidelines on the Treatment of Persons Rescued at Sea", MSC Resolution 167(78) (20 May 2004), para. 6.17.

¹⁵⁴ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 *UNTS* 137 [Refugee Convention]. Article 33 of the Refugee Convention states that: "No Contracting State shall

which the survivors were recovered is held responsible for providing a place of safety on its own territory or ensuring that such a place of safety is granted in another country.¹⁵⁵ Although an assisting ship may only serve as a temporary place of safety,¹⁵⁶ there is still no actual duty for States to disembark the persons rescued.¹⁵⁷ This means that States can refuse disembarkation or make it dependent on certain conditions, such as the division of the financial burden (for example, for medical care), resettlement, readmission or immediate return to a safe third country.¹⁵⁸ The positive side of these agreements is that they share the burden between several States and that disembarkation will be advanced. Except for the immediate return to safe third countries – because this could violate the *non-refoulement* principle¹⁵⁹ – the UNHCR supports this burden-sharing approach.¹⁶⁰ Unfortunately not all countries have concluded such agreements. Most of the time burden-sharing decisions must be made *ad hoc*. Therefore in some cases it can still take weeks before arrangements for disembarkation have been made.¹⁶¹

expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." This principle is not only applicable to refugees but also to all asylum-seekers. See for example: BETHLEHEM, Daniel & LAUTERPACHT, Elihu, "The scope and content of the principle of non-refoulement: Opinion", in FELLER, Erika, TÜRK, Volker & NICHOLSON, Frances (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 116-118; UNHCR, "The Protection of Asylum-Seekers and Refugees Rescued at Sea", in ALENIKOFF, Alexander T. & CHETAIL, Vincent (Eds.), *Migration and International Legal Norms* (The Hague: Asser Press, 2003).

¹⁵⁵ MSC, "Guidelines on the Treatment of Persons Rescued at Sea", MSC Resolution 167(78) (20 May 2004), para. 2.5.

¹⁵⁶ MSC, "Guidelines on the Treatment of Persons Rescued at Sea", MSC Resolution 167(78) (20 May 2004), para. 6.13.

¹⁵⁷ See for example: O'BRIAN, Killian S., "Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem", 3 *Goettingen Journal of International Law* 715 (2011), 723-725.

¹⁵⁸ GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed. 1996), 157.

¹⁵⁹ See, for example, LAVENEX, Sandra, "Transgressing Borders: The Emergent European Refugee Regime and 'Safe Third Countries'", in CAFRUNY, Alan and PETERS, Patrick (Eds.), *The Union and the World. The Political Economy of a Common European Foreign Policy* (The Hague: Kluwer Law International, 1998), 113-132; GIL-BAZO, Maria-Teresa, "The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited", 18 *International Journal of Refugee Law* 571 (2006), 571-600; Amnesty International, "Amnesty International's Concerns Regarding an EU List of Safe Countries of Origin" (10 February 2006), available online: <http://www.amnesty-eu.org/static/documents/2006/b525-aide_memoire_safe_countries_of_origin-Feb_06.pdf>.

¹⁶⁰ UNHCR, "Rescue-at-Sea. Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees. Summary of Discussions", Expert Roundtable Lisbon (25-26 March 2002), para. 15, available online: <<http://www.unhcr.org/home/RSDLEGAL/3cd14e3b4.pdf>>.

¹⁶¹ See, for example, the cases involving the ships *Cap Anamur II* in 2004 (see UNHCR, "Italy boat: UNHCR urges disembarkation on humanitarian grounds" (9 July 2004), available online: <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=40ee70780&query=cap%20anamur>>), *Marine I* in 2007 (see WOUTERS, Kees & DEN HEIJER, Maarten, "The Marine I Case: A Comment", 22 *International Journal of Refugee Law* 1 (2010), 1-19) and *Le Diamant* in 2008 (see FSI, "Measures to protect the safety of Persons Rescued at Sea. Compulsory guidelines for the treatment of persons rescued at sea. Submitted by Spain and Italy", *IMO Doc. FSI 17/15/1* (13 February 2009), para. 5). See also: COPPENS, Jasmine & SOMERS, Eduard,

On 11 July 2011, the *Almirante Juan de Borbón* – a Spanish frigate participating in NATO *Operation Unified Protector* – rescued 114 migrants from drowning in the Mediterranean. After the vessel had left Libya, the engine broke down and the persons on board drifted around for two days without food or water. When the warship was informed about their condition, they provided immediate assistance. On 13 July 2011, a man and his pregnant wife were brought to Malta for medical treatment. Spain agreed to receive a 10-month-old baby. However, neither Spain, Italy nor Malta wanted to accept disembarkation onto their territory. Malta stated that NATO was responsible for the problem. Eventually, the migrants were transferred to Tunisia on 16 July 2011.¹⁶² As some of the asylum-seekers were of Tunisian origin and due to the political situation in the country at that time, this might have been a violation of the *non-refoulement* principle.

Next to this, by making the Government of the SRR in which survivors were recovered responsible for providing a place of safety or ensuring that such a place of safety is provided, migrants in distress at sea are sometimes being ignored or brought to the SRR of another State. As a result, States know that they will not only be responsible for providing assistance, but also for the place of safety. In March 2011, a boat carrying 72 migrants spent 16 days drifting in the Mediterranean after it had left Tripoli to reach Italy. Migrants stated that several ships and even a NATO aircraft carrier ignored pleas for help. The out-of-fuel ship eventually washed up on western Libyan beach. Only 11 people survived while the others had died of thirst and starvation at sea.¹⁶³ There are even testimonies of asylum-seekers that the Greek coast guard tows seaborne migrants into the Turkish SRR.¹⁶⁴

“Towards New Rules on Disembarkation of Persons Rescued at Sea?”, 25 *International Journal of Marine & Coastal Law* 377 (2010), 377-404.

¹⁶² Migrants at Sea, “Italy and Malta Turn Back NATO Ship Carrying 100 Rescued Migrants” (14 July 2011), available online: <<http://migrantsatsea.wordpress.com/2011/07/14/italy-and-malta-turn-back-nato-ship-carrying-100-rescued-migrants/>>; Migrants at Sea, “Malta Says the 111 Rescued Migrants Aboard Spanish Frigate Are NATO’s Problem, Not Malta’s Problem” (15 July 2011), available online:

<<http://migrantsatsea.wordpress.com/2011/07/15/malta-says-the-111-rescued-migrants-aboard-spanish-frigate-are-nato%E2%80%99s-problem-not-malta%E2%80%99s-problem/>>; Migrants at Sea, “NATO Transfers Rescued Migrants to Tunisia” (16 July 2011), available online:

<<http://migrantsatsea.wordpress.com/2011/07/16/nato-transfers-rescued-migrants-to-tunisia/>>.

¹⁶³ The Guardian, “Aircraft carrier left us to die, say migrants” (8 May 2011), available online: <<http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants>>.

¹⁶⁴ ECRE, “What Price Does a Refugee Pay to Reach Europe?” (10 February 2009), 6-7, available online: <http://www.ecre.org/resources/ECRE_actions/1313>.

Moreover, implementing the 2004 SOLAS and SAR Amendments proved to be more difficult than expected. Developed countries like Finland and Malta have not even signed the amendments yet. Even for countries that did implement the amendments, together with the other legal obligations, it is in practice not always easy to enforce them. Several reports by non-governmental organizations (NGOs) indicate that some shipmasters and even State authorities ignore people in need of assistance at sea or simply tow their boats into the SRR of another country.¹⁶⁵ The European Council on Refugees and Exiles (ECRE) is a pan-European network of NGOs concerned with the needs of all individuals seeking refuge and protection within Europe. It has collected migrant stories through its member agencies across Europe. For example, Mitra, an asylum-seeker from Afghanistan, was 16 years old when he tried to reach Greece with other people in a small inflatable dinghy. The Greek coast guard discovered them when they were 300 meters away from the Island of Lesbos. The coast guard threw them a rope and Mitra and the others were taken on board the coast guard's vessel. The coast guard threw the bread, water, and everything else that was left in the dinghy into the water. A few kilometres from the Turkish coast they threw the dinghy back out and Mitra and the others were violently forced back into it. The coast guard had made a small hole in the rubber dinghy and only gave them one oar.¹⁶⁶ Because of the isolated nature of the problem, chances are small that these kinds of practices will be revealed. Finally, many of the rules are soft law, such as the IMO Guidelines on the Treatment of Persons Rescued at Sea.

Finally, no clear guidance is given as to the extent of the responsibility of Contracting Parties who are not responsible for the SRR in which the rescue occurs, even when these SRR are geographically located very close to where a vessel has rescued persons in distress. It is, for example, possible that SRRs stretch to areas near the coasts of other Contracting States.

¹⁶⁵ MSC, "Report-Record of Decisions on the Third United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea", *IMO Doc. MSC 84/20/1* (1 February 2008), Annex, para. 12; see also ECRE, "What Price Does a Refugee Pay to Reach Europe?" (10 February 2009), available online: <http://www.ecre.org/resources/ECRE_actions/1313>.

¹⁶⁶ ECRE, "What Price Does a Refugee Pay to Reach Europe?" (10 February 2009), 6-7, available online: <http://www.ecre.org/resources/ECRE_actions/1313>.

Moreover, in areas with overlapping SRRs, it is unclear which State is the Contracting Party that is primarily responsible for finding a suitable place of safety.¹⁶⁷

2.2.2.2. Relationship with Article 98 LOSC

What exactly is the relationship between Article 98 LOSC and the relevant articles in the SAR and SOLAS Conventions? Several provisions of the LOSC reflect principles compatible with those already included in IMO treaties and recommendations adopted prior to the LOSC; such indeed is the case with certain provisions in the 1979 SAR and 1974 SOLAS Conventions. The active participation of the IMO Secretariat at the Third United Nations Conference on the Law of the Sea has ensured that no overlapping, inconsistency or incompatibility exist between the LOSC and IMO treaties. What about the 2004 SAR and SOLAS Amendments? The IMO is explicitly mentioned in only one of the articles of the LOSC, namely Article 2 of Annex VIII. Several other provisions refer to the ‘competent international organization’ in connection with the adoption of international shipping rules and standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from vessels and by dumping. The expression ‘competent international organization’ – when used in the singular of the LOSC – applies exclusively to IMO, bearing in mind the global mandate of the organization as a specialized agency within the United Nations system.

The wide acceptance and uncontested legitimacy of IMO’s mandate is indicated by the universality of the organization as the 170 sovereign States that are member of IMO represent all regions of the world. They may participate in the meetings of the IMO bodies responsible for drafting and adopting safety and anti-pollution rules and standards. New IMO conventions are normally adopted by consensus. Numerous provisions in the LOSC refer to the mandate of several organizations in connection with the same subject matter.

¹⁶⁷ FSI, “Measures to Protect the Safety of Persons Rescued at Sea. Comments on Document FSI 17/15/1. Submitted by Malta”, *IMO Doc. FSI 17/15/2* (27 February 2009), paras. 9-12.

Sometimes, activities set forth in these provisions may involve IMO working in co-operation with other organizations.¹⁶⁸

As the LOSC is regarded as an ‘umbrella convention’, most of its provisions – being of a general kind – can be implemented only through specific operative regulations in other international agreements.¹⁶⁹ This is reflected in several provisions of the LOSC which require States to ‘take account of’, ‘conform to’, ‘give effect to’ or ‘implement’ the relevant international rules and standards developed by or through the ‘competent international organization’ (i.e. IMO). The latter are variously referred to as ‘applicable international rules and standards’, ‘internationally agreed rules, standards, and recommended practices and procedures’, ‘generally accepted international rules and standards’, ‘generally accepted international regulations’, ‘applicable international instruments’ or ‘generally accepted international regulations, procedures and practices’.¹⁷⁰ Despite the fact that in many cases the LOSC contains general obligations to apply rules and standards contained in IMO Conventions, IMO rules and standards which are very precise technical provisions cannot be considered as binding among States unless they are parties to the treaties where they are contained. The LOSC provisions concerning maritime safety aim at the effective implementation of substantive safety rules, but in the end they remain basically provisions which regulate the features and extent of State jurisdiction and not the enforcement of measures regulated in IMO conventions.¹⁷¹

However, in Article 98 LOSC there is no reference to rules established by the ‘competent international organization’. As a result, the obligations under the LOSC concerning search

¹⁶⁸ LEG, “Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization”, *IMO Doc. LEG/MISC.6* (10 September 2008), 7-8. The Division for Ocean Affairs and the Law of the Sea (UNDOALOS), Office of Legal Affairs prepared a table on ‘Competent or relevant international organizations’ in relation to the LOSC. The table lists subjects and articles in the sequence in which they appear in the Convention, together with the corresponding competent organizations. See: *Law of the Sea Bulletin No.31*, 81-95.

¹⁶⁹ LEG, “Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization”, *IMO Doc. LEG/MISC.6* (10 September 2008), 8.

¹⁷⁰ LEG, “Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization”, *IMO Doc. LEG/MISC.6* (10 September 2008), 8.

¹⁷¹ MIHNEVA-NATOVA, Anna, “The Relationship between United Nations Convention on the Law of the Sea and the IMO Conventions”, Paper within the Framework of The United Nations and The Nippon Foundation of Japan Fellowship (2005), 14, available online: http://www.un.org/depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/natova_0506_bulgaria.pdf.

and rescue at sea are exhausted by the provisions in Article 98 LOSC. Relevant IMO conventions – such as the SAR and SOLAS Conventions – can therefore only be used as an interpretative tool pursuant to Article 31(3) of the 1969 Vienna Convention on the Law of Treaties (VCLT). Concerning the interpretation of treaties, the VCLT provides in Article 31(3) that (a) subsequent agreements, (b) practice and (c) relevant rules of international law between the Parties to a treaty are relevant to its interpretation.¹⁷²

Nevertheless, the use of such interpretative methods has to remain faithful to the ordinary meaning and context of the treaty in light of its object and purpose.¹⁷³ Although the ICJ has acknowledged that treaties have to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation, it also accepted that there is a primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion.¹⁷⁴ In combining both the evolutionary and the inter-temporal element, the ICJ reflects the opinion of the International Law Commission when commenting on the draft text of Article 31(3)(c) VCLT.¹⁷⁵

However, this approach is based on the view that the concepts, terms and provisions in question were by definition evolutionary. Therefore, it cannot be applied with regard to a general revision or re-interpretation of a treaty. As a result, evolutionary interpretation does not entitle a court or a tribunal to engage in a process of constant revision or updating of a treaty – such as the LOSC – every time a newer treaty is concluded that relates to similar matters.¹⁷⁶ Many of the terms in the LOSC are likely to be inherently evolutionary, such as the definition of pollution of the marine environment.¹⁷⁷ The effectiveness of any such

¹⁷² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331. [VCLT]

¹⁷³ VCLT, Art. 31(2).

¹⁷⁴ ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Namibia Advisory Opinion), 21 June 1971, *ICJ Reports* 16 (1971), para. 53; ICJ, Aegean Sea Continental Shelf Case, *Greece v. Turkey*, 19 December 1978, *ICJ Reports* 3 (1978); ICJ, Oil Platforms Case, *Islamic Republic of Iran v. United States of America*, 6 November 2003, *ICJ Reports* 161 (2003), paras. 40-41.

¹⁷⁵ ILC, “The Law of Treaties”, Commentary to draft Article 27, para. 16, in WATTS, Arthur D., *The International Law Commission 1949-1998* (Oxford: Oxford University Press, 1999), Vol. II, 690.

¹⁷⁶ ICJ, Gabcikovo-Nagymaros Case, *Hungary v. Slovakia*, 25 September 1997, Separate Opinion of Judge Mohammed BEDJAOUI, *ICJ Reports* 120 (1997), para. 12.

¹⁷⁷ BOYLE, Alan, “Further Development of the 1982 Convention on the Law of the Sea”, in FREESTONE, David, BARNES, Richard A. & ONG, David M. (Eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), 46.

development is dependent upon a general acceptance by the States Parties to the LOSC, either through widespread participation in treaty-making processes or acquiescence.¹⁷⁸

Although the 1979 SAR and 1974 SOLAS Conventions have respectively 101 and 161 State parties,¹⁷⁹ the implementation of the 2004 Amendments – containing several humanitarian considerations – proved to be more difficult than expected. States like Finland and Malta have not even signed the amendments yet. As there is no general acceptance of the provisions contained in the 2004 Amendments, the latter cannot be used to re-interpret Article 98 LOSC. States that did not sign the amendments will thus not be bound by them. Italy however is a party to the LOSC, the 1979 SAR and 1974 SOLAS Conventions and the 2004 SAR and SOLAS Amendments.

The 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea were especially developed to provide guidance to Governments and to shipmasters with regard to humanitarian obligations and obligations under the relevant international law relating to treatment of persons rescued at sea. These guidelines are considered to be associated with the 2004 SAR and SOLAS Amendments, as they were adopted at the same time. The term ‘Government’ that is used in these Guidelines, should be read to mean Contracting Government to the SOLAS Convention of 1974, as amended in 2004, or Party to the SAR Convention of 1979, as amended in 2004.¹⁸⁰ Although these provisions are not binding, a soft law instrument can also contain an agreed interpretation of a treaty provision (Article 31(3)(a) VCLT). Soft law instruments can help to meet the practical obstacles of implementation and assist States in meeting their existing commitments. They contain certain elements which are unlikely to find their way into a treaty because of the opposition of some States to binding agreements, but also because of their aim. Subtle evolutionary changes in existing treaties may come about through the process of interpretation under the influence of soft law. Therefore, sometimes there is not even the need for attempting to turn

¹⁷⁸ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 111.

¹⁷⁹ IMO, “Status of Conventions summary” (31 August 2012), available online: <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>>.

¹⁸⁰ MSC, “Guidelines on the Treatment of Persons Rescued at Sea”, MSC Resolution 167(78) (20 May 2004), para. 1.1.

a soft law provision into a 'rule' of international customary law or to enshrine it in a binding treaty.¹⁸¹

It is submitted that States that have adopted the 2004 SAR and SOLAS Amendments have also agreed upon the associated 2004 IMO Guidelines as a tool of interpretation. Malta for example did not sign the 2004 Amendments, because they do not agree with the provisions in the 2004 Guidelines. On 22 December 2005, the IMO received a communication from the Ministry of Foreign Affairs of Malta declaring that Malta "*is not yet in a position to accept these amendments*".¹⁸² According to Malta there is a safe place in terms of search and rescue and there is a safe place in terms of humanitarian law.¹⁸³ The 2004 Guidelines, however, do state that a place of safety has to fulfil humanitarian requirements too.

2.3. 2009 FAL Principles

2.3.1. Content

In the beginning of 2009 the IMO FAL Committee approved a circular on 'Principles relating to administrative procedures for disembarking persons rescued at sea'.¹⁸⁴ This circular could lead to more harmonized, efficient and predictable procedures. Initially, the ultimate objective was to amend the SOLAS and SAR Conventions, taking into account these principles, as appropriate. Spain, Italy and Malta submitted proposals for amendment, which were rejected in 2010. In January 2009 the FAL Committee identified five essential – but only recommendatory – principles that governments should incorporate into their administrative procedures for disembarking persons rescued at sea:

¹⁸¹ BOYLE, Alan, "Further Development of the 1982 Convention on the Law of the Sea", in FREESTONE, David, BARNES, Richard A. and ONG, David M. (Eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), 51-52.

¹⁸² IMO, "Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions" (30 November 2012), available online: < <http://www.imo.org/about/conventions/statusofconventions/documents/status%20-%202012.pdf>>.

¹⁸³ KLEPP, Silja, "A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea", 23 *International Journal of Refugee Law* 538 (2011), 549.

¹⁸⁴ FAL, "Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea", *IMO Doc. FAL 35/Circ.194* (22 January 2009).

- “1. The coastal States should ensure that the search and rescue (SAR) service or other competent national authority coordinates its efforts with all other entities responsible for matters relating to the disembarkation of persons rescued at sea;*
- 2. 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. The master should normally only be asked to aid such processes by obtaining information about the name, age, gender, apparent health and medical condition and any special medical needs of any person rescued. If a person rescued expresses a wish to apply for asylum, great consideration must be given to the security of the asylum seeker. When communicating this information, it should therefore not be shared with his or her country of origin or any other country in which he or she may face threat;*
- 3. All parties involved (for example, the Government responsible for the SAR area where the persons are rescued, other coastal States in the planned route of the rescuing ship, the flag State, the shipowners and their representatives, States of nationality or residence of the persons rescued, the State from which the persons rescued departed, if known, and the United Nations High Commissioner for Refugees (UNHCR)) should cooperate in order to ensure that disembarkation of the persons rescued is carried out swiftly, taking into account the master’s preferred arrangements for disembarkation and the immediate basic needs of the rescued persons. The Government responsible for the SAR area where the persons were rescued should exercise primary responsibility for ensuring such cooperation occurs. 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;*
- 4. All parties involved should cooperate with the Government of the area where the persons rescued have been disembarked to facilitate the return or repatriation of the persons rescued. Rescued asylum seekers should be referred to the responsible asylum authority for an examination of their asylum request; and*
- 5. International protection principles as set out in international instruments should be followed.”*¹⁸⁵

¹⁸⁵ FAL, “Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea”, *IMO Doc. FAL 35/Circ.194* (22 January 2009), para. 2.

The United States stated that, although it supports the aims and objectives of the circular, it disagreed with certain aspects, because some of the provisions are inconsistent with its domestic law.¹⁸⁶ The third Principle especially is quite far-reaching. When disembarkation cannot be arranged swiftly elsewhere, the Government of the SRR should accept – in accordance with national immigration laws and regulations – to disembark the persons rescued. This means that coastal States have the ultimate responsibility. Malta and Japan reserved their position with respect to this sentence.¹⁸⁷ The other FAL Principles were already incorporated in non-binding instruments – in particular the IMO Guidelines on The Treatment of Persons Rescued at Sea¹⁸⁸ and the IMO/UNHCR Practical Guide on Rescue at Sea¹⁸⁹ – but they can become binding when they are used as a basis for amendments to the SOLAS and SAR Conventions.

The FAL Circular was forwarded to the UNHCR for its information. The Working Group that drafted these Principles stated that if the MSC decides to amend the provisions of the SOLAS and SAR Conventions on persons rescued at sea, the FAL Principles could serve as interim guidelines to Member Governments until the revised provisions of the two Conventions enter into force.¹⁹⁰ The MSC – at its eighty-fourth session in May 2008 (MSC 84) – already agreed to include a high-priority item on “Measures to protect the safety of persons rescued at sea” in the work programme of its Sub-Committee on Radiocommunications and Search and Rescue (COMSAR) and of its Sub-Committee on Flag State Implementation (FSI). On practical grounds, the MSC decided that the COMSAR should consider the matter first and then – at a later date – to progress it in cooperation with the FSI. The MSC further instructed the two Sub-Committees to take into consideration the work being carried out by FAL, as appropriate.¹⁹¹

¹⁸⁶ FAL, “Draft Report of the Facilitation Committee on its Thirty-Fifth Session”, *IMO Doc. FAL 35/WP.6* (16 January 2009), para. 6.39.

¹⁸⁷ FAL, “Formalities connected with the Arrival, Stay and Departure of Persons”, *IMO Doc. FAL 35/WP.5* (14 January 2009), para. 6.

¹⁸⁸ MSC, “Guidelines on the Treatment of Persons Rescued at Sea”, MSC Resolution 167(78) (20 May 2004).

¹⁸⁹ IMO/UNHCR, “Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees” (2006), available online:

<http://www.imo.org/includes/blastDataOnly.asp/data_id=15282/UNHCRIMOleafletpersonsrescuedatsea.pdf>.

¹⁹⁰ FAL, “Formalities connected with the Arrival, Stay and Departure of Persons”, *IMO Doc. FAL 35/WP.5* (14 January 2009), para. 4.

¹⁹¹ MSC, “Report of the Maritime Safety Committee on its 84th Session”, *IMO Doc. MSC/84/24* (16 May 2008), paras. 22.25 and 22.36.

2.3.2. Appraisal

The FAL is responsible for IMO's activities and functions relating to the facilitation of international maritime traffic.¹⁹² These are aimed at reducing the formalities and simplifying the documentation required of ships when entering or leaving ports or other terminals. Its involvement on issues concerning persons rescued at sea should be limited to those matters which fall either within the areas of its competence already mentioned or within the scope of the Convention on Facilitation of International Maritime Traffic (FAL Convention). These can be broadly summarized as issues relating to the arrival and disembarkation of persons rescued.¹⁹³ For example, in 2005 the 1965 FAL Convention was amended to include under Section 2, 'Arrival, stay and departure of the ship', special measures of facilitation for ships calling at ports in order to put ashore sick or injured persons rescued at sea.¹⁹⁴ The purpose of these measures is purely facilitative. Their application implies that the State already permitted disembarkation.

The 2009 FAL Circular on Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea actually go further than the 2005 FAL Amendments because they deal with the problem of disembarkation itself, which is regarded as falling within the FAL's competence. The FAL is clear: the purpose of the Principles set out in the Circular is to harmonize the administrative procedures and make them both efficient and predictable.¹⁹⁵ The hoped-for result is rapid disembarkation and legal certainty, which will lead to facilitated maritime traffic. As mentioned before, four out of the five 2009 FAL Principles are not new. They were already included in non-binding instruments. The FAL Circular containing the Principles is not a binding instrument but can only be regarded as soft law. Nevertheless, because the MSC instructed the COMSAR and the FSI to take these

¹⁹² IMO Convention, Art 1.

¹⁹³ COMSAR, "Draft Report to the Maritime Safety Committee", *IMO Doc. COMSAR 13/WP.5* (22 January 2009), para 10.7.

¹⁹⁴ FAL Convention, Section 2H.

¹⁹⁵ FAL, "Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea", *IMO Doc. FAL 35/Circ.194* (22 January 2009), para. 2.

principles into consideration – as appropriate – when drafting the SOLAS and SAR amendments, these could become binding law.¹⁹⁶

The most controversial Principle is the one containing a new far-reaching duty for the Government of the SRR where the persons are rescued: *“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”*.¹⁹⁷ A number of observations can be made with regard to this text. First of all, this paragraph uses some vague terms. The word ‘swiftly’ can mean hours, days or even weeks, so that it is not very clear what is exactly meant. On the other hand, when disembarkation can be defined as being swift, is dependent on the specific circumstances. When the public order on the ship is totally disrupted, when the great amount of rescued people endangers the seaworthiness of the ship, or when people are dangerously ill, even one day can be too long. An identical problem arises with regard to the word ‘timely’, in relation to access to post-rescue support. Another ambiguous expression is that the Government should accept disembarkation at a place of safety ‘under its control’. It is not clear what is meant by this. For example, such a place could well be an isolated island. After all, the conditions for a place of safety incorporated in the IMO Guidelines are not mentioned in the FAL Principles. The last issue is that overlapping of SRR sometimes makes it difficult to determine the ‘Government responsible for the SAR area’.

Second, the SAR Government has a clear duty to permit disembarking, even when this cannot be arranged swiftly. The biggest advantage is the legal certainty for the ship and the rescued people. Moreover, as the SAR Government has the ultimate responsibility to permit disembarking, it will be stimulated to find a swift solution. In most cases, the State that takes care of the SAR operation will also have the closest port, which is positive from a humanitarian perspective and from the seafarers’ perspective. The counterpoint is that if this duty to disembark were laid down in binding amendments, it would never be accepted.

¹⁹⁶ MSC, “Report of the Maritime Safety Committee on its 84th Session”, *IMO Doc. MSC/84/24* (16 May 2008), paras. 22.25 and 22.36.

¹⁹⁷ FAL, “Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea”, *IMO Doc. FAL 35/Circ.194* (22 January 2009), para 2.3.

Malta and Japan entered reservations concerning this paragraph of the Circular. During the MSC's drafting of the 2004 SOLAS and SAR Amendments, most States had already indicated that they would not agree to such an obligation. As a matter of fact, this is the reason why the International Convention relating to Stowaways of 1957¹⁹⁸ remains unable to obtain the required number of ratifications. Its Article 2(1) stipulates: *"If on any voyage of a ship registered in or bearing the flag of a Contracting State a stowaway is found in a port or at sea, the Master of the ship may, subject to the provisions of paragraph (3), deliver the stowaway to the appropriate authority at the first port in a Contracting State at which the ship calls after the stowaway is found, and at which he considers that the stowaway will be dealt with in accordance with the provisions of this Convention."*

It is clear that imposing such a duty on States will be difficult to realize,¹⁹⁹ even more so because the 2004 SOLAS and SAR amendments cope with implementation problems. Furthermore, if the SAR Government bears the ultimate responsibility, it could be inclined to deny demands for assistance or to tow the migrant boats into the SRR of a neighbouring country. On the other hand, the willingness of other countries involved – such as the flag State – to make arrangements for disembarkation can diminish because they know that the SAR Government will eventually bear the responsibility. As a last point, the disembarkation is related to the immigration laws and regulations of each Member State. In practice this often leads to the refusal of the sea-borne migrants. Only persons rescued at sea who are not asylum-seekers will be disembarked rapidly, but this has never posed a problem. However, when migrants are involved, States can use this provision to refuse disembarkation onto their territory.

¹⁹⁸ International Convention relating to Stowaways (adopted 10 October 1957, not yet entered into force), reprinted in Comité Maritime International, *Handbook of Maritime Conventions* (2001) as Doc. 14-1.

¹⁹⁹ BARNES, Richard A., "Refugee Law at Sea", 53 *International and Comparative Law Quarterly* 47 (2004), 71-72.

2.4. SAR and SOLAS Amendment proposals

2.4.1. Content

Only one week after the completion of the January 2009 FAL meeting, the thirteenth session of COMSAR (COMSAR 13) started and the FAL Principles were formulated. Spain and Italy stated that they had intended to submit an information document, but that the period between the conclusion of MSC 84 and the date for submission of documents to COMSAR 13 had not left them enough time to do so. Instead they both intended to submit the documents to the seventeenth session of FSI (FSI 17) in April 2009. As a result, COMSAR agreed that it was premature to refer the issue to the SAR Working Group due to the lack of substantive submissions and invited interested parties to submit proposals for consideration by FSI 17 and COMSAR 14 (March 2010).²⁰⁰

At FSI 17, Spain and Italy submitted a proposal to amend the SOLAS and SAR Conventions. The existing paragraph 3.1.9 of Chapter 3 “Co-operation between States” in the SAR Convention and paragraph 1-1 of Regulation 33 “Distress situations: obligations and procedure” in Chapter V of the SOLAS Convention would be replaced by the following:²⁰¹ “*All parties involved (for instance, the Contracting Government responsible for the search and rescue area where persons are rescued, other States along the route of the vessels rescuing persons at sea, the flag State, the ship owners and their representatives, the States of nationality or residence of the persons rescued, the State where the persons rescued at sea are coming, if it is known) shall co-operate and collaborate to guarantee the rapid disembarkation of persons rescued at sea and to ensure that masters of ships, when involved in search and rescue operations by embarking persons in distress at sea, are released from their obligations with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from their obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region, where the rescue operation takes place, shall exercise*

²⁰⁰ COMSAR, “Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 13/14* (6 February 2009), para. 10.

²⁰¹ FSI, “Measures to protect the safety of Persons Rescued at Sea. Compulsory guidelines for the treatment of persons rescued at sea. Submitted by Spain and Italy.”, *IMO Doc. FSI 17/15/1* (13 February 2009), Annexes 1 and 2.

primary responsibility for ensuring that such coordination and co-operation occurs, so that the persons rescued at sea are disembarked from the vessel involved in the rescued operation and delivered to a place of safety under its control, where persons rescued at sea can have timely access to post rescue support.”

Both proposals go beyond the 2004 amendments of SOLAS and SAR Conventions. Four major changes can be identified:

- In the first paragraph the words ‘Parties’ (used in the 2004 SAR Amendments) and ‘Contracting Governments’ (used in the 2004 SOLAS Amendments) are replaced by ‘all parties involved’. These parties are specified between brackets, but because they are just given as an example, this list is not exhaustive. Not only States are included; ship owners and their representatives are also mentioned. We must however keep in mind that the ship owner, according to Regulation 34-1 of the SOLAS Convention, must not prevent or restrict the master of the ship from taking or executing any decision which, in the master’s professional judgement, is necessary for the safety of life at sea.
- Disembarkation must be executed rapidly instead of ‘as soon as reasonably practicable’. These are both quite vague formulations, so that in practice there will probably be hardly any difference between the two. However, there is a slight difference in connotation for the parties involved. From a flag State point of view, it is deemed of critical interest that its merchant ships are relieved rapidly as commercial vessels are not suited to host rescued persons for extended periods. Moreover, the financial impact for the ship due to delay can become enormous after a few weeks. The well-being of the rescued persons and of the crew of the rescuing vessel itself is also taken into account. As a result, when disembarkation is not rapidly achieved, shipmasters could be dissuaded from fulfilling the international principle of helping in a rescue situation at sea. On the other hand, it is important for the coastal State that accepts the rescued persons, that certain arrangements have

been made before disembarkation is allowed and that the latter is thus reasonably practicable.

- The place of safety must be 'under the control' of the Contracting Government responsible for the SRR. This does not mean that disembarkation must be allowed at a place under the jurisdiction of the State.

- Timely access to post-rescue support must be provided at the place of safety. The IMO Guidelines on the Treatment of Persons Rescued at Sea and the IMO/UNHCR Practical Guide on Rescue at Sea are already aimed at promoting post-rescue support, not only focussing on the period after the rescue and before disembarkation but also after disembarkation. By laying down certain conditions for the place of safety, post-rescue support was guaranteed. Paragraph 6.12 of the IMO Guidelines stipulates that a place of safety is a location where the survivors' safety or life is no longer threatened, basic human needs such as food, shelter and medical needs can be met, and transportation arrangements can be made for the survivors' next or final destination.

These proposals are clearly based on the 2009 FAL Principles. According to Spain and Italy, the 2009 FAL Principles address all the main aspects relating to procedures for disembarkation, fully balancing the requirement of protection of human lives at sea with the need of minimizing disruptions to those who assist persons in distress.²⁰² Nevertheless, one main difference can be recognized. The obligation on the Government responsible for the SRR to accept the disembarkation in accordance with its immigration laws and regulations when it cannot be swiftly executed elsewhere, has disappeared. This was the most controversial part of the 2009 FAL Principles and did not make it into the amendment proposals. Therefore, no duty to disembark is imposed upon States.

²⁰² COMSAR, "Draft Report to the Maritime Safety Committee", *IMO Doc. COMSAR 13/WP.5* (22 January 2009), para. 10.9.

Malta argued strongly that disembarkation is a very delicate issue on which a lengthy debate had taken place in 2004, as a result of the negotiations for the SOLAS and SAR Amendments. It maintained that disembarkation is a multi-disciplinary matter that needs to be undertaken with an inter-agency approach.²⁰³ But because FSI 17 considered the proposal by Spain and Italy, Malta submitted draft amendments as well.²⁰⁴ It was suggested that paragraph 3.1.9 of Chapter 3 of the SAR Convention and paragraph 1-1 of Regulation 33 of Chapter V of the SOLAS Convention could be replaced by the following text:²⁰⁵ *“All parties involved shall cooperate and collaborate to guarantee the rapid disembarkation of persons rescued at sea and to ensure that masters of ships, when involved in search and rescue operations by embarking persons in distress at sea, are released from their obligations with minimum delay, provided that releasing the masters of the ships from their obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region, where the rescue operation takes place, shall exercise primary responsibility for ensuring that such coordination and co-operation occurs, so that the persons rescued at sea are disembarked from the vessel involved in the rescued operation and delivered to a place of safety, where persons rescued at sea can have timely access to post-rescue support. All Contracting Governments involved shall co-operate to ensure that disembarkation occurs in the nearest safe haven, that is, that port closest to the location of the rescue which may be deemed a place of safety.”*

The big difference with the 2009 FAL Principles and the proposal by Spain and Italy is that disembarkation should take place in the nearest safe haven, namely the port closest to the location of the rescue which may be deemed as a place of safety. The implementation of this suggestion requires that all Contracting Governments provide such a safe haven – when requested by the RCC involved in the rescue operation – on the basis of geographical proximity.²⁰⁶ In this proposal a clear duty to disembark is incorporated.

²⁰³ COMSAR, “Draft Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 13/WP.5* (22 January 2009), para. 10.10.

²⁰⁴ FSI, “Measures to Protect the Safety of Persons Rescued at Sea. Comments on document FSI 17/15/1. Submitted by Malta”, *IMO Doc. FSI 17/15/2* (27 February 2009), para 3.

²⁰⁵ FSI, “Measures to Protect the Safety of Persons Rescued at Sea. Comments on document FSI 17/15/1. Submitted by Malta”, *IMO Doc. FSI 17/15/2* (27 February 2009), para. 16.

²⁰⁶ FSI, “Measures to Protect the Safety of Persons Rescued at Sea. Comments on document FSI 17/15/1. Submitted by Malta”, *IMO Doc. FSI 17/15/2* (27 February 2009), para. 15.

2.4.2. Appraisal

Spain and Italy already stressed at COMSAR 13 that they felt that the issue of disembarkation was not a matter for the COMSAR, because both countries had no problems with regard to communication during SAR operations as they have sufficient resources and qualified personnel.²⁰⁷ Malta, on the other hand, argued that the FSI is not the right forum. Introducing proposals for amending the SOLAS and SAR conventions at the FSI before they are first launched at COMSAR is – according to Malta – not in conformity with the MSC Decision. The reason that Malta did put forward a proposal at FSI 17 is because the FSI considered the proposal by Spain and Italy. The MSC decided on purely practical grounds that the COMSAR should consider the matter first and after that to progress it in cooperation with the FSI.²⁰⁸ We can thus conclude –because both Sub-Committees are competent to deal with this matter – that the MSC did not intend to allocate a more important role to the COMSAR than to the FSI.

The proposal by Spain and Italy is characterized by the primary responsibility of the Government responsible for the SAR area where the persons were rescued. The fact that both countries have bilateral agreements with countries of transit, like Morocco and Libya, is probably the reason why they support the SAR State responsibility. This means that the burden is being shared. However, a real duty to disembark is not included. On the one hand, this is a more realistic approach, but on the other hand, no fundamental differences are included, compared to the 2004 SOLAS and SAR Amendments.

Malta's proposal takes into account the geographic realities of each case, which would also permit the rapid identification of a place of disembarkation without ambiguity, ensure the rapid delivery of rescued persons to a place of safety and ensure minimum disruption to commercial shipping activities, while respecting the value of human life.²⁰⁹ Some SRRs – such as Malta's – pose the challenge of extending considerable distances from the land territory of

²⁰⁷ COMSAR, "Draft Report to the Maritime Safety Committee", *IMO Doc. COMSAR 13/WP.5* (22 January 2009), para. 10.8.

²⁰⁸ MSC, "Report of the Maritime Safety Committee on its 84th Session", *IMO Doc. MSC/84/24* (16 May 2008), paras. 22.25 and 22.36.

²⁰⁹ FSI, "Measures to Protect the Safety of Persons Rescued at Sea. Comments on document FSI 17/15/1. Submitted by Malta", *IMO Doc. FSI 17/15/2* (27 February 2009), paras. 14-15.

the Contracting States responsible for the coordination of SAR activities within their confines. It could be the case that such SRRs extend to areas near coasts of other Contracting States that would be in a better position to guarantee timely disembarkation of survivors than the coordinating State. Under the proposal by Spain and Italy, however, these third States are not obliged to do so. Malta's proposal again entails a duty to disembark and, as mentioned before, this will be difficult to realize.

The discussion ended in March 2010 at COMSAR 14. The United States stated that the 2004 Amendments of SAR and SOLAS are sufficient and that the discussion between Malta on the one hand, and Italy and Spain on the other hand, is based on a regional problem requiring a regional solution. Australia added that the focus must be on the implementation and the enforcement of the existing rules. The conclusion was that new amendments are not needed. The IMO Secretary-General will address the problem of disembarkation in the Mediterranean at the next Interagency Group meeting. The goal is to develop a pilot project for a regional solution in the Mediterranean. If this project works, it could be applied in other parts of the world.²¹⁰

2.5. EU Council Decision 2010/252

EU Council Decision 2010/252, supplementing the Schengen Borders Code, spells out guidelines for sea border operations coordinated by Frontex. As regards the surveillance of the sea external borders, the guidelines try to impose a layered duty to disembark.²¹¹ The operational plan, used during a joint operation at sea, should spell out the modalities for the disembarkation of the persons rescued. Nevertheless, when not specified in the operational plan, the mission's host country carries the ultimate responsibility. Malta strongly opposes these guidelines and as a result stopped hosting Frontex operations.

²¹⁰ COMSAR, "Report to the Maritime Safety Committee", *IMO Doc. COMSAR 14/17* (22 March 2010), paras. 10.1-10.26.

²¹¹ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJ L 111/20* of 4 May 2010.

After the adoption of the EU Council Decision 2010/252, the Dutch Government also declared: *“Asielverzoeken kunnen alleen worden ingediend bij een voor asielverzoeken verantwoordelijke autoriteit van een Staat op wiens grondgebied, inclusief de territoriale wateren, een asielverzoek wordt gedaan. Een Nederlands schip behoort niet tot het Nederlands grondgebied [...]. Op een Nederlands schip geldt wel de Nederlandse rechtsmacht. De commandant van het Nederlandse schip draagt in dit opzicht een verantwoordelijkheid in die zin dat het niet zonder gevolgen mag blijven indien een migrant aan boord aangeeft een asielverzoek te willen indienen. [...] Deze migranten dienen derhalve in de gelegenheid te worden gesteld een asielverzoek in te dienen bij een bevoegde autoriteit. In dit verband is voor de maritieme Frontex-operaties in de operationele voorschriften bepaald dat lidstaten in het operationeel plan voor een Frontex-operatie de vervolgstappen vastleggen ten aanzien van onderschepte of geredde personen die bescherming behoeven en over de locatie van het aan wal brengen, conform het internationale recht en alle toepasselijke bilaterale overeenkomsten. Dat betekent dat in het operationele plan de expliciete bepaling kan worden opgenomen dat het gastland verantwoordelijk is voor de afhandeling van het aan boord van het deelnemende Nederlandse schip gedane asielverzoek van een onderschepte of geredde migrant. Nederland heeft de opname van een dergelijke bepaling als voorwaarde voor zijn deelname aan een Frontex-operatie gesteld.”*²¹²

This means that – within a Frontex operation – The Netherlands will not be responsible for handling the asylum applications of rescued persons made on board a Dutch ship. The Netherlands considers the inclusion of a provision in the operational plan – stating that the host State will be responsible for dealing with asylum claims – a condition to participate in a Frontex operation. On the one hand, this approach could be considered as quite reasonable, as the Dutch navy operates far away from its territory. Therefore, the migrants’ disembarkation in the intervening State’s territory would simply be unfeasible. On the other hand, putting the disembarkation burden primarily on the host State’s shoulders seems a

²¹² Letter from the Dutch Minister of Justice HIRSCH BALLIN, E. M. H. to the President of the House of Representatives, Kamerstuk 21501-28 nr. 61 (3 September 2010), available online: <<https://zoek.officielebekendmakingen.nl/kst-21501-28-61.html>>.

somewhat opportunistic way of avoiding any further problems arising from the transfer of migrants.²¹³

2.6. Conclusion

Neither treaty law nor customary international law requires States to let rescued persons disembark onto their territory. By accepting a duty to disembark, States would surrender part of their sovereignty. However, during the last couple of years, States have done quite the contrary. They have assumed more and more competences by carrying out interception operations at sea (see Chapter II) – even on the high seas – in order to send back seaborne migrants. The conclusion – given the current interception trend – is that it will be almost impossible to ask States to accept an obligation to disembark. A possible solution is to link this disembarkation duty to financial arrangements and/or burden-sharing agreements, as was done in the CPA of 1989. This would be in line with the principles of both burden- and responsibility-sharing promoted by the UNHCR.²¹⁴

With respect to financial arrangements, we can think, for example, of capacity-building for RCCs, as well as for processing and reception centres. The European Union, for example, is already funding projects to improve the capacities of EU Member States in the case of the arrival of large groups of irregular arrivals, e.g., the strengthening of reception capacity in Lampedusa. Likewise, the Communication on Strengthened Practical Cooperation, issued by the Commission in February 2006, proposed to set up rapid-reaction migration units to better respond to sudden influxes of irregular migrants.²¹⁵ With regard to the burden-sharing agreements, States should be encouraged to engage in resettlement and readmission agreements. When States know they can share the burden after disembarkation, they will be less reluctant to accept a duty to disembark sea-borne migrants. Normally the political, socio-

²¹³ TONDINI, Matteo, “The Legality of Intercepting Boat People under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the Hirsi Case”, 18 *Journal of International Maritime Law* 59 (2012), 65-66.

²¹⁴ ExCom, “Protection of Asylum-Seekers in Situations of Large-Scale Influx”, Conclusion No. 22 (XXXII) (1981), available online: <<http://www.unhcr.org/41b041534.html>>; ExCom, “Rescue of Asylum-Seekers in Distress at Sea”, Conclusion No. 38 (XXXVI) (1985), available online: <<http://www.unhcr.org/3ae68c4358.html>>.

²¹⁵ Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation – New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System, COM (2006) 67 final.

economic and financial costs of asylum have to be carried by one State, namely, the State of disembarkation. However, due to burden-sharing agreements this will not be the case.

But which State should bear the duty to disembark? Is it the State of the closest port or the State responsible for the search and rescue? As long as a duty to disembark could be imposed (when linked to financial and burden-sharing agreements), compliance with the *non-refoulement* principle can be guaranteed and the definition of a place of safety becomes binding, it actually does not matter, as in practice this will often be the same port. Nonetheless, when the duty to disembark is legally connected to the duty to rescue, this could lead to several difficulties, as mentioned in the evaluation of the 2009 FAL Principles. Choosing the closest port would avoid these problems. Moreover, Malta – a State that must cope with a lot of migrants at sea nowadays²¹⁶ – could in this way be stimulated to sign and to ratify the SOLAS and SAR Amendments. Recently, EU Council Decision 2010/252 addressed the problem of disembarkation during Frontex operations at sea. According to these new rules, the mission's host country carries the ultimate responsibility, unless it is necessary to act otherwise to ensure the safety of these persons.²¹⁷ Malta strongly opposes the Guidelines and stated that it refuses to host future Frontex operations. This situation makes it clear that choosing the closest port is a better option.

Disembarkation of persons – and especially migrants – rescued at sea is certainly a very sensitive issue, because States simply do not have a legally binding duty to grant these people access to their territory. Thus States would have to surrender part of their sovereignty to change the current situation. The discussions within the IMO show us that this is not likely to happen in the next couple of years. In the past decennium, States have transferred

²¹⁶ Based on the first indicator (national population), between 2007 and 2010 the two Mediterranean islands of Malta and Cyprus received on average the highest number of asylum-seekers compared to their national population, i.e., 20.1 and 17.1 applicants per 1,000 inhabitants, respectively. Source: UNHCR, “Asylum Levels and Trends in Industrialized Countries 2011 – Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European countries” (2012), 13, available online: <<http://www.unhcr.org/4e9beaa19.html>>.

²¹⁷ European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final; Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, OJL 111/20 of 4 May 2010.

the issue from the IMO to the Interagency Group, and from the Interagency Group back to the IMO. At COMSAR 14, States even decided that this is only a regional problem and that no additional international rules are needed.

Although it is true that the focus should first be on the implementation and the enforcement of the existing rules, States must also take steps to improve and amend the legal framework. If States would accept a responsibility to disembark persons in the long term, this responsibility should definitely not be linked to the duty to rescue people in distress. Therefore, the closest port that can be regarded as a place of safety would be the best choice for both the seafarers and the persons rescued.

3. Regional MoU for the Mediterranean on Disembarkation

3.1. From an international to a regional approach

As mentioned, at the COMSAR meeting in March 2010, the United States stated that the discussions between Mediterranean countries concerning rescue and disembarkation of migrants at sea is based on a regional problem requiring a regional solution. However, Italy, Malta and Spain expressed their disappointment that other countries seemingly did not recognize that the problem was much wider than simply a regional one. Other parts of the world are also confronted with similar difficulties and, even more importantly, ships of all flags are currently involved in the resulting rescue operations. Therefore, the IMO Secretary-General proposed to first develop a pilot project for a regional solution in the Mediterranean. Second, if this project works, it could be applied in other parts of the world.²¹⁸

One of the primary concerns of the IMO is the integrity of the search and rescue and, consequentially, the safety of life at sea regime.²¹⁹ Therefore, the IMO wants to prevent incidents – which cause loss of life at sea – from recurring.²²⁰ COMSAR launched the idea of developing a pilot project for a regional solution in the Mediterranean in March 2010. On the one hand, the system of rescuing migrants in the Mediterranean Basin has to be improved. On the other hand, these persons also have to be disembarked at a place of safety in accordance with the SAR and SOLAS Conventions.²²¹ If the project works, it could be extended to other parts of the world experiencing similar situations.²²²

²¹⁸ COMSAR, “Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 14/17* (22 March 2010), paras. 10.1-10.26.

²¹⁹ MSC, “Report of the Maritime Safety Committee on its eighty-seventh session”, *IMO Doc. MSC 87/26* (25 May 2010), para. 14.18.

²²⁰ LEG, “Report of the Legal Committee on the work of its ninety-eight session”, *IMO Doc. LEG 98/14* (18 April 2011), para. 13.25.

²²¹ LEG, “Report of the Legal Committee on the work of its ninety-eight session”, *IMO Doc. LEG 98/14* (18 April 2011), para. 13.25.

²²² COMSAR, “Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 14/17* (22 March 2010), paras. 10.1-10.26.

Meanwhile, the IMO is even waiting to take steps on the international level – for example amending the Facilitation Convention²²³ – until the results of this Regional Agreement are ready.²²⁴ In May 2010 the IMO Secretary-General made available his good offices to take this matter forward for informal consultations with a group of interested parties.²²⁵ A first draft of the Terms of Reference for such a consultation group were established by the IMO Secretariat in co-operation with interested parties, including Italy, Malta and Spain.²²⁶

A first meeting of the consultation group was held under the auspices of, and chaired by, the IMO Secretary-General on 28 July 2010. It was attended by representatives from Italy, Malta, Spain and the IMO Secretariat. The meeting had agreed upon the Terms of Reference for the group and it finalized a list of issues to be discussed in the development of a Regional Agreement on concerted procedures relating to the disembarkation of persons rescued at sea. The IMO Secretariat prepared a draft for this Regional Agreement which was tabled for the parties concerned to consider and to comment.²²⁷ However, since not sufficient progress could be made, the delegations of Italy, Malta and Spain requested an extension of the target completion date to 2012.²²⁸ Due to the non-availability of delegations a second meeting had to be postponed.²²⁹ Italy requested that the consultation group of interested parties should be extended to the other relevant regional institutions, for instance the European Union, in order to avoid the stalling of future consultations due to non-availability of delegations.²³⁰

In 2011, States however realized that the situation in the Mediterranean region had deteriorated over the following months after the first meeting. The urgency of progressing

²²³ Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967) 591 *UNTS* 265 [FAL Convention].

²²⁴ COMSAR, “Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 15/16* (25 March 2011), para. 10.3.

²²⁵ MSC, “Report of the Maritime Safety Committee on its eighty-seventh session”, *IMO Doc. MSC 87/26* (25 May 2010), para. 14.18.

²²⁶ MSC, “Report of the Maritime Safety Committee on its eighty-seventh session”, *IMO Doc. MSC 87/26* (25 May 2010), para. 14.20.

²²⁷ COMSAR, “Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 15/16* (25 March 2011), para. 10.4.

²²⁸ COMSAR, “Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 15/16* (25 March 2011), para. 10.5.

²²⁹ COMSAR, “Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 15/16* (25 March 2011), paras. 10.4.4 and 10.6.

²³⁰ COMSAR, “Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 15/16* (25 March 2011), para. 10.6.

the issue was stressed, as a consequence of a wave of social uprising affecting the northern part of the African continent, thus resulting in a massive migration by sea towards Europe.²³¹ In March 2011, NATO warships as well as aircraft started patrolling the approaches to Libyan territorial waters as part of 'Operation Unified Protector'. As called for in United Nations Security Council Resolution 1973²³², their purpose is to reduce the flow of arms, related material and mercenaries to Libya. This operation is part of the broad international effort to protect civilians in Libya from the violence committed by the GHADDAFI regime.²³³

However, there were growing signs that GHADDAFI's regime was trying to force a migration crisis as a weapon against his NATO enemies.²³⁴ According to IOM some migrants stated that they were forced onto boats by Libyan troops and police. Migrants who were brought to safety on the Italian island of Lampedusa said they witnessed a boat – carrying between 500 and 600 people – sink off the Libyan coast. Although some of the persons were able to swim to the shore, it is not clear how many migrants survived. After seeing what had happened to the first boat, many of the migrants – who had been waiting on land to take another boat – changed their mind about making the sea journey to Italy. However, they claim that Libyan soldiers and officials forced them onto a waiting boat by firing their guns indirectly.²³⁵

On 6 April 2011, a second meeting – again under the auspices of and chaired by the IMO Secretary-General – was held pursuant to this debate. It was attended by representatives from Italy, Spain and the IMO Secretariat.²³⁶ Exactly on that day, over 250 migrants were lost after their vessel capsized in the Mediterranean Sea, which proved again to the meeting how

⁸⁸ COMSAR, "Report to the Maritime Safety Committee", *IMO Doc. COMSAR 15/16* (25 March 2011), para. 10.6.

²³² UNSC, "Resolution 1973 (2011)", *UN Doc. S/RES/1973* (17 March 2011), available online: <http://www.un.org/Docs/sc/unsc_resolutions11.htm>.

²³³ NATO, "Operation Unified Protector – Factsheet" (25 March 2011), available online: <http://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110325_110325-unified-protector-factsheet.pdf>.

²³⁴ The Telegraph, "Libya: Col Gaddafi trying to force refugee crisis on Europe" (10 May 2011), available online: <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8505447/Libya-Col-Gaddafi--trying-to-force-refugee-crisis-on-Europe.html>>.

²³⁵ IOM, "Migrant Survivors Speak of Boat Tragedy off the Coast of Libya", Press Briefing Note (9 May 2011), available online: <<http://www.iom.int/jahia/Jahia/media/press-briefing-notes/pbnAF/cache/offonce?entryId=29620>>.

²³⁶ MSC, "Measures to protect the safety of persons rescued at sea", *IMO Doc. MSC 89/INF.23* (12 April 2011), para. 4.

urgent this matter was.²³⁷ The Terms of Reference were reviewed and accepted.²³⁸ It was concluded that the development of the Regional Agreement was to:

1. establish and strengthen co-operation among Parties to enable them to cope with incidents involving persons rescued at sea;
2. establish a system of communication between the countries in the region to exchange information on the movement of persons by sea;
3. ensure the safety of persons rescued at sea, pending a decision as to the place where such persons will be safely delivered, taking into account the prevailing weather and other conditions, including the safety of the delivering ships and the capacity of the places where they are delivered to provide care as may be necessary under the circumstances;
4. arrange that delivery of persons takes place without undue delays to the rescuing ships which should be allowed to promptly proceed to their destination once the delivery operation is over; and
5. promote co-operation for the delivery of persons rescued at sea to a port of a place of safety.²³⁹

Next to this, the meeting prepared the draft text for the Regional Agreement which should be used as a basis for consideration at a future meeting.²⁴⁰ They agreed that the group should be expanded to include other interested parties concerned in the region, such as relevant regional and international organizations.²⁴¹ Malta stated that it was unable to attend the second meeting and that it not completely agreed with the outcome of that meeting. While they had no difficulties with the essence of the Terms of Reference, the text needs to be revised in the interest of clarity and consistency. Moreover, Malta had reservations on both

²³⁷ MSC, “Measures to protect the safety of persons rescued at sea”, *IMO Doc. MSC 89/INF.23* (12 April 2011), para. 5.

²³⁸ MSC, “Measures to protect the safety of persons rescued at sea”, *IMO Doc. MSC 89/INF.23* (12 April 2011), para. 6.

²³⁹ MSC, “Measures to protect the safety of persons rescued at sea”, *IMO Doc. MSC 89/INF.23* (12 April 2011), Annex.

²⁴⁰ MSC, “Measures to protect the safety of persons rescued at sea”, *IMO Doc. MSC 89/INF.23* (12 April 2011), para. 7.

²⁴¹ MSC, “Measures to protect the safety of persons rescued at sea”, *IMO Doc. MSC 89/INF.23* (12 April 2011), para. 8.

the expansion of the consultation group and the draft text of the Regional Agreement. The country therefore proposed another meeting to discuss all these issues.²⁴²

The third meeting of the consultation group was held on 15 June 2011. The meeting further developed the Terms of Reference and discussed a draft Regional Agreement on concerted procedures relating to the disembarkation of persons rescued at sea. Next to this, it was agreed that the consultation group – Italy, Spain and Malta – should be expanded.²⁴³ As a first expansion step, all Mediterranean countries were invited through Circular letter No. 3203 of 18 August 2011.²⁴⁴ This regional meeting is being held back-to-back with the celebrations of the World Maritime Day parallel event in Rome on 12 October 2011 attended by 10 Member States in the Mediterranean. The ultimate goal here will be the development of a Regional Agreement in the form of a Memorandum of Understanding (MoU) on concerted procedures relating to the disembarkation of persons rescued at sea.²⁴⁵

At COMSAR 16, it was considered beneficial – in order to make significant progress towards finalizing the draft Regional MoU – to hold informal consultations among interested parties to agree on some of the more contentious issues and associated draft texts before organizing the next regional formal meeting. Accordingly, informal consultations were held at IMO Headquarters on 21 February 2012. Some of the most contentious aspects were discussed and agreements reached on sensitive subjects and the draft text of the Regional MoU was improved accordingly.²⁴⁶ However, after some discussion, taking into account that the work on this matter was still in progress, COMSAR decided to invite the MSC to extend the target completion year to 2013.²⁴⁷ MSC agreed to postpone the deadline to 2013.²⁴⁸

²⁴² MSC, “Report of the Maritime Safety Committee on its eighty-ninth session”, *IMO Doc. MSC 89/25* (27 May 2011), para. 13.15.

²⁴³ FAL, “Formalities Connected with the Arrival, Stay and Departure of Persons – Measures to Protect the Safety of Persons rescued at Sea”, *IMO Doc. FAL 37/6/1* (1 July 2011), para. 10.

²⁴⁴ IMO, “Meeting on a Regional Memorandum of Understanding on concerted procedures relating to the disembarkation of persons rescued at sea, in Rome (Italy) on 12 October 2011”, Circular Letter No. 3203 (18 August 2011); IMO, “Meeting on a Regional Memorandum of Understanding on concerted procedures relating to the disembarkation of persons rescued at sea, in Rome (Italy) on 12 October 2011”, Circular Letter No. 3203/Add/1 (16 September 2011).

²⁴⁵ FAL, “Address of the Secretary-General at the Opening of the Thirty-Seventh Session of the Facilitation Committee”, *IMO Doc. FAL 37/INF. 5* (5 September 2011), 3-4.

²⁴⁶ COMSAR, “Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 16/17* (23 March 2012), para. 10.3.

²⁴⁷ COMSAR, “Report to the Maritime Safety Committee”, *IMO Doc. COMSAR 16/17* (23 March 2012), para. 10.4.

A MoU is a well-accepted type of legal instrument in international law and practice and it is being identified as “an informal but nevertheless legal agreement” between two or more parties.²⁴⁹ Whether this MoU is meant to be binding is not clear at the moment. However, a soft law agreement would not necessarily be a negative factor. Hard and soft law are used as alternatives or they can interact in complementary ways. Legal positivists tend to favour hard law as it refers to legal obligations of a formally binding nature, while soft law refers to those that are not formally binding but may nonetheless lead to binding hard law. Rationalists, in contrast, contend that hard and soft law have distinct attributes that States choose for different contexts and thus they can build upon each other. Lastly, constructivists maintain that State interests are formed through socialization processes of interstate interaction which hard and soft law can facilitate. Therefore, constructivists often favour soft law instruments for their capacity to generate shared norms and a sense of common purpose and identity, without the constraints raised by concerns over potential litigation.²⁵⁰

Regardless of their views about the strengths and weaknesses of hard and soft law, all three schools examine how hard and soft law can serve as mutually supporting complements to each other.²⁵¹ Moreover, soft law can sometimes be more effective than hard law. Effectiveness goes beyond looking at implementation or compliance to determine whether an international norm – whatever its source in domestic or international law – achieves its policy objective.²⁵² A rule is deemed effective when it led to certain behaviour which may or may not meet the legal standard of compliance.²⁵³ The development of a soft law framework

²⁴⁸ MSC, “Revised biennial agenda of the COMSAR Sub-Committee for the 2012-2013 biennium and provisional agenda for COMSAR 17 – Note by the Secretariat”, *IMO Doc. MSC 90/25/Add. 1* (5 April 2012), Annex 1, para. 5.1.2.2.

²⁴⁹ MCNAIR, Arnold D., *The Law of Treaties* (Oxford: Clarendon Press, 1961), 15; HOLLIS, Duncan B., *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012), 46 *et seq.* See also: ICJ, Maritime Delimitation and Territorial Questions between Qatar and Bahrain, *Qatar v. Bahrain*, 1 July 1994, *ICJ Reports* 112 (1994), para. 27, on what constitutes a binding agreement.

²⁵⁰ SHAFFER, Gregory C. & POLLACK, Mark A., “Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance”, 94 *Minnesota Law Review* 706 (2010), 707-708.

²⁵¹ SHAFFER, Gregory C. & POLLACK, Mark A., “Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance”, 94 *Minnesota Law Review* 706 (2010), 707-708.

²⁵² ALVAREZ, Jose E., “Why Nations Behave”, 19 *Michigan Journal of International Law* 303 (1998), 305.

²⁵³ Compliance as a concept merely identifies a conformity between a legal rule and behaviour. However, it does not draw a causal linkage between these two. For example, compliance may occur without implementing legislation. On the other hand, it is also possible that a State may not be in compliance with international law, even with implementing legislation in place. See: RAUSTIALA, Kal, “Compliance & Effectiveness in

has been successfully applied to address gaps in international law in the past.²⁵⁴ BARNES states that – consistent with the general trend towards the use of soft law instruments – new legal initiatives concerning migrants at sea are most likely to take the form of non-binding measures.²⁵⁵

3.2. From an interagency to a maritime approach

During the meetings, it was stressed that the development of a Regional Agreement should be restricted to purely maritime matters, in view of IMO's primary concern for the integrity of the search and rescue.²⁵⁶ Although the competences of the IMO only extend to the search and rescue part at sea and to the provision of a place of safety afterwards²⁵⁷, it is definitely a shift in view towards the issue. William O'NEIL – the former IMO Secretary-General – already stated in 2001 that the implementation of measures for safety at sea would not suffice since the problem of migrants at sea is not only a maritime issue. In a situation involving asylum-seekers, certain principles of refugee law and human rights must be respected.²⁵⁸ As a result, an Interagency Group was set up in July 2002 to deal with the problem of migrants at sea.²⁵⁹ IMO, UNHCR, UNDOALOS, UNODC, OHCHR and IOM are all participating in this Interagency Group. Therefore, it is quite remarkable that agencies, such as the UNHCR or the IOM, are not yet being involved in drafting the MoU too. Although this will probably happen during future meetings, when also countries outside the

International Regulatory Cooperation”, 32 *Case Western Reserve Journal of International Law* (2000), 398; ALVAREZ, Jose E., “Why Nations Behave”, 19 *Michigan Journal of International Law* 303 (1998), 305.

²⁵⁴ BETTS illustrates this by giving the example of the soft law framework for IDP's. BETTS, Alexander, “Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Irregular Migrants”, 22 *International Journal of Refugee Law* 209 (2010), 224-225.

²⁵⁵ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 113-114.

²⁵⁶ MSC, “Measures to protect the safety of persons rescued at sea”, *IMO Doc. MSC 89/INF.23* (12 April 2011), para. 9; HESSE, Hartmut, “Persons rescued at Sea”, Presentation by the Senior Deputy Director, IMO Maritime safety Division at the Expert Meeting on Refugee and Asylum Seekers in Distress at Sea (8-10 November 2011), available online: <<http://www.unhcr.org/4ef3061e9.html>>.

²⁵⁷ Convention on the International Maritime Organization (adopted 6 March 1948, entered into force 17 March 1958) 289 *UNTS* 48 [IMO Convention], Artt. 1 and 15(j); Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967) 591 *UNTS* 265 [FAL Convention]; SOLAS Convention; SAR Convention.

²⁵⁸ O'NEIL, William, Speech at the IMO Headquarters London (19 November 2001); available online: <http://www.imo.org/Newsroom/mainframe.asp?topic_id=82&doc_id=1703>.

²⁵⁹ MSC, “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”.

region are invited²⁶⁰, it is strange that this is not the case for the moment. Even when they are invited, their role will definitely be limited since the agreement will be restricted to purely maritime matters.

It is clear that past developments did not occur in the isolation of particular fields of law, but with a considerable degree of cooperation between international organizations and experts from across a number of fields. This integrated approach must thus continue.²⁶¹ The International Tribunal for the Law of the Sea affirmed in the *M/V Saiga Case* that considerations of humanity must apply to the Law of the Sea as they do in other areas of international law.²⁶² As TREVES correctly stated: “*The Law of the Sea and the law of human rights are not separate planets rotating in different orbits. Instead, they meet in many situations. Rules of the Law of the Sea are sometimes inspired by human rights considerations and may or must be interpreted in light of such considerations.*”²⁶³ Even the IMO itself recognizes this. In April 2011, the IMO stated that the problem is not entirely in IMO’s hands, as political developments – due to the Arab Spring – had exacerbated the situation beyond its competence.²⁶⁴

At the end of 2011, the UNHCR developed a Draft Model framework for cooperation following rescue at sea operations. This framework contains principles of burden and responsibility-sharing among States during and after rescue.²⁶⁵ It could be complementary or supplementary to the regional MoU. The Model Framework could be added by *Standard Operating Procedures for Shipmasters* (SOPs) when faced with distress at sea situations

²⁶⁰ LEG, “Report of the Legal Committee on the work of its ninety-eight session”, *IMO Doc. LEG 98/14* (18 April 2011), para. 13.25.

²⁶¹ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 149.

²⁶² ITLOS, *The M/V Saiga Case* (No. 2), *St. Vincent and the Grenadines v. Guinea*, 1 July 1999, *ITLOS Reports* (1999), para. 155, available online: <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf>.

²⁶³ TREVES, Tullio, “Human Rights and the Law of the Sea”, 28 *Berkeley Journal of International Law* 1 (2010), 12.

²⁶⁴ LEG, “Report of the Legal Committee on the work of its ninety-eight session”, *IMO Doc. LEG 98/14* (18 April 2011), para. 13.25.

²⁶⁵ UNHCR, “Refugees and Asylum-Seekers in Distress at Sea – How Best to Respond?”, Background paper (8-10 November 2011), available online: <<http://www.unhcr.org/4ec1436c9.html>>. The Model Framework is based on and further develops the UNHCR’s 10 Point Plan of Action on Refugee Protection and International Migration. See: UNHCR, “Refugees and Asylum-Seekers in Distress at Sea – How Best to Respond?”, Summary Conclusions (8-10 November 2011), available online: ><http://www.unhcr.org/4ede2ae99.html>>, para. 13.

involving undocumented migrants, refugees and asylum-seekers. SOPs could provide guidance as regards the appropriate procedures to be followed and they could be incorporated into 'industry best practice' guidance to be developed in conjunction with the International Chamber of Shipping (ICS), to ensure that humanitarian and protection concerns are taken into account. They could *inter alia* include contact points for relevant authorities (i.e. Maritime Rescue Coordination Centres) in specific countries, a list of potential places of safety for disembarkation, as may be designated by Governments for their respective SRR, along with relevant criteria that may assist to make a determination in any particular case, advice on information that shipmasters may be able to collect about rescued persons and recommendations on proper management of the human remains and handling of data on deceased persons.²⁶⁶

3.3. Malta and the Regional Agreement

3.3.1. Malta: A distinct view on migrants at sea

Malta is a small island of only 316 km². Nevertheless, in some ways Malta has a bigger stake in the Mediterranean than most of the other coastal States. It is an island State with an important fishing industry, a high level of tourism and marine-related industries such as shipbuilding and ship repairs. Therefore, Malta is clearly one of the Mediterranean's most ocean-dependent States. As a result, maritime affairs – especially those of a political kind – are followed keenly by the Maltese people.²⁶⁷ Due to its population density, the island feels under pressure from migrants arriving by boat across the Mediterranean.²⁶⁸ Malta is a Party to the 1982 LOSC²⁶⁹ and it is thus bound by the legal obligations therein. Although Malta accessed the 1974 SOLAS Convention on 8 August 1986 and the 1979 SAR Convention on 24

²⁶⁶ UNHCR, "Refugees and Asylum-Seekers in Distress at Sea – How Best to Respond?", Summary Conclusions (8-10 November 2011), available online: ><http://www.unhcr.org/4ede2ae99.html>>, paras. 17-19.

²⁶⁷ BLAKE, Gerald H., "Coastal state sovereignty in the Mediterranean Sea: the case of Malta", 41 *GeoJournal* 173 (1997), 173.

²⁶⁸ KLEPP, Silja, "A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea", 23 *International Journal of Refugee Law* 538 (2011), 545.

²⁶⁹ Malta accessed the Convention on 26 June 1996.

September 2002²⁷⁰, it has not yet signed the 2004 SOLAS and SAR Amendments. On 22 December 2005, the IMO received a communication from the Ministry of Foreign Affairs of Malta declaring that Malta “is not yet in a position to accept these amendments”.²⁷¹ The Armed Forces of Malta (AFM) deal with the search and rescue operations. The Department of Civil Aviation (DCA) operates jointly with the AFM in the event of an aeronautical incident.²⁷² Although there is a certain discretion in deciding when a person is in distress or not, the AFM is being accused of not fulfilling their duty, by for example only helping persons who are actually requesting assistance.²⁷³

In 2001, COMSAR/Circ.27 invited States to submit all details concerning the current availability of their SAR services as well as the exact coordinates of their SRR.²⁷⁴ Malta submitted this information on 30 September 2005.²⁷⁵ Although Malta is only as small as 316 km², it claimed a maritime SRR that coincides with the Malta Aeronautical SRR and the Malta Flight Information Region (FIR).²⁷⁶ Since the country ‘inherited’ an enormous Flight Identification Region (FIR) from Great Britain, Malta is now responsible for a region that amounts to 250.000 km². Towards the west, the Maltese SRR almost reaches the territorial waters of Tunisia. Towards the east, it nearly stretches to Crete. Moreover, towards the north, Malta claimed partly the same area as Italy did. This is reflected on the map which was attached to SAR.8/Circ.3.²⁷⁷ For example, the Italian island of Lampedusa is both part of the Maltese and the Italian SRR. Migrants coming from the North African coast and crossing the Mediterranean to reach Italy, have to pass through the Maltese SRR.

²⁷⁰ IMO, “Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions” (30 November 2012), available online: < <http://www.imo.org/about/conventions/statusofconventions/documents/status%20-%202012.pdf>>.

²⁷¹ IMO, “Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions” (30 November 2012), available online: < <http://www.imo.org/about/conventions/statusofconventions/documents/status%20-%202012.pdf>>.

²⁷² COMSAR, “Matters Concerning Search and Rescue Including Those Related to the 1979 SAR Conference and the Introduction of the GMDSS”, *IMO Doc. COMSAR 5/INF. 2* (17 April 2000), para. 52.

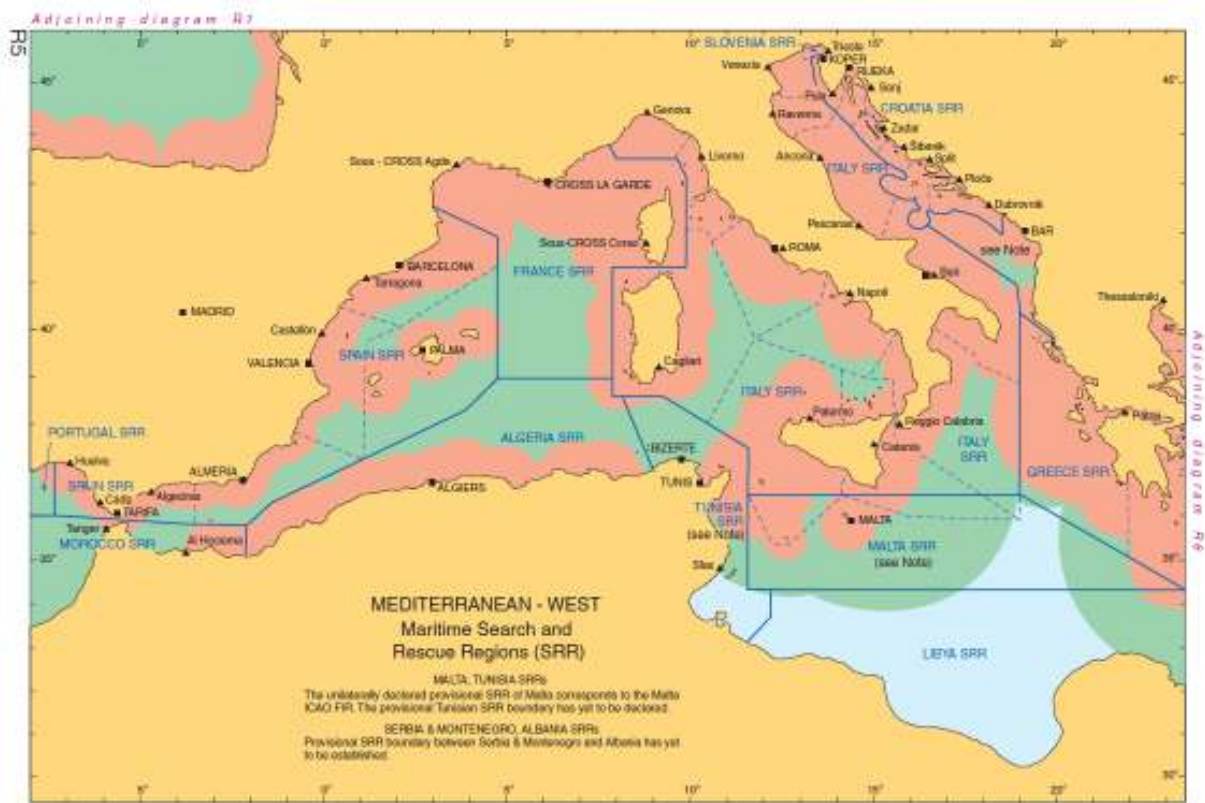
²⁷³ KLEPP, Silja, “A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea”, 23 *International Journal of Refugee Law* 538 (2011), 551-554.

²⁷⁴ COMSAR, “Data Format for a New Combined SAR.2 and SAR.3 Circular Concerning Information on the Current Availability of SAR Services”, *IMO Doc. COMSAR/Circ.27* (12 October 2001), para. 4.

²⁷⁵ IMO, “Global SAR Plan Containing Information on the Current Availability of SAR Services”, *IMO Doc. SAR.8/Circ.1/Corr.3* (20 October 2005), Annex 2, 25.

²⁷⁶ IMO, “Global SAR Plan Containing Information on the Current Availability of SAR Services”, *IMO Doc. SAR.8/Circ.1/Corr.3* (20 October 2005), Annex 2, 25.

²⁷⁷ IMO, “Global SAR Plan Containing Information on the Current Availability of SAR Services”, *IMO Doc. SAR.8/Circ.1/Corr.3* (20 October 2005), Annex 4, 7.



Maritime Search and Rescue Regions – Mediterranean West²⁷⁸

Although Italy is pressuring Malta to give up part of this vast area, this is definitely not an option for the Maltese government. One of the reasons is that this area is connected to the lucrative income the island derives from its Flight Information Region (FIR), as the size of the latter is bound to the SRR. Malta earns millions of euros a year from air traffic control charges on aircraft using the area. Next to this, there are rumours that Malta thinks the SRR could be an asset when delimiting its continental shelf.²⁷⁹ Malta's maritime boundary system is only partially delimited²⁸⁰ and there are strong indications of oil and gas resources in the areas between Tunisia and Malta on the one hand and Sicily and Malta on the other hand.²⁸¹

²⁷⁸ IMO, "Global SAR Plan Containing Information on the Current Availability of SAR Services", *IMO Doc. SAR.8/Circ.1/Corr.3* (20 October 2005), Annex 4, 7.

²⁷⁹ Times of Malta, "Shrinking Malta's search and rescue area is 'not an option' – Italy applying pressure directly and indirectly" (26 April 2009), available online: <<http://www.timesofmalta.com/articles/view/20090426/local/shrinking-maltas-search-and-rescue-area-is-not-an-option.254380>>.

²⁸⁰ See for example BLAKE, Gerald H., "Coastal state sovereignty in the Mediterranean Sea: the case of Malta", 41 *GeoJournal* 173 (1997), 173-180.

²⁸¹ See for example LEANZA, Umberto, "The Delimitation of the Continental Shelf of the Mediterranean Sea", 8 *International Journal of Marine & Coastal Law* 373, 373-395.

However, the SAR Convention is very clear on this issue. It states that the delimitation of SRR is not related to and shall not prejudice the delimitation of any boundary between States.²⁸²

But is Malta actually able to operate this unilateral declared SRR? First of all, the unilateral declaration of the Maltese SRR is subject to the principle of good faith. This principle creates a need to ensure compliance with unilateral commitments.²⁸³ However, the SAR Convention only asks States to coordinate search and rescue services in the area under their responsibility. Thus, there is no obligation for States do this individually as they can act in cooperation with other States.²⁸⁴

For example, on 6 April 2011, Malta informed the Italian Maritime Rescue Coordination Centre of the presence of a boat in distress, 45 miles from the Italian island of Lampedusa. As Maltese patrol boats were temporarily unavailable, Italian search and rescue assets were shipped to the area. The boat – which had departed from the Libyan port of Zuara – carried some 300 persons who had been fleeing the north coast of Africa in search of a better life. Normally, the type of vessel was only capable of holding a maximum of 40 people. Moreover, the engine was severely damaged, which made it impossible to manoeuvre the boat. Over 250 migrants were lost after their vessel capsized due to flooding. Eventually, only 52 persons could be saved by the Italian Coast Guard.²⁸⁵ The fact that Italy was asked to deal with the rescue, does not mean that Malta did not live up to its obligations under the SAR Convention. However, is the Maltese coordination efficient enough when 250 migrants are lost? Moreover, due to an overlap of the Maltese and the Italian SRR, there can be a delay in deciding who is responsible, thus jeopardizing the lives of migrants in distress. Although

²⁸² International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 405 *UNTS* 97 [SAR Convention], Annex Chapter 2 para. 2.1.7.

²⁸³ ILC, “Ninth Report on Unilateral Acts of States”, *UN Doc. A/CN.4/569/Add.1* (6 April 2006), para. 12, available online: <http://untreaty.un.org/ilc/documentation/english/a_cn4_569_add1.pdf>; ILC, “Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations”, *UN Doc. A/61/10* (9 September 2006), 368, para. 1, available online:

<<http://www.un.org/Docs/journal/asp/ws.asp?m=A/61/10>>. The declaration can be regarded as a unilateral act *stricto sensu* as it is not part of a treaty relationship. Although the declaration was made during a meeting within the IMO (the depositary of the SAR Convention), it was not officially registered by the Secretary-General in the context of the SAR Convention.

²⁸⁴ SAR Convention, Annex Chapter 2.

²⁸⁵ LEG, “Report of the Legal Committee on the work of its ninety-eight session”, *IMO Doc. LEG 98/14* (18 April 2011), para. 13.25 and Annex 9.

the SAR Convention mentions that overlaps have to be avoided as far as practicable²⁸⁶, it also states that SRR's be established by agreement among parties.²⁸⁷ This is not the case up until today.

According to Malta there is a safe place in terms of search and rescue and there is a safe place in terms of humanitarian law.²⁸⁸ As Malta did not sign the 2004 SOLAS and SAR Amendments and as it does not accept the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, it does not recognize the link between the two concepts which was established in these instruments. Next to this, the country does not accept any link between responsibility for the search and rescue and responsibility for providing a place of safety or ensuring that such a place of safety is provided. Nevertheless, the Council Decision 2010/252 also mentions that no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*.²⁸⁹ However, these guidelines are only applicable with regard to the surveillance of the sea external borders in the context of operational cooperation coordinated by Frontex, the European Agency for the management of operational cooperation at the external borders of the Member States.²⁹⁰ This means that when Malta is acting outside a Frontex surveillance operation, these guidelines will not be applicable.

It is however understandable that Malta wants to divide the two concepts as the country is situated at the frontline of European border controls. The Dublin II Regulation is regarded as unfavourable for Malta as the Member State responsible for an asylum claim will be the State through which the asylum seeker first entered the European Union. Therefore, the

²⁸⁶ SAR Convention, Annex Chapter 2 para. 2.1.3.

²⁸⁷ SAR Convention, Annex Chapter 2 para. 2.1.4.

²⁸⁸ KLEPP, Silja, "A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea", 23 *International Journal of Refugee Law* 538 (2011), 549.

⁷¹ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010, Annex para. 1.2.

²⁹⁰ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010, Preamble para. 11.

country considers burden-sharing a crucial element.²⁹¹ DE BLOUW believes that the modification of the Dublin Regulation is the first and most important step to eradicating human rights abuses in Southern Europe as this could lessen the immigration burden on coastal Mediterranean Member States.²⁹² To help Malta to cope with the migration problem, EUREMA (European Relocation Malta) – a pilot project for intra-EU re-allocation of beneficiaries of protection from Malta – was launched in July 2009. It was co-funded by the EU under the ERF and supported by IOM and UNHCR. Its objectives are the implementation of the principle of solidarity among states, the identification of resettlement solutions for people in need and the improvement of the situation for those who remain in Malta. Nevertheless, this project is not a solution to the negative impact of the Dublin II Regulation.²⁹³

3.3.2. Malta and the regional MoU: a mutual impact

Why did the IMO suddenly shift towards a purely maritime approach? One of the reasons could be that they definitely wanted Malta to be part of the agreement. As Malta does not accept a link between the maritime and the humanitarian elements of the problem, the country could have restraints due to the fact that the agreement could contain similar provisions as incorporated in the 2004 SOLAS and SAR Amendments and the IMO Guidelines on the Treatment of Persons Rescued at Sea. It was indeed remarkable that Malta was absent during the second meeting of the consultation group in April 2011. The problem is that if Malta is not willing to negotiate or decides not to be part of the MoU, there could simply not be an efficient agreement. Since Malta has an enormous SRR, it is of utmost importance that this country is being included. In that way, an issue that could be dealt with in the agreement is the coordination between the several SRR in the Mediterranean.

²⁹¹ KLEPP, Silja, “A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea”, 23 *International Journal of Refugee Law* 538 (2011), 546.

²⁹² DE BLOUW, Nicholas, “Drowning Policies: A Proposal to Modify the Dublin Agreement and Reduce Human Rights Abuses in the Mediterranean”, 40 *California Western International Law Journal* 335 (2010), 368.

²⁹³ UNHCR, “EUREMA (2010-2011) – A pilot project for intra-EU re-allocation of beneficiaries of protection from Malta”, Presentation at the Expert Meeting on Refugee and Asylum Seekers in Distress at Sea, Djibouti (8-10 November 2011), available online: <<http://www.unhcr.org/4ef338859.html>>.

Next to this, an essential element of the agreement has to be a system of burden-sharing, especially if other countries want Malta to cooperate. However, a few problems arise in this respect. First, some European States fear that clarifying obligations and solving the problem through burden-sharing would produce an enormous pull factor, thus encouraging migrants to come to Europe by sea.²⁹⁴ Second, the United States of America has begun to play a small yet important role in resettling refugees from Malta in order to reduce the burden for this country.²⁹⁵ Yet, since this agreement is a regional one, this kind of burden-sharing cannot be included. Third, burden-sharing clearly goes beyond a purely maritime approach.

On the one hand the regional Agreement is positive for Malta, since a system of burden-sharing could be established. On the other hand Malta could be obliged to accept certain provisions in the 2004 SOLAS and SAR Amendments and the IMO Guidelines on the Treatment of Persons Rescued at Sea. Moreover, due to the agreement Malta could be forced to give up part of its SRR. Therefore, it seems that it would be better for Malta to decide not to negotiate or to be part of this agreement as the negative consequences outweigh the positive ones. This is merely a rational choice. Nevertheless, it would be better for Malta to take part in this new agreement since it would definitely improve its reputation. For the moment Malta does not have a very good reputation concerning the treatment of migrants at sea. First, the reputational theory in international law – as part of the rational choice theory – will be explained. Second, this theory will be applied to Malta.

GUZMAN introduced the reputational theory in international law by stating that reputation plays a very important role in compliance. He identified three factors which enhance the compliance of States with international law, namely reciprocity, retaliation and reputation.²⁹⁶ The first factor is reciprocity. Reciprocity works best in bilateral situations: if one of the two cooperating States refuses to comply with a legal norm, the other may react in

²⁹⁴ European Union Committee of the House of Lords, “FRONTEX: the EU external borders agency”, 9th Report of Session 2007-08 (5 March 2008), para. 115, available online: <<http://www.publications.parliament.uk/pa/ld200708/ldselect/lducom/60/60.pdf>>. See also: MORENO-LAX, Violeta, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, 23 *International Journal of Refugee Law* 174 (2011), 176.

²⁹⁵ BETTS, Alexander, “Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Irregular Migrants”, 22 *International Journal of Refugee Law* 209 (2010), 235.

²⁹⁶ GUZMAN, Andrew T., *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press, 2008), 32-33.

the same way. Consequently, both states lose the benefit of cooperation. However, reciprocity does not work in all cases. For example norms that concern human rights cannot be based on a reciprocal basis since reciprocal behaviour would not affect the violating State at all.²⁹⁷ The second factor is the possibility of retaliation. A State may punish another State for non-compliance. Nevertheless, imposing a sanction on another state may be very costly for the punishing state. Moreover, in multilateral situations States have an incentive to free-ride and to hope that another state will punish the violator.²⁹⁸ Therefore, GUZMAN stipulates that the third factor – reputation – is the most important one. A State's calculus over the reputational costs of non-compliance is thus the primary factor for explaining State compliance with international law.

This theory is based upon the assumption that States are rational, self-interested actors.²⁹⁹ States want to cooperate with other States when it makes them better off. Nonetheless, States need a 'good' reputation as this allows them to make more credible promises. As a result of this reputation for cooperativeness, States may be able to extract higher returns for their cooperation.³⁰⁰ A reputational theory must take into account the fact that not all agreements are the same.³⁰¹ LIPSON is convinced that the more formal and public the agreement is – for example a treaty – the higher the reputational costs of non-compliance will be.³⁰² Moreover, the more uncertain a performance standard is (e.g. vague terms in the treaty), the less clear that a State's behaviour is violating that standard.

However, GUZMAN's reputational theory does not explain why States *überhaupt* enter into treaties. As a State's reputation is influenced by its compliance with legal obligations,

²⁹⁷ GUZMAN, Andrew T., *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press, 2008), 65.

²⁹⁸ GUZMAN, Andrew T., *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press, 2008), 66.

²⁹⁹ GUZMAN, Andrew T., *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press, 2008), 260 p. See also: GUZMAN, Andrew T., "A Compliance-Based Theory of International Law", 90 *California Law Review* 1823 (2002), 1823-1887; GUZMAN, Andrew T., "Reputation and International Law", 34 *Georgia Journal of International & Comparative Law* 379 (2006), 379-391.

³⁰⁰ GUZMAN, Andrew T., *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press, 2008), 34.

³⁰¹ GUZMAN, Andrew T., "Reputation and International Law", 34 *Georgia Journal of International & Comparative Law* 379 (2006), 384.

³⁰² LIPSON, Charles, "Why Are Some International Agreements Informal?", 45 *International Organization* 495 (1991), 508.

reputational forces become relevant after a State has accepted legal obligations. Therefore, reputational harm can only occur if a legal obligation already exists.³⁰³ Nevertheless, GEISINGER & STEIN suggest that reputation also plays a role in treaty formation. A State will enter into a treaty when the estimated benefits it receives from this entry outweigh the costs of entry and compliance.³⁰⁴ Compliance with international law is only one of the many dimensions along which States are being judged. Hence, it is important to differentiate between the global standing of the State – or global public opinion – on the one hand and the State’s reputation for compliance with international law on the other hand. For example, the refusal to take on legal obligations – rather than the violation of international law – could influence the popular perception of the State more than violations of legal obligations do.³⁰⁵ BREWSTER illustrates this by giving the example of the United States’ refusal to join the Kyoto Protocol on Global Climate Change, since this is widely believed to have hurt the reputation of the United States.³⁰⁶ On the other hand, violations of international law might sometimes even improve the popular perception of States.³⁰⁷ Although the NATO bombing of Serbia to stop the ethnic cleansing in the Former Yugoslavia was a violation of international law on the use of force, the Independent International Commission on Kosovo used the term “*illegal but legitimate*” to describe the bombing of Serbia.³⁰⁸

Therefore, BREWSTER puts forward a distinction between ‘legality reputation’ and ‘reliability reputation’. A legality reputation implies strict compliance with legal commitments, while a reliability reputation entails commitment to the goals of the regime. For instance, a State can completely fulfil its legal obligations and yet develop a reputation for being unreliable. Similarly, the two types of reputations will have different effects on States’ decision making. The United States withdrew from the ABM Treaty (Treaty Between

³⁰³ GEISINGER, Alex & STEIN, Michael A., “Rational Choice, Reputation, and Human Rights Treaties”, 106 *Michigan Law Review* 1129 (2008), 1137.

³⁰⁴ GEISINGER, Alex & STEIN, Michael A., “Rational Choice, Reputation, and Human Rights Treaties”, 106 *Michigan Law Review* 1129 (2008), 1138.

³⁰⁵ BREWSTER, Rachel, “Unpacking the State’s Reputation”, 50 *Harvard International Law Journal* 231 (2009), 238-239.

³⁰⁶ BREWSTER, Rachel, “Unpacking the State’s Reputation”, 50 *Harvard International Law Journal* 231 (2009), 238-239.

³⁰⁷ BREWSTER, Rachel, “Unpacking the State’s Reputation”, 50 *Harvard International Law Journal* 231 (2009), 240.

³⁰⁸ INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000), 4.

the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems Sea) in 2001.³⁰⁹ Although this withdrawal was completely legal – the ABM Treaty specifies that either party can withdraw from the treaty with six months’ notice, and the United States gave the requisite notice – many States criticized the United States for not upholding international goals of arms limits. A reputation for legal compliance can thus be maintained as long as the State acts in accordance with the treaty’s terms. However, actions that are formally in compliance with a treaty regime might nonetheless signal that a State is unreliable. By contrast, a reliability reputation might permit some violations of the agreement. Which kind of reputation is better will be often context specific. If the treaty is very specific, then a reputation for strict legal compliance might be better.³¹⁰

As we consider Malta a rational, self-interested State, reputation will be important in both treaty compliance and treaty formation. We start by taking a look at the current international obligations of Malta, namely the rescue of persons in distress and the establishment of an efficient SRR. As both legal provisions are vague, we cannot say that Malta is not in compliance with its obligations. There is a certain discretion in deciding when a person is in distress or not. Next to this, it is not strictly forbidden to have a disproportionate SRR that overlaps with other countries. Therefore, its ‘legality reputation’ remains intact.

But what about Malta’s ‘reliability reputation’? Until now, Malta was able to keep this reputation quite high. This is a result of the particular circumstances, namely a small island being flooded by migrants and not getting enough help from other countries. This is also the reason why Malta’s refusal to join the 2004 SOLAS and SAR Amendments and the IMO Guidelines on the Treatment of Persons Rescued at Sea did not harm its reputation in such a way that it felt under pressure to actually subscribe these obligations. Malta officially declared “*that it is not yet in a position to accept these amendments*”.³¹¹ It thus seems that Malta

³⁰⁹ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems Sea (adopted 26 May 1972, entered into force 3 October 1972) 944 *UNTS* 13.

³¹⁰ BREWSTER, Rachel, “Unpacking the State’s Reputation”, 50 *Harvard International Law Journal* 231 (2009), 262-266.

³¹¹ IMO, “Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions” (30 November 2012), available online: < <http://www.imo.org/about/conventions/statusofconventions/documents/status%20-%202012.pdf>>.

does want to accept these amendments, but that it simply cannot do so because of the current situation.

However, Malta cannot invoke these arguments in order not to negotiate the new Regional Agreement. After the absence of Malta during the second meeting of the consultation group, the country stated that it would be available for future meetings.³¹² Especially due to the recent incidents as a consequence of the Arab Spring, Malta feels pressure to cooperate in order to find a solution. The 2004 SOLAS and SAR Amendments and the IMO Guidelines on the Treatment of Persons Rescued at Sea were also drafted after the *Tampa* incident in 2001. However, the big difference now is that Malta is being directly involved since the problem is situated in the Mediterranean Sea. Thus, Malta's reputation is without any doubt at stake.

3.4. Conclusion

The Arab Spring highlighted once more the problem of migrants at sea. Due to the increased loss of life in the Mediterranean in 2011, the negotiations on the Draft Regional Agreement on concerted procedures relating to the disembarkation of persons rescued at sea in the Mediterranean Basin were speeded up. Malta has an important role in this agreement due to its enormous SRR. One of the problems that should be tackled is the coordination between the several SRR in the Mediterranean. Also, a system of burden-sharing has to be part of the agreement. When the Regional Agreement could meet part of the concerns Malta has, it could even go further than purely maritime matters and thus include provisions on human rights and humanitarian law. For the moment Malta is losing its 'good' reputation. If Malta wants to avoid this, it should accept that the law of the sea is not isolated from other parts of the law.

On the one hand the draft MoU contains certain elements that are negative for Malta, such as the provision that the primary responsibility rests with the Government responsible for the respective SRR. Also a definition of what constitutes a distress phase is incorporated

³¹² MSC, "Report of the Maritime Safety Committee on its eighty-ninth session", *IMO Doc. MSC 89/25* (27 May 2011), paras. 13.15-13.16.

into the MoU. On the other hand the draft MoU is positive for Malta as it takes into consideration the respective capacities of a State when providing place of safety and the particular circumstances of the case. Next to this, a place of safety may be outside the SRR (next or nearest port). Finally, States have to cooperate in providing a suitable place of safety, taking into account relevant factors, risks and circumstances, particularly, when the number of survivors exceeds capacity of the responsible State for SRR.

4. State responsibility

4.1. State responsibility of flag States and of coastal States

First of all, the flag State – whose flag the vessel in distress is flying – can be responsible. Under the law of the sea, there is an obligation for every State to exercise its jurisdiction and control over ships flying its flag. According to Article 94(3) LOSC “[e]very State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to the construction, equipment and seaworthiness of ships”. Therefore, with regard to migrants at sea, it is deemed critical that flag States exercise effective jurisdiction and control over their vessels in order to ensure strict compliance with safety standards set out in relevant international instruments. Unseaworthy vessels should not be permitted to sail.³¹³ The situation, wherein a State permits unseaworthy vessels carrying migrants to fly its flag, will raise questions of international responsibility of that State. Nevertheless, this State is not in this capacity subject to the obligation of Article 98 LOSC, which only refers to the flag States in the vicinity of the vessel in distress.³¹⁴

Whenever a State commits an internationally unlawful act against another State, international responsibility is established between the two. As a result, a breach of an international obligation gives rise to a requirement for reparation.³¹⁵ Next to the wide range

³¹³ UNHCR, “The Treatment of Persons Rescued at Sea: Conclusions and Recommendations from Recent Meetings and Expert Round Tables Convened by the Office of the United Nations High Commissioner for Refugees – Report of the Office of the United Nations High Commissioner for Refugees,” *UN Doc. A/AC.259/17* (11 April 2008), para. 11, available online:

<http://www.un.org/Depts/los/consultative_process/consultative_process.htm>.

³¹⁴ PAPASTAVRIDIS, Efthymios, “Rescuing Migrants at Sea: The Responsibility of States under International Law”, Working Paper Series Social Science Research Network (27 September 2011), 16-17, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

³¹⁵ On State responsibility in general see: CHENG, Bin, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens, 1953), 490 p.; BROWNLIE, Ian, *System of the Law of Nations: State Responsibility*, Part I, (Oxford: Oxford University Press, 1983), 302 p.; SPINEDI, Marina & SIMMA, Bruno (Eds.), *United Nations Codification of State Responsibility* (New York: Oceana, 1987), 418 p.; CRAWFORD, James, *The International Law Commission’s Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), 387 p.; FITZMAURICE, Malgosia & SAROOSHI, Dan (Eds.), *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart, 2003), 326 p.; JØRGENSEN, Nina H. B., *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2003), 325 p.

On State responsibility concerning interferences with the freedom of navigation see: WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007).

of State practice in this area,³¹⁶ the ILC worked extensively on this topic. In 2001, the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles) were adopted.³¹⁷ The ILC Draft Articles do not address issues of either the responsibility of international organizations or the responsibility of individuals.³¹⁸ General Assembly Resolution 56/83 of 12 December 2001 annexed the text of the Articles and commended them to governments.³¹⁹ This is an unusual procedure which must be seen as giving particular weight to the status of the articles.³²⁰

Under the law of State responsibility, every internationally wrongful act of a State – consisting of an action or omission – entails the international responsibility of that State. An act is internationally wrongful when the conduct is attributable to the State under international law and when it constitutes a breach of an international obligation of the State.³²¹ The failure of a vessel to provide assistance to persons in distress at sea can be attributable to its flag State in two cases: (1) when the vessel is a warship or other duly designated State vessel and (2) when the vessel is private and the shipmaster is acting on the instructions of – or under the direction or control of – the flag State.³²² In the first case, the shipmaster – with which the pertinent duty to provide assistance lies – is a *de jure* organ of the flag State. His conduct will be attributable to the flag State pursuant to Article 4 ILC Draft Articles. In the second case, should the flag State instruct the shipmaster to turn a blind eye to persons in distress at sea, this omission would be attributable to the flag State according to Article 8 ILC Draft Articles. However, there must be stressed that flag States – which enact a duty of assistance in their domestic legislation and exercise disciplinary control and

³¹⁶ See: ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, available online: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

³¹⁷ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts” (adopted 9 August 2001), *UN Doc. A/56/10* (24 October 2001), Supp. No. 10, available online: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> [ILC Draft Articles].

³¹⁸ ILC Draft Articles, Artt. 57-58.

³¹⁹ UNGA, “Responsibility of States for Internationally Wrongful Acts”, *UN Doc. A/RES/56/83* (28 January 2002), available online: <<http://www.un.org/Depts/dhl/resguide/r56.htm>>.

³²⁰ SHAW, Malcolm M., *International Law* (Cambridge: Cambridge University Press, 6th ed. 2008), 781. See also: CRAWFORD, James & OLLESON, Simon, “The Continuing Debate on a UN Convention on State Responsibility”, 54 *International & Comparative Law Quarterly* 959 (2005), 959-971.

³²¹ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts” (adopted 9 August 2001), *UN Doc. A/56/10* (24 October 2001), Supp. No. 10, Artt. 1-2, available online: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf>. [ILC Draft Articles]

³²² PAPASTAVRIDIS, Efthymios, “Rescuing Migrants at Sea: The Responsibility of States under International Law”, Working Paper Series Social Science Research Network (27 September 2011), 17-18, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

jurisdiction over potential infringements of this duty in accordance with their legislation – should be considered to meet their obligations under Article 98(1) LOSC.³²³

There is a third – although unlikely – possibility that the conduct of a private vessel will be attributable to the flag State, namely when the vessel is private and the shipmaster is empowered by the law to exercise elements of governmental authority. In this case, the conduct shall be considered an act of the State, provided that the person or entity is acting in that capacity in the particular instance.³²⁴ Whether the shipmaster will be empowered to exercise ‘elements of governmental authority’ and to what extent, will be a matter of domestic law. Shipmasters often enjoy certain public powers, for example the power to arrest and to board a vessel. When there would exist a similar delegation of governmental authority with respect to search and rescue at sea in the national law, it would be difficult to contest the attribution of the conduct to the flag State.³²⁵ What is being regarded as ‘governmental’ depends on the particular society, its history and traditions. Not only the content of the powers will be important, but also the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. Article 5 ILC Draft Articles does not cover situations where internal law confers powers upon or authorizes conduct by citizens or residents generally.³²⁶ Therefore, it is a very narrow category. Moreover, rendering assistance can be regarded as a humanitarian duty, rather than a governmental activity.³²⁷

The obligations for coastal States under Article 98(2) LOSC as well as under the SAR and SOLAS Conventions are to promote the establishment, operation and maintenance of an adequate and effective search and rescue service, where circumstances so require cooperate

³²³ PAPANASTAVRIDIS, Efthymios, “Rescuing Migrants at Sea: The Responsibility of States under International Law”, Working Paper Series Social Science Research Network (27 September 2011), 19, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

³²⁴ ILC Draft Articles, Art. 5.

³²⁵ PAPANASTAVRIDIS, Efthymios, “Rescuing Migrants at Sea: The Responsibility of States under International Law”, Working Paper Series Social Science Research Network (27 September 2011), 18, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

³²⁶ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, 43, available online: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

³²⁷ PAPANASTAVRIDIS, Efthymios, “Rescuing Migrants at Sea: The Responsibility of States under International Law”, Working Paper Series Social Science Research Network (27 September 2011), 18, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

with neighbouring States for this purpose and to ensure that a place of safety is provided. The conduct of an RCC will always be attributed to its coastal States, as the RCC administrators are necessarily *de jure* organs of the State.³²⁸ Although an RCC can be operated either unilaterally by personnel of a single military service (e.g. an Air Force or a Navy) or either by a single civilian service (e.g. a national Police force or a Coast Guard), it will always be regarded as a State organ. Article 4(1) ILC Draft Articles reads: “*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*” The fact that the State is responsible for the conduct of its own organs – acting in that capacity – has long been recognized in international judicial decisions. One of the earliest sources of this principle was Umpire LIEBER’s statement in the *Moses* case, a decision of a Mexico-United States Mixed Claims Commission: “*An officer or person in authority represents pro tanto his government, which in an international sense is the aggregate of all officers and men in authority.*”³²⁹ The ICJ has also confirmed this rule. In its Advisory Opinion *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said that according to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule is of a customary character.³³⁰

The words of Article 98(2) LOSC indicate that coastal States shall promote – not provide – a certain level of search and rescue services. Search and rescue services have to be ‘adequate and effective’. However, it is not always clear what ‘adequate and effective’ means. MOEN gives the example of the recent Arctic luxury eco-tourism. Cruise ships – icebreaking vessels that need no escort to navigate – now take advantage of ice-free conditions during the summer months to sail from Iceland to Alaska through the Northwest Passage. Nevertheless, travelling along the Northwest Passage still imposes serious risks, making the potential for a

³²⁸ PAPANASTAVRIDIS, Efthymios, “Rescuing Migrants at Sea: The Responsibility of States under International Law”, Working Paper Series Social Science Research Network (27 September 2011), 19, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

³²⁹ MOORE, John Bassett, *History and Digest of the International Arbitrations to Which The United States Has Been a Party* (Washington D.C.: Government Printing Office, 1871), Vol. III, 3129.

³³⁰ ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* Advisory Opinion, 29 April 1999, *ICJ Reports* 62 (1999), para. 62.

humanitarian disaster real. Canada should therefore adapt its search and rescue services in order to adequately and effectively deal with these new risks.³³¹ It can be concluded that coastal States are under an obligation of conduct, not an obligation of result.³³² For State Parties to the 2004 SAR and SOLAS Amendments, there is an additional obligation to ensure that a place of safety is being provided for the persons rescued at sea. Whether this requirement will be met, will have to be decided on a case-by-case basis.

According to Article 98(2) LOSC, coastal States also have to cooperate where appropriate. But in practice, this is not always the case. On 9 November 2011, 44 people – mostly sub-Saharan – were rescued by the Italian navy ship *Foscari* after two days of sending out distress calls from a satellite phone in the Mediterranean Sea. The delay in rescuing the boat led to huge risks to the lives of the persons in distress. Risks for example included drowning, dehydration and exposure. After the rescue, the migrants were transported to Sicily, not to Lampedusa or Malta which were the two closest ports. UNHCR spokesman Adrian EDWARDS stated that UNHCR was grateful that the Italian navy took this initiative despite the fact that the boat was in Maltese SRR.³³³ In response, the AFM and the Maltese SAR authorities both rejected what they characterized as the “*impression conveyed*” by the UNHCR spokesperson that Maltese SAR authorities abdicated from their responsibilities and did not cooperate with the relevant Italian authorities. The AFM statement – as reported by the newspaper *Times of Malta* – outlines in detail the Maltese response to the distress call from the migrant boat. The AFM said that the decision for the *Foscari* to take the rescued migrants to an Italian port in Sicily was the result of Italian insistence that Lampedusa does not represent a place of safety for the disembarkation of migrants. According to Malta, Lampedusa did represent the nearest place of safety under the relevant legal regime applicable with the Malta SRR. Therefore, the persons should have been disembarked here.³³⁴

³³¹ MOEN, Amy E., “For Those in Peril on the Sea: Search and Rescue under the Law of the Sea Convention”, 24 *Ocean Yearbook* 377 (2010), 377-410.

³³² PASTAVRIDIS, Efthymios, “Rescuing Migrants at Sea: The Responsibility of States under International Law”, Working Paper Series Social Science Research Network (27 September 2011), 20, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

³³³ UNHCR, “UNHCR Thanks Italian Navy for Rescuing Boat in Distress Packed with Refugees from Libya”, Briefing Notes (11 November 2011), available online: <<http://www.unhcr.org/4ebd29809.html>>.

³³⁴ Times of Malta, “UNHCR Comments Give the Wrong Impression – AFM” (14 November 2011), available online: <<http://www.timesofmalta.com/articles/view/20111114/local/unhcr-comments-give-the-wrong-impression-afm.393791>>.

Could Malta be responsible for not cooperating? First of all, as was mentioned in the first part of this chapter, it will be difficult to establish a breach of the duty to cooperate. Second, there are migrant boats who refuse to be rescued by Malta, because they want to go to Italy. For example, on 9 July 2012, a boat – reportedly carrying 50 Eritreans and Somalis – was at sea. They refused to be rescued by Maltese military forces. UNHCR reported that over 1.000 people on 14 boats have arrived in Malta from Libya so far in 2012. Two other boats were intercepted by Maltese authorities. It is striking that the majority elected not to be rescued and continued to Italy.³³⁵

4.2. An example: the left-to-die-boat

A recent incident that gave rise to a discussion on responsibility for failing to meet search and rescue obligations, involved a disabled boat filled with migrants fleeing Libya. It was left to drift for two weeks in the Mediterranean before finally landing back in Libya on 10 April 2011. The boat ran into trouble not long after its departure from Tripoli. Despite several distress calls as well as sightings by survivors of a military helicopter and a warship, the boat received no help. It is almost certain that the helicopter must have come from a ship.³³⁶ The warship was of an off-white or light grey colour and the boat was close enough for them to see people on board wearing different coloured military uniforms. However, none of the survivors could remember seeing the ship's flag.³³⁷ The situation on board the boat when they encountered the ship was very different to the situation when they encountered the helicopter. When the ship came across them, many persons had already died and there was no food and water. In an attempt to approach the ship, the migrants jumped into the sea and starting pushing their boat in its direction. They even showed the babies that had died, the sick women and the empty fuel tanks. However, no assistance was provided and after a

³³⁵ UNHCR, "One Survivor, 54 Die at Sea Attempting the Voyage to Italy from Libya", Press Release (10 July 2012), available online: <<http://www.unhcr.org/4ffc59e89.html>>.

³³⁶ PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 138, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

³³⁷ PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 41-43, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

short while, the military vessel sailed away.³³⁸ It should have been clear that the survivors and the boat were in distress and that the situation required immediate rescue. As a result, in these circumstances there was a clear failure to intervene.³³⁹ Ultimately, 63 persons – including 20 women and two babies – out of the 72 passengers died. As of 24 March 2011 – two days before the migrant boat left Tripoli – NATO and France, Great Britain, Italy, Spain, the United States, and Canada all had warships patrolling NATO’s Maritime Surveillance Area, to enforce the arms embargo on Libya.³⁴⁰

But which military vessel ignored the calls for assistance? According to the fact finding PACE (Parliamentary Assembly of the Council of Europe) report of Tineke STRIK of 29 March 2012, at least two vessels involved in NATO’s operations were in the boat’s vicinity when the distress call was sent, namely the Spanish frigate *Méndez Núñez* (11 miles away) and the Italian *ITS Borsini* (37 miles away).³⁴¹ Tineke STRIK met with NATO officials in Brussels on 28 November 2011.³⁴² Next to this, she also requested written information from NATO and from the ministers of defence of countries involved in NATO operations with vessels with aircraft and/or helicopter-carrying facilities (Canada, France, Greece, Italy, Romania, Spain, Turkey, the United Kingdom and the United States).³⁴³ However, NATO stated: *“In all cases, NATO warships did everything they could to respond to distress calls and provide help when necessary. In addition, through coordination with national authorities, NATO has indirectly facilitated the rescue of many hundreds more. Commanders of warships under NATO command were, and remain, fully aware of their obligations under the International Law and Law of the Sea and responded*

³³⁸ PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 43, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

³³⁹ PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 99, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

³⁴⁰ FIDH, “NATO: Clarify Response to Deaths at Sea” (26 March 2012), available online: <http://www.fidh.org/IMG/article_PDF/article_a11532.pdf>.

³⁴¹ PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Draft Resolution para. 8, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

³⁴² PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 8, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

³⁴³ PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 10, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

*appropriately.*³⁴⁴ As – at that time – all vessels in the area were under NATO command, the vessel must have been under the command of NATO, whatever its nationality was. As a result, according to Ms. STRIK, NATO must take responsibility for the ship’s ignoring the calls for assistance from the “left-to-die boat”.³⁴⁵ The report of Tineke STRIK was adopted by the PACE Committee on Migration, Refugees and Displaced Persons. It demanded that NATO would conduct an inquiry into the incident. Next to this, national parliaments of the States concerned should also carry out inquiries.³⁴⁶

On 11 April 2012, three NGO’s – *La Fédération internationale des liges des droits de l’homme* (FIDH), *Groupe d’information et de soutien des immigrés* (GISTI) and the European Programme for Integration and Migration (Migreurop) – held a press conference to announce the filing of a legal complaint against the French military with the *Procureur de la République du Tribunal de Grande Instance de Paris*, alleging that military forces failed to render assistance to a migrant boat within the NATO military zone during *Operation Unified Protector*.³⁴⁷ FIDH, GISTI and Migreurop conclude that the French military must have had knowledge of the distress situation, based upon three reasons: “(1) *Compte tenu de la connaissance de la présence et de la localisation (33°45mn de latitude nord et 13°05 mn de longitude est) de ce bateau par un avion de reconnaissance français le 27 mars à 14h55. (2) Compte tenu de la présence de l’armée française dans le périmètre de 50 milles nautiques, à partir de la localisation de l’embarcation, lors de la diffusion du message de détresse le 27 mars à 20h54 (18H54 GMT) par les garde-côtes italiens. (3) Compte tenu de l’importante présence de l’armée française dans le périmètre de la diffusion du message Hydrolant en*

³⁴⁴ EVANS, Stephen, “Letter from Mr Stephen Evans, Assistant Secretary General for Operations of NATO, to Ms Strik, rapporteur of the Committee on Migrations, Refugees and Displaced Persons” (27 March 2012), available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_LET.APENDIX.EN.pdf>. See also: FROH, Richard, “Letter from Mr Richard Froh, Deputy Assistant Secretary General, Operations Directorate of NATO, to Ms Strik, rapporteur of the Committee on Migrations, Refugees and Displaced Persons” (8 February 2012), available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.APENDIX.EN.pdf>.

³⁴⁵ PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 148, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

³⁴⁶ PACE, “PACE Committee Finds a ‘Catalogue of Failures’ that Led to Deaths of 63 People Fleeing Libyan Conflict by Sea”, Press Statement (29 March 2012), available online: <http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=7567&L=2>.

³⁴⁷ FIDH, GISTI & Migreurop, “Plainte Contre X.” (11 April 2012), available online : <http://www.gisti.org/IMG/pdf/plainte_2012-04_c-armee-francaise.pdf>.

date du 28 mars 2011 à 06h06 et de sa diffusion durant les dix jours suivants toutes les quatre heures."³⁴⁸

Information provided by the Rome MRCC indicates a sighting of a boat full of migrants by a French aircraft on 27 March 2011. According to the French sighting, the boat was a rubber dinghy, had about 50 persons on board and was under propulsion. A photograph taken by the aircraft was provided to Ms. STRIK by the Rome MRCC, showing distinctly a blue boat packed with people and steadily moving ahead. The boat in the picture was identified as the boat in question by two of the survivors.³⁴⁹ According to information provided by the French military, no such event occurred off the Libyan shores during the NATO operations. The French Minister of Defence stated that the French vessel *Meuse* encountered a vessel carrying migrants on 28 March 2011, approximately 12 nautical miles south of Malta. However, this could not have been the boat in question. The Minister went on to say that all other French assets were operating in the Gulf of Sidra. Therefore, they were not in the area of concern. NATO's written reply that "*based on a review of existing records in NATO operational headquarters, there is no record of any aircraft or ship under NATO command having seen or made contact with the small boat in question*". These responses fail to provide any concrete answers as to the identity of the French aircraft that took a picture of the boat.³⁵⁰

One of the problems is the isolated nature of the ocean. Therefore, it is difficult to prove a failure of search and rescue obligations. Nevertheless, satellite images for example could provide for proof. The European Union Satellite Centre (EUSC) gathers a great deal of data and pictures across the globe.³⁵¹ In the light of the PACE fact finding report "*Lives Lost in the Mediterranean Sea: Who is Responsible?*", Tineke STRIK asked EUSC for satellite images. However, EUSC replied that the Centre did not have archived products available for the

³⁴⁸ FIDH, GISTI & Migreurop, "Plainte Contre X." (11 April 2012), 18, available online : http://www.gisti.org/IMG/pdf/plainte_2012-04_c-armee-francaise.pdf.

³⁴⁹ PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 85-87, available online: http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf.

³⁵⁰ PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 90-91, available online: http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf.

³⁵¹ For information on the European Union Satellite Centre see: <http://www.eusc.europa.eu/>.

indicated area and the indicated time frame. It continued stating that – considering that the area of interest coincided with the area of NATO *Operation Unified Protector* – the envisaged investigation could involve classified ‘NATO confidential’ information. Nevertheless, EUSC admitted that access to satellite imagery of the area would have been an invaluable tool to identify the location of ships as military vessels are certainly large enough to be spotted and possibly identified from such data.³⁵²

In July 2012, the AFM expressed interest in benefitting from a European Union-sponsored project involving the deployment of ‘drones’ – Unmanned Aerial Vehicles (UAVs) – to assist in migrant patrols at sea. While the AFM is fully involved in the development of the system, it is however not yet participating in the testing of such drones.³⁵³ Frontex’ Research and Development Unit is currently engaged in a study to identify more cost efficient and operational effective solutions for aerial border surveillance, in particular Unmanned Aircraft Systems (UAS’s) with Optional Piloted Vehicles (OPVs) that could be used during joint operations at sea.³⁵⁴ The United States is already using ‘Predator drones’ to monitor land and sea borders. However, serious questions have been raised about the effectiveness of surveillance drones operating over the sea as – until now – the drones have had limited success in for example spotting drug runners in the open ocean.³⁵⁵ The use of drones for land and sea border surveillance is contemplated by in the EU Commission’s proposal on the establishment of the European Border Surveillance System (EUROSUR).³⁵⁶ The main purpose of EUROSUR is to improve the situational awareness and reaction capability at the external borders of the Member States and of the European Union.³⁵⁷ The

³⁵² PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), Explanatory Memorandum para. 141-143, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

³⁵³ Malta Today, “AFM ‘interested’ in EU-sponsored drones for migrant surveillance at sea” (29 July 2012), available online: <<http://www.maltatoday.com.mt/en/newsdetails/news/national/AFM-interested-in-EU-sponsored-drones-for-migrant-surveillance-at-sea-20120728>>.

³⁵⁴ Frontex, “Programme of Work 2012” (2012), 105, available online: <http://www.frontex.europa.eu/assets/About_Frontex/Governance_documents/Work_programme/2012/frontex_pow_2012.pdf>.

³⁵⁵ Los Angeles Times, “U.S. plans more drone flights over Caribbean” (23 June 2012), available online: <<http://articles.latimes.com/2012/jun/23/nation/la-na-drugs-caribbean-20120623>>.

³⁵⁶ European Commission Proposal of 12 December 2011 for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR), COM (2011) 873 final. This proposal is currently being considered by the European Parliament.

³⁵⁷ European Commission Proposal of 12 December 2011 for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR), COM (2011) 873 final, Article 1.

planned surveillance of the Mediterranean – using UAVs, satellites and shipboard monitoring systems – could aid in the rescue of refugees shipwrecked on the open seas.³⁵⁸ However, EUROSUR could cover up a lack of substance. For example, maritime rescue services are not part of EUROSUR and border guards do not share information with them.³⁵⁹ Moreover, EUROSUR should be adapted to meet the specific needs that asylum seekers may have. For example, the exchange of personal data with third countries should be prohibited, as this exchange may jeopardize both the safety and protection of asylum seekers and refugees, and their data protection rights.³⁶⁰

4.3. Conclusion

The failure of a vessel to provide assistance to persons in distress at sea can be attributable to its flag State in two cases: (1) when the vessel is a warship or other duly designated State vessel and (2) when the vessel is private and the shipmaster is acting on the instructions of – or under the direction or control of – the flag State. Coastal States have to promote the establishment, operation and maintenance of an adequate and effective search and rescue service, where circumstances so require cooperate with neighbouring States for this purpose and to ensure that a place of safety is provided. Also, according to Article 98(2) LOSC, coastal States have to cooperate where appropriate. The conduct of an RCC will always be attributed to its coastal States, as the RCC administrators are necessarily *de jure* organs of the State.³⁶¹

³⁵⁸ Human Rights Watch, “Hidden Emergency – Migrant Deaths in the Mediterranean” (August 2012), 11, available online:

<http://www.hrw.org/sites/default/files/related_material/2012_EU_Hidden%20Emergency.pdf>.

³⁵⁹ HAYES, Ben & VERMEULEN, Mathias, “Borderline – The EU’s New Border Surveillance Initiatives”, Heinrich Böll Foundation (June 2012), 74-76, available online:

<<http://www.statewatch.org/news/2012/jun/borderline.pdf>>.

³⁶⁰ LIBE, Draft Report on the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR) by Rapporteur Jan Mulder, COD (2011) 0427; Meijers Committee – Dutch Standing committee of experts in international immigration, refugee and criminal law, “Note on the proposal for a Regulation establishing the European Border Surveillance” (12 September 2012), available online: <<http://www.statewatch.org/news/2012/sep/eu-meijers-cttee-eurosur.pdf?>>.

³⁶¹ PAPANASTAVRIDIS, Efthymios, “Rescuing Migrants at Sea: The Responsibility of States under International Law”, Working Paper Series Social Science Research Network (27 September 2011), 19, available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

The case with the 'left-to-die-boat' once more proved that international obligations are not always being fulfilled. One of the problems is the isolated nature of the ocean. Therefore, it is difficult to prove a failure of search and rescue obligations. Nevertheless, satellite images for example could provide for proof. Unmanned Aerial Vehicles (UAVs) could assist in migrant patrols at sea. The use of drones for land and sea border surveillance is contemplated by in the EU Commission's proposal on the establishment of EUROSUR.³⁶² Nevertheless, EUROSUR should be adapted to meet the specific needs that asylum seekers may have.³⁶³

³⁶² European Commission Proposal of 12 December 2011 for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR), COM (2011) 873 final. This proposal is currently being considered by the European Parliament.

³⁶³ LIBE, Draft Report on the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR) by Rapporteur Jan Mulder, COD (2011) 0427; Meijers Committee – Dutch Standing committee of experts in international immigration, refugee and criminal law, "Note on the proposal for a Regulation establishing the European Border Surveillance" (12 September 2012), available online: <<http://www.statewatch.org/news/2012/sep/eu-meijers-cttee-eurosur.pdf?>>.

5. Sanctions for the master and the ship owner

5.1. Shipmaster

When the 1989 Salvage Convention added Article 10(2), it placed the obligation to give effect to the duty to render assistance on the States, rather than on masters.³⁶⁴ Although Article 10(1) says that 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, para. 2 says: “*The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.*” Also other multinational instruments do not directly obligate masters to render assistance. At first sight the treaties refer to the masters of ships and they appear to create obligations for them. However, the binding element is on States parties.³⁶⁵ Also Article 98(1) LOSC says “*Every State shall require the master of a ship flying its flag [...] to render assistance*”. Indeed, international law seldom imposes obligations directly on individuals.³⁶⁶

Article 2 of the 1989 Salvage Convention provides that States must bring judicial and arbitral proceedings regarding a breach of the duty to render assistance. Despite the fact that the duty to render assistance has been widely accepted, sometimes it still remains unenforced against masters.³⁶⁷ There are several reasons for this. First of all, failures to render assistance are rarely reported, as a survivor of a disaster at sea would have to be able to somehow identify a vessel whose master had failed to render assistance.³⁶⁸ Second, an action against a master requires that he is subject to the enforcing State’s jurisdiction.³⁶⁹ It may be possible for States other than the flag State to assert criminal jurisdiction due to failure by a

³⁶⁴ SEVERANCE, Arthur Alan, “The Duty to Render Assistance in the Satellite Age”, 36 *California Western International Law Journal* 377 (2006), 382.

³⁶⁵ DAVIES, Martin, “Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea”, 12 *Pacific Rim Law & Policy Journal* 109 (2003), 109-143, 128; SEVERANCE, Arthur Alan, “The Duty to Render Assistance in the Satellite Age”, 36 *California Western International Law Journal* 377 (2006), 384.

³⁶⁶ JENNINGS, Robert & WATTS, Arthur (Eds.), *Oppenheim’s International Law* (Harlow: Longman, 9th ed. 1992), paras. 374-375.

³⁶⁷ LONG, Patrick J., “The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea”, 48 *Buffalo Law Review* 591 (2000), 627.

³⁶⁸ LONG, Patrick J., “The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea”, 48 *Buffalo Law Review* 591 (2000), 610.

³⁶⁹ O’CONNELL, Daniel P. (Ed. by SHEARER, Ivan A.), *The International Law of the Sea* (Oxford: Clarendon Press, 1982/1984), Vol. II, 907.

shipmaster to assist persons in need of assistance on the high seas.³⁷⁰ Third, many States – such as flags of convenience – are either unable or unwilling to enforce the duty.³⁷¹ Moreover, even otherwise responsible flag States are unwilling to enforce the duty. For example, in the case *Korpi v. United States*, the Court held that as a matter of law “[a] private party has no affirmative duty to rescue a vessel or person in distress.”³⁷² Last, as the master has a margin of appreciation to decide whether or not to provide assistance, as well as what kind of assistance to give, it is difficult to actually prove a breach of the duty he has.

Article 16(1) of the 1989 Salvage Convention says: “1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject. 2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment.” Therefore, States do not need to grant masters the right to a reward unless their national laws provide otherwise.³⁷³ Nevertheless, this could be an incentive to fulfil the legal duty to assist. However, one has to be careful that this does not amount to the act of smuggling. Smuggling is the explicit and mutually beneficial arrangement between two parties involving illegal entry (crossing borders without complying with the necessary requirements for legal entry into the receiving State) into a given country.³⁷⁴

It has been suggested that the Global Maritime Distress and Safety System (GMDSS) could be used to assist in the enforcement of the duty to render assistance.³⁷⁵ The GMDSS is

³⁷⁰ DAVIES, Martin, “Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea”, 12 *Pacific Rim Law & Policy Journal* 109 (2003), 109-143.

³⁷¹ BARNES, Richard A., “Refugee Law at Sea”, 53 *International and Comparative Law Quarterly* 47 (2004), 51.

³⁷² *Korpi v. United States*, 961 F. Supp. 1346, N.D. Cal. (1997). The Court in this case concluded that the Coast Guard had no affirmative duty to render aid to a vessel or person in distress. Nevertheless, once having undertaken to do so, the Coast Guard will be held to the same standard of care as private persons. According to the Court, the standard of care applicable in rescues undertaken at sea is that the rescuer will be liable for damages only (1) for negligent conduct that worsens the position of the victim, or (2) reckless and wanton conduct in performing the rescue.

³⁷³ However, PARENT submits that the granting of a compensation for life salvage is customary international law. See: PARENT, Jason, “No Duty to Save Lives, No Reward for Rescue: Is That Truly the Current State of International Salvage Law?”, 12 *Annual Survey of International and Comparative Law* 87 (2006).

³⁷⁴ Smuggling Protocol, Artt. 3(a) and 3(b).

³⁷⁵ SEVERANCE, Arthur Alan, “The Duty to Render Assistance in the Satellite Age”, 36 *California Western International Law Journal* 377 (2006), 398-399.

said to be “the biggest change to maritime communications since the invention of radio.”³⁷⁶ The basic concept of this system is that search and rescue authorities ashore, as well as ships in the vicinity, will be alerted in the event of an emergency. Therefore, it helps shipmasters and States to fulfil their duty to provide search and rescue services. The GMDSS makes use of the satellite communications provided by Inmarsat as well as terrestrial radio. The equipment required by ships varies according to the sea area in which they operate. For example, ships travelling to the high seas must carry more communications equipment than those which remain within reach of specified shore-based radio facilities. In addition to distress communications, the GMDSS also provides for the dissemination of general maritime safety information.

The GMDSS was adopted by means of amendments to the SOLAS Convention. The amendments – contained in Chapter IV of SOLAS on Radiocommunications – were adopted in 1988 and entered into force on 1 February 1992. However, they provided for a phase-in period until 1 February 1999.³⁷⁷ The search and rescue radar transponders on ships, to facilitate the location of vessels in distress, are generally capable of detecting signals at a distance of eight nautical miles and displaying the signals on a vessel’s radar screen. It has been suggested that if a recording device were employed with these transponders, it could record distress signals as they are received from a vessel in distress. Flag States could compare transponder recordings with the ship’s log, inquire into discrepancies between the recording and the log, and hold masters to task for failing to respond. Also recording technology is already in place as ships need to carry voyage data recorders (VDRs) – the shipboard equivalent of the famous “black box” flight data recorders used in the airline industry – to assist in accident investigation.³⁷⁸ Adapting VDRs to take and record input from search and rescue transponders should not present a significant technical hurdle.³⁷⁹

³⁷⁶ IMO, “SOLAS 1974 – A Brief History”, available online: <<http://www.imo.org/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Documents/SOLAS%201974%20-%20Brief%20History%20-%20List%20of%20amendments%20to%20date%20and%20how%20to%20find%20them.html>>.

³⁷⁷ 1988 Amendments Relating to the International Convention for the Safety of Life at Sea, 1974 (adopted 11 November 1988, entered into force 1 February 1992), Resolutions SOLAS/CONF.1 and SOLAS/CONF.2.

³⁷⁸ SOLAS Convention, Chapter V, Regulation 20.

³⁷⁹ SEVERANCE, Arthur Alan, “The Duty to Render Assistance in the Satellite Age”, 36 *California Western International Law Journal* 377 (2006), 398-399.

5.2. Ship owner

Could a ship owner be liable for damages to a stranger in peril on the high seas to whom the shipmaster has failed to give aid? In the case *Warschauer v. Lloyd Sabaudo* (1934),³⁸⁰ the plaintiff WARSCHAUER – a United States citizen – brought an action against an Italian corporation which owned and operated the steamship *Conte Biancamano*. The complaint alleged that on the afternoon of 31 October 1931, the plaintiff and a companion were adrift on the high seas in a disabled motorboat. They had no gasoline and no food and when the defendant's operating personnel of the *Conte Biancamano* observed the distress signals, they refused to heed them or to stop and take the plaintiff aboard. In the case at hand, they could have done so without peril to themselves or their vessel. Although WARSCHAUER was rescued by the Coastguard two days later, he had suffered permanent physical injuries due to the exposure and deprivations to which he was subjected by the failure of the defendant's steamship to render assistance. Therefore, WARSCHAUER demanded damages for the pain and subsequently incurred medical expenses. This situation involved no personal dereliction by the ship owner. Such dereliction was that of the master. Only by applying the doctrine of *respondet superior* it could be imputed to the ship owner.

The Court referred to Article 11 of the 1910 Salvage Convention that the owner of the vessel incurs no liability by reason of contravention of the master's obligation to render assistance. The applicant in this case held that this provision only referred to the criminal liability of the owner. However, the Court decided that such an interpretation would seem most unlikely. It said that: "*Unless it was intended to cover civil liability, no reason is apparent for mentioning the owner's exemption from liability. It is almost inconceivable that criminal responsibility should be imputed to an owner who had not directed the dereliction of his agent. [...] A penal statute is construed to apply only to the class of persons to whom it specifically refers.*"³⁸¹ Therefore, if the 1910 Salvage Convention only refers to the master's duty, breach of which is to be enforced by the criminal law, there would have been no need to express the owner's

³⁸⁰ *Warschauer v. Lloyd Sabaudo, S.A.*, 71 F.2d 146, 2d Cir., cert. denied, 293 U.S. 610 (1934), as published in: SOHN, Louis B. & NOYES, John E., *Cases and Materials on the Law of the Sea* (Ardsley: Transnational Publishers, 2004), 94-97.

³⁸¹ *Warschauer v. Lloyd Sabaudo, S.A.*, 71 F.2d 146, 2d Cir., cert. denied, 293 U.S. 610 (1934), as published in: SOHN, Louis B. & NOYES, John E., *Cases and Materials on the Law of the Sea* (Ardsley: Transnational Publishers, 2004), 95.

exemption from responsibility. However, if the master's liability can be civil as well as criminal, then the provision referring to the owner serves a purpose as it clearly relieves him from civil liability.

This is confirmed by the 1989 Salvage Convention. Although Article 10(1) of the 1989 Salvage Convention requires that 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, para. 3 continues: “*The owner of a vessel incurs no liability by reason of contravention of the above position.*”

5.3. When the rescuer becomes a smuggler

As States are reluctant to accept rescued migrants onto their territory, the rescuer is sometimes being assimilated with a smuggler. In 2000, the Smuggling Protocol was attached to the United Nations Convention Against Transnational Organized Crime (UNTOC) in 2000.³⁸² While there is no express reference to distress situations at sea, Article 7 Smuggling Protocol mentions that States have to cooperate in accordance with the international law of the sea.³⁸³ Next to this, Article 8 Smuggling Protocol stipulates that – although measures such as boarding are not allowed without the express authorization of the flag State – States can take measures necessary to relieve imminent danger to the lives of persons.³⁸⁴ This could for example be the case when a woman is in labour. Lastly, Article 19(1) Smuggling Protocol states that nothing in the Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law.

In 2009, a Sicilian Court acquitted three Germans from *Cap Anamur* – a humanitarian non-profit organization that has its headquarters in Cologne – of criminal charges that they aided illegal migration by bringing a boatload of African migrants they rescued at sea to shore in Sicily in 2004. The former *Cap Anamur* president, as well as the shipmaster and first

³⁸² United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003), 2225 *UNTS* 209 [UNTOC].

³⁸³ Smuggling Protocol, Art. 7.

³⁸⁴ Smuggling Protocol, Art. 8(5).

officer faced several years in prison.³⁸⁵ However, the Smuggling Protocol entered into force for Italy on 2 August 2006 – 2 years after the *Cap Anamur* incident.³⁸⁶ Moreover, in 2007 there was a similar case when two Tunisian fishing boat captains rescued 44 migrants and brought them to Lampedusa despite being ordered by the Italian authorities not to enter the port. The migrant boat – which had departed from Libya – had been at sea for three days and was carrying asylum seekers from Eritrea, Ethiopia, and Sudan. Most of the migrants were seriously ill. The two masters as well as their crew members were arrested and criminally charged with facilitating illegal immigration. Eventually, they were acquitted by the Court of Agrigento of these charges in November 2009.³⁸⁷

A smuggler is someone who obtains, directly or indirectly, a financial or other material benefit. Although this should be understood broadly – to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members³⁸⁸ – the reference to ‘a financial or other material benefit’ as an element of the definition was especially included in order to emphasize that the intention was to only include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the

³⁸⁵ The Malta Independent, “Cap Anamur crew acquitted of aiding illegal migration” (11 October 2009), available online: <<http://www.independent.com.mt/news.asp?newsitemid=95465>>.

³⁸⁶ UNODC, ‘Status of UNTOC’, available online:

<<http://www.unodc.org/unodc/en/treaties/CTOC/countrylist.html>>. In Italian law there does exist a specific exemption from criminal liability in the event humanitarian aid and assistance is given to persons in need. See DI PASCALE, Alessia, “Migration Control at Sea: The Italian Case”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 301.

³⁸⁷ Migrants at Sea, “Italian Appeals Court Acquits Two Tunisian Fishing Boat Captains Who Rescued Migrants in 2007” (29 September 2011), available online: <<http://migrantsatsea.wordpress.com/2011/09/29/italian-appeals-court-acquits-2-tunisian-fishing-boat-captains-who-rescued-migrants-in-2007/>>. However, it must be noted that the two captains were convicted in 2009 of charges of resisting a public officer and committing violence against a warship in connection with their refusal to turn their boats around and not enter the port. In 2011, the Court of Appeal of Palermo formally acquitted them, bringing the case to an end after 4 years.

³⁸⁸ UNGA, “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Interpretative notes for the official records (*travaux préparatoires*) of the Negotiation of the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime”, *UN Doc.* A/55/383.Add.1 (3 November 2000), para. 3.

Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.³⁸⁹

However, the reasoning of the decision which validated the initial arrest of the captain and officials of *Cap Anamur* does contain a reference to the notion of profit: according to the Court they actually wanted to get the greatest media coverage and publicity in favour of the organization.³⁹⁰ *Cap Anamur* became well known in the 1980s for helping Vietnamese boat people – fleeing for the communist regime – in the South China Sea. The committee '*Ein Schiff für Vietnam*' ('A boat for Vietnam') chartered a cargo ship – '*Cap Anamur*' – which rescued more than 10.000 boat persons.³⁹¹ Rumours therefore suggest that the *Cap Anamur* activists staged a stunt in 2004 to attract news media attention.³⁹²

In the case of 2007 concerning two Tunisian fishing boats, neither net, nor fish were found on the fishing boat by Italian authorities.³⁹³ The UN General Assembly already noted in its Resolution 64/72 on sustainable fisheries of 4 December 2009 that it had concerns about possible connections between international organized crime and illegal fishing in certain regions of the world.³⁹⁴ A 2011 UNODC study on transnational organized crime in the fishing industry found that there are indeed fishing vessels that are involved in smuggling of migrants, illicit traffic in drugs (primarily cocaine), illicit traffic in weapons and acts of terrorism. Fishing vessels are being used as mother ships, as supply vessels for other vessels engaged in criminal activities or simply as cover for clandestine activities at sea and in ports. Although fishers are often recruited by organized criminal groups due to their skills and

³⁸⁹ UNGA, "Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Interpretative notes for the official records (*travaux préparatoires*) of the Negotiation of the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime", *UN Doc. A/55/383.Add.1* (3 November 2000), para. 88.

³⁹⁰ Tribunale di Agrigento, *Cap Anamur Case*, Ordinanza 16 luglio 2004, Decision of the Court of Agrigento (16 July 2004), available online: <<http://www.tribunale.agrigento.it>>.

³⁹¹ *Cap Anamur*, "Über uns", available online: <<http://www.cap-anamur.org/service/%C3%BCber-uns>>.

³⁹² The Malta Independent, "Cap Anamur crew acquitted of aiding illegal migration" (11 October 2009), available online: <<http://www.independent.com.mt/news.asp?newsitemid=95465>>.

³⁹³ DI PASCALE, Alessia, "Migration Control at Sea: The Italian Case", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 304.

³⁹⁴ UNGA, "Sustainable fisheries, including through the 1995 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, and related instruments", *UN Doc. A/RES/64/72* (4 December 2009), para. 61.

knowledge of the sea, they seldom seem to be regarded as the masterminds behind organized criminal activities involving the fishing industry or fishing vessels. Therefore, it is unfortunate that fishermen – rather than more centrally placed persons in the criminal networks – are likely to be targeted when criminal activities involving fishing vessels or the fishing industry are investigated and prosecuted, particularly in light of the possibility that some of these fishers may be victims of human trafficking.³⁹⁵ There are no available comprehensive data on the extent to which fishers are involved in smuggling of migrants at sea across the Mediterranean. The IMO biannual reports made by Italy, Greece and Turkey suggest that relatively few fishing vessels are used for smuggling of migrants at sea into Italy and Greece compared to the use of amongst others inflatable boats and smaller engine powered plastic, wooden or fiberglass boats.³⁹⁶ Therefore, there seems to be very little basis upon which to claim that fishers are involved in an organized manner in migrant smuggling into Europe.³⁹⁷

5.4. Conclusion

The obligation to give effect to the duty to render assistance lies on the flag States, rather than on masters.³⁹⁸ Although Article 10(1) 1989 Salvage Convention says that 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, para. 2 says: “*The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.*” Also Article 98(1) LOSC says “*Every State shall require the master of a ship flying its flag [...] to render assistance*”. Article 2 of the 1989 Salvage Convention provides that States must bring judicial and arbitral proceedings regarding a breach of the duty to render assistance. Despite the fact that the duty to render assistance has been widely accepted, sometimes it still remains unenforced

³⁹⁵ UNODC, “Transnational Organized Crime in the Fishing Industry – Focus on: Trafficking in Persons, Smuggling of Migrants and Illicit Drugs Trafficking”, Issue Paper (2011), 4, available online: <http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf>.

³⁹⁶ MSC, “Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea”, Biannual Reports, available online: <www.imo.org>.

³⁹⁷ UNODC, “Transnational Organized Crime in the Fishing Industry – Focus on: Trafficking in Persons, Smuggling of Migrants and Illicit Drugs Trafficking”, Issue Paper (2011), 60, available online: <http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf>.

³⁹⁸ SEVERANCE, Arthur Alan, “The Duty to Render Assistance in the Satellite Age”, 36 *California Western International Law Journal* 377 (2006), 382.

against masters.³⁹⁹

The case with the *Cap Anamur* painfully demonstrates the criminalization of shipmasters who rescued migrants. Although every flag State must require the master of a ship flying its flag to proceed with all possible speed to the rescue of persons in distress when informed of their need of assistance,⁴⁰⁰ the fear of criminalization by those who go to the rescue of boats carrying migrants is one of the reasons why commercial vessels fail to go to the rescue of boats in distress. This was confirmed by a 2012 PACE report.⁴⁰¹

³⁹⁹ LONG, Patrick J., “The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea”, 48 *Buffalo Law Review* 591 (2000), 627.

⁴⁰⁰ LOSC, Art. 98(1).

⁴⁰¹ PACE launched an inquiry in 2011 to investigate why over 1.000 migrants had died or perished in the Mediterranean Sea while trying to reach European soil from North Africa. See PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), para. 13.4, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

Summary

Although it is a legal obligation for shipmasters and States under customary international law, as well as under the LOSC to render assistance to persons in danger of being lost and to proceed with all possible speed to the rescue of persons in distress, there is no comparable duty to disembark these persons. As a result, rescued asylum seekers can spend weeks on a ship before going ashore. Shipmasters are therefore reluctant to rescue migrants at sea. At the fourth meeting of the Interagency Group in June 2008, involving IMO, UNDOALOS, UNHCR, OHCHR, the International Labour Organization (ILO) and IOM, the participants stated: “If States fail to meet their obligations, then masters of ships cannot fulfil their duties either”.⁴⁰² Therefore it is deemed crucial to solve the disembarkation problem.

Recent international and European soft law initiatives do focus on a real disembarkation duty. However, they also put too much burden on the coastal States. The 2009 IMO Guidelines on Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea mention that if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SRR should accept the disembarkation.⁴⁰³ Similarly, Council Decision 2010/252⁴⁰⁴ states in its Guidelines that regarding disembarkation, priority should be given to the third country from where the ship carrying the persons departed or through the territorial waters or SRR of which that ship transited. If this is not possible, priority should be given to disembarkation in the Member State hosting the surveillance operation at sea.⁴⁰⁵ Without any prior agreements on burden-sharing between States, the life of many migrants is being jeopardized. It is estimated that for every 100 people safely landing after a dangerous journey in the Mediterranean, 5 people

⁴⁰² UNGA, “Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its ninth meeting”, *UN Doc. A/63/174* (25 July 2008), para. 100, available online: <http://www.un.org/Depts/los/consultative_process/consultative_process.htm>.

⁴⁰³ IOM, “Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea”, *IMO Doc. IOM/35/Circ.194* (22 January 2009), para. 2.3.

⁴⁰⁴ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJ L 111/20* of 4 May 2010.

⁴⁰⁵ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJ L 111/20* of 4 May 2010, Annex Part II para. 2.1.

drown without leaving any trace.⁴⁰⁶ However, some States fear that clarifying obligations and solving the problem through burden-sharing would produce an enormous pull factor, thus encouraging migrants to come to Europe by sea.⁴⁰⁷

The Arab Spring highlighted once more the problem of migrants at sea. Due to the increased loss of life in the Mediterranean in 2011, the negotiations on the Draft Regional Agreement on concerted procedures relating to the disembarkation of persons rescued at sea in the Mediterranean Basin were speeded up. Malta has an important role in this agreement due to its enormous SRR. One of the problems that should be tackled is the coordination between the several SRR in the Mediterranean. Also, a system of burden-sharing has to be part of the agreement. When the Regional Agreement could meet part of the concerns Malta has, it could even go further than purely maritime matters and thus include provisions on human rights and humanitarian law.

⁴⁰⁶ LEG, “Report of the Legal Committee on the work of its ninety-eight session”, *IMO Doc. LEG 98/14* (18 April 2011), Annex 9.

⁴⁰⁷ European Union Committee of the House of Lords, “FRONTEX: the EU external borders agency”, 9th Report of Session 2007-08 (5 March 2008), para. 115, available online: <<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/60/60.pdf>>. See also: MORENO-LAX, Violeta, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, 23 *International Journal of Refugee Law* 174 (2011), 176.

CHAPTER II.
MARITIME SECURITY: INTERCEPTION AT SEA

Introduction

Huge disparities in wealth across the world, the denial of fundamental rights in some countries and natural disasters have resulted in broad population movements, also by sea. For example, in 2010, almost 10,000 irregular arrivals by sea were reported in Greece, Spain, Italy and Malta. Due to the uprisings in Tunisia and Libya, this number even amounted to nearly 70,000 in 2011. In Yemen, there were 53,382 arrivals from Somalia in 2010 and even 103,000 in 2011.⁴⁰⁸ Nowadays, most maritime movements are so-called 'mixed' movements, involving individuals or groups travelling in an irregular manner along similar routes and using similar means of travel, but for different reasons. This means that the people on board have various profiles and needs, as opposed to being primarily refugee outflows.⁴⁰⁹ The 1951 Convention relating to the Status of Refugees defines a refugee as someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.⁴¹⁰ However, among seaborne migrants, there are also people who are economic migrants looking for a better life in a developed country. Therefore, States are quite reluctant in permitting these persons onto their territory. In order to cope with this problem, States are taking interception measures to prevent people from arriving at their territory by sea.

This chapter will first deal with the content of the concept 'interception'. Secondly, we will take a look at the legality of interception measures in the territorial sea and the contiguous zone. Nevertheless, due to the freedom of navigation, the most interesting maritime area to discuss the legality of interception is the high seas. This will be discussed in the third part. As a sea journey is often difficult and dangerous, migrants request the help of smugglers to reach their destination. Therefore, maritime interception in case of migrant smuggling will be dealt with in the fourth part. The goal of interception activities is to divert

⁴⁰⁸ UNHCR, "Key Facts & Figures", available online: <www.unhcr.org/pages/4a1d406060.html>.

⁴⁰⁹ UNHCR, "All in the Same Boat: The Challenges of Mixed Migration", available online: <<http://www.unhcr.org/pages/4a1d406060.html>>.

⁴¹⁰ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 *UNTS* 137 [Refugee Convention], Art. 1. The 1967 Protocol relating to the Status of Refugees removed geographical and temporal restrictions from the Refugee Convention. Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 *UNTS* 267.

or to return asylum-seekers. The return of seaborne migrants – thereby focusing on the *non-refoulement* principle – is being dealt with in the fifth part. After this, we will highlight regional initiatives in the Mediterranean Sea as well as in the Asia-Pacific. Finally, State responsibility and compensation will be elaborated on.

1. The concept of interception

1.1. The difference between interception and interdiction

There is no internationally accepted definition of interception or interdiction at sea. According to the Executive Committee of the UNHCR (ExCom):

“[I]nterception or interdiction occurs when mandated authorities representing a State:

- (i) prevent embarkation of persons on an international journey*
- (ii) prevent further onward international travel by persons, who have commenced their journey*
- (iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law.”⁴¹¹*

The above can occur in the form of either physical interception or administrative measures.⁴¹² The UNHCR assimilates ‘interception’ and ‘interdiction’. However, in this paper a clear distinction will be made between both concepts. GUILFOYLE describes the concept of maritime interdiction as a two-step process.⁴¹³ First, the stopping, boarding, inspection and search of a ship at sea suspected of prohibited conduct (boarding). Secondly, where such suspicions prove justified, taking measures including any combination of arresting the vessel, arresting persons aboard or seizing cargo (seizure). Seizure is always conditioned upon and preceded by boarding. The right of approach is not included within the concept of interdiction as it is not unlawful for a governmental vessel on the high seas to draw near a foreign vessel to observe its flag or other marks of nationality. Such actions are not being

⁴¹¹ ExCom, “Protection Safeguards in Interception Measures Problems Related to the Rescue of Asylum-Seekers in Distress at Sea”, Conclusion No. 97 (LIV) (2003), available online: <<http://www.unhcr.org/refworld/docid/3f93b2894.html>>.

⁴¹² UNHCR, “Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach”, *UN Doc. EC/50/SC/CRP. 17* (9 June 2000), paras. 12-13, available online: <<http://www.unhcr.org/refworld/docid/49997afal1a.html>>.

⁴¹³ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 4-5.

regarded as hostile.⁴¹⁴ Yet, the right of approach can be an interception measure as the concept of interception is much broader as set out in the UNHCR definition. In any case, it is clear that when vessels respond to persons in distress at sea,⁴¹⁵ they are not engaged in interception or interdiction.⁴¹⁶

A first positive effect from interception measures is that they can disrupt major smuggling and trafficking routes.⁴¹⁷ However, due to the increasing surveillance operations, smugglers are often sending migrants to navigate the sea on their own, rather than risk being caught with the passengers. Also, because of the likelihood that the vessels will not return, smugglers are utilizing less expensive materials to build the boats. With no need to transport fuel for a return trip, migrants are making use of this extra space by loading their boats with more people, resulting in more drownings.⁴¹⁸ Moreover, a recent UNODC study illustrates that increased surveillances can even stimulate migrant smuggling.⁴¹⁹ Due to tighter controls on immigration, prices seem to be rising and the activity of smuggling becomes more lucrative. A second positive consequence could be that operations at sea can help detect persons in distress at sea and thus can facilitate saving lives.⁴²⁰ However, this is not the primary goal of interception measures. A third positive consequence is that increasing controls can prevent people from choosing to leave their country. However, experience

⁴¹⁴ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 4-5.

⁴¹⁵ For an overview of the current problems concerning persons in distress at sea, especially disembarkation, see: COPPENS, Jasmine & SOMERS, Eduard, "Towards New Rules on Disembarkation of Persons Rescued at Sea?", 25 *International Journal of Marine and Coastal Law* 377 (2010), 377-403.

⁴¹⁶ ExCom, "Protection Safeguards in Interception Measures Problems Related to the Rescue of Asylum-Seekers in Distress at Sea", Conclusion No. 97 (LIV) (2003), available online: <<http://www.unhcr.org/refworld/docid/3f93b2894.html>>.

⁴¹⁷ UNHCR, "Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach", *UN Doc. EC/50/SC/CRP. 17* (9 June 2000), para. 14, available online: <<http://www.unhcr.org/refworld/docid/49997af1a.html>>; PAPASTAVRIDIS, Efthymios, "Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law", 36 *Syracuse Journal of International Law and Commerce* 145 (2009), 150.

⁴¹⁸ CARLING, Jorgen, "Migration Control and Migrant Fatalities at the Spanish-African Borders", 41 *International Migration Review* 316 (2007), 327. See also: NESSEL, Lori A., "Externalized Borders and the Invisible Refugee", 40 *Columbia Human Rights Law Review* 625 (2009), 625-699.

⁴¹⁹ UNODC, "The role of organized crime in the smuggling of migrants from West Africa to the European Union" (2011), 43, available online: <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Report_SOM_West_Africa_EU.pdf>.

⁴²⁰ UNHCR, "Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach", *UN Doc. EC/50/SC/CRP. 17* (9 June 2000), para. 16, available online: <<http://www.unhcr.org/refworld/docid/49997af1a.html>>.

shows that as soon as one illegal immigration route has been closed down, pressure shifts to other routes.⁴²¹

1.2. *Interception and the right to leave*

Preventing embarkation from inside the intercepting State via the imposition of exit visas or border closures to prevent departure would for example qualify under the ExCom definition of interception. But could the legality of in-country activities of interception – for example within the territorial sea – violate the right to leave any country? The right to leave one’s own country is an aspect of the general concern with freedom of movement.⁴²² It is an established human right recognized in a range of international instruments. Article 13 of the Universal Declaration of Human Rights (UDHR)⁴²³ as well as Article 12(2) International Covenant on Civil and Political Rights (ICCPR)⁴²⁴ stipulate that everyone has the right to leave any country, including his own. The scope of the right is not restricted to persons lawfully within the territory of a State. An alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State.⁴²⁵ Both travelling abroad and departure for permanent emigration are covered.⁴²⁶ Also the 1969 American Convention on Human Rights⁴²⁷ and Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) mention this right in Article 22(2) and Article 2(2), respectively.

⁴²¹ Communication from the Commission to the Council on Reinforcing the Management of the European Union’s Southern Maritime Borders, COM (2006) 733 final, para. 21.

⁴²² See in general: HARVEY, Colin & BARNIDGE, Robert P., “Human Rights, Free Movement, and the Right to Leave in International Law”, 19 *International Journal of Refugee Law* 1 (2007), 1-21.

⁴²³ UNGA, “Universal Declaration of Human Rights”, *UN Doc. A/RES/217A* (III) (6 November 1948) [UDHR], available online: <<http://www.un-documents.net/a3r217a.htm>>.

⁴²⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 99 *UNTS* 171 [ICCPR].

⁴²⁵ Human Rights Committee, “General Comment No. 15: The Position of Aliens under the Covenant”, *UN Doc. HRI/GEN/1/Rev.3* (15 August 1997), available online:

<<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument>>.

⁴²⁶ Human Rights Committee, “General Comment No. 27: Freedom of Movement”, *UN Doc. CCPR/C/21/Rev.1/Add.9* (2 November 1999), para. 8, available online:

<<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/6c76e1b8ee1710e380256824005a10a9?Opendocument#5%2F%20See%20general>>.

⁴²⁷ American Convention on Human Rights (22 November 1969, entered into force 18 July 1978), 9 *ILM* 99.

Nevertheless, the right to leave is not an absolute right and – under certain conditions – there can be restrictions by law, for example when it is necessary to protect national security or public safety.⁴²⁸ In its General Comment No. 27 on Article 12 ICCPR, the UN Human Rights Committee has stressed that restrictive measures must conform to the principle of proportionality. Therefore, they must be appropriate to achieve their protective function, they must be the least intrusive instrument amongst those which might achieve the desired result and they must be proportionate to the interest to be protected. The principle of proportionality has to be respected in the law that frames the restrictions, as well as by the administrative and judicial authorities in applying the law.⁴²⁹ Moreover, restrictions need to be consistent with the fundamental principles of equality and non-discrimination. Thus, distinctions such as those on the basis of race, language, religion, political or other opinion, national origin, birth or other legal status are impermissible. For example, the UN Human Rights Committee has found on several occasions that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person, constitute a violation of Article 12 ICCPR.⁴³⁰

Faced with the wave of Albanian citizens immigrating illegally into Italy, the Italian and Albanian authorities took a number of measures to discourage Albanians from leaving. In 1997, both countries signed an agreement authorising the Italian navy to set up a naval blockade in international waters and Albanian territorial waters. The case was brought before the European Court of Human Rights (ECtHR) by Albanian migrants in *Xhavara and Others v. Italy and Albania*, who were trying to enter Italy illegally when their boat *Kater I Rades* sank following a collision with an Italian warship. Although the applicants were rescued, 58 people – among whom were members of their family – perished in the shipwreck. The applicants claimed that the bilateral agreement between Albania and Italy – allowing for Italy’s interception of Albanian sea vessels in international waters as well as in

⁴²⁸ ICCPR, Art. 12(3); American Convention on Human Rights, Art. 22(3); ECHR, Protocol No. 4, Art. 2(3).

⁴²⁹ Human Rights Committee, “General Comment No. 27: Freedom of Movement”, *UN Doc. CCPR/C/21/Rev.1/Add.9* (2 November 1999), paras. 14-15, available online: <<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/6c76e1b8ee1710e380256824005a10a9?Opendocument#5%2F%20See%20general>>.

⁴³⁰ Human Rights Committee, “General Comment No. 27: Freedom of Movement”, *UN Doc. CCPR/C/21/Rev.1/Add.9* (2 November 1999), para. 18, available online: <<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/6c76e1b8ee1710e380256824005a10a9?Opendocument#5%2F%20See%20general>>.

Albanian territorial waters – violated Article 2(2) Protocol 4 ECHR, namely the right to leave one’s country. However, as the interception activities were not aimed at preventing the Albanians from leaving their country, but rather at preventing them from entering Italian territory – the ECtHR held that this right was not violated.⁴³¹ However, this decision is being criticized in doctrine. It has been argued that when the most accessible safety route is sealed off, the result is to lock migrants into their home countries or to cause them to risk more perilous journeys. Therefore, Italy's actions would have significantly undermined both the right to leave one’s country and the right to seek asylum.⁴³² Nevertheless, in this case, the most accessible safety route was not sealed off as persons could still choose to migrate by land or by air, both safer routes than by sea. Therefore, the result of the interception measures was not to lock migrants into their home country, nor to cause them to risk more perilous journeys.

1.3. Interception and the right to seek and to enjoy asylum

The right to leave must be read in conjunction with the right to seek and to enjoy asylum in Article 14(1) UDHR. Thus, States have an obligation to respect an individual’s right to leave his or her country in search of protection.⁴³³ Nevertheless, there is no obligation for States to grant asylum and individuals do not have the right to be granted asylum.⁴³⁴ During the drafting of the UDHR, the proposal to substitute ‘to be granted’ for ‘to enjoy’ was vigorously opposed.⁴³⁵ Moreover, LAUTERPACHT noted that there was no intention among States to assume even a moral obligation in the matter, as granting asylum was regarded as the sovereign right – and not the duty – of every State.⁴³⁶ Draft texts of the 1951 Convention

⁴³¹ ECtHR, *Xhavara and Others v. Italy and Albania*, 11 January 2001, Appl. No. 39473/98 (2001).

⁴³² NESSEL, Lori A., “Externalized Borders and the Invisible Refugee”, 40 *Columbia Human Rights Law Review*, 625 (2009), 675.

⁴³³ GOODWIN-GILL, Guy S. & MCADAM, Jane, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed. 2007), 373; GOODWIN-GILL, Guy S., “The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement”, 23 *International Journal of Refugee Law* 443 (2011), 444.

⁴³⁴ GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed. 1996), 202.

⁴³⁵ UNGA, “Draft International Declaration of Human Rights: Recapitulation of Amendments to Article 12”, *UN Doc. A/C.3/285* (16 October 1948), available online: <http://www.un.org/depts/dhl/udhr/docs_1948_3rd_3c_ga.shtml>.

⁴³⁶ LAUTERPACHT, Hersch, *International Law and Human Rights* (New York: Frederick A. Praeger Inc., 1950), 421.

relating to the Status of Refugees⁴³⁷ (Refugee Convention) contained an article on the admission of refugees which said: “(1) In pursuance of Article 14 of the Universal Declaration of Human Rights the High Contracting Parties shall give favourable consideration to the position of refugees seeking asylum from persecution or the threat of persecution on account of their race, religion, nationality or political opinions. (2) The High Contracting Parties shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum to persons to whom paragraph 1 refers. They shall do so, inter alia, by agreeing to receive a certain number of refugees in their territory.”⁴³⁸ However, the *Ad Hoc* Committee decided that the Convention should not deal with asylum and that it should merely provide for a certain number of improvements in the position of refugees.⁴³⁹ At the Conference of the Plenipotentiaries, the British delegation stressed again that the right of asylum is only the right of a State to grant or to refuse asylum and not a right belonging to the individual entitling him to insist on it being extended to him.⁴⁴⁰ This view was reflected in the 1967 United Nations General Assembly (UNGA) Declaration on Territorial Asylum, that provides that asylum granted by a State – in the exercise of its sovereignty – to persons entitled to invoke Article 14 UDHR, has to be respected by all other States. The State of asylum has the authority to evaluate the grounds for the grant of asylum.⁴⁴¹

In 1977, the world community again passed over an opportunity to grant to individuals the right to asylum *vis-à-vis* the State of refuge. The 1977 United Nations Conference on Territorial Asylum – convened with the goal of adopting a Convention on Territorial Asylum – adjourned without finishing its work, due to the considerable disagreement among

⁴³⁷ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 *UNTS* 137 [Refugee Convention].

⁴³⁸ *Ad Hoc* Committee on Statelessness and Related Problems, “Memorandum by the Secretary-General”, *UN Doc.* E/AC.32/2 (3 January 1950), 22, available online: <<http://www.unhcr.org/refworld/publisher,AHCRSP,,,3ae68c280,0.html>>.

⁴³⁹ *Ad Hoc* Committee on Statelessness and Related Problems, “First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, on Wednesday, 1 February 1950, at 2.30. p.m.”, *UN Doc.* E/AC.32/SR.20 (10 February 1950), para. 54, available online: <<http://www.unhcr.org/refworld/publisher,AHCRSP,,,3ae68c1c0,0.html>>.

⁴⁴⁰ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, “Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting”, *UN Doc.* A/CONF.2/SR.13 (22 November 1951), para. 14, available online: <<http://www.unhcr.org/refworld/publisher,CPSRSP,,,3ae68cdc8,0.html>>.

⁴⁴¹ UNGA, “Declaration on Territorial Asylum”, *UN Doc.* A/RES/2312(XXII) (14 December 1967), Artt. 1(1) and 1(3), available online: <<http://www.unhcr.org/refworld/docid/3b00f05a2c.html>>.

States.⁴⁴² Also regional instruments do not provide for an individual's right to be granted asylum. The ECHR makes no reference to asylum and although African and American regional instruments address asylum, they do so with great respect for State sovereignty. Article 12(3) of the African Charter on Human and Peoples' Rights states that every individual has the right to seek and obtain asylum, but in accordance with laws of those countries and international conventions.⁴⁴³ Similarly, the American Convention on Human Rights provides in Article 22(7) that every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the State and international conventions.⁴⁴⁴

1.4 Conclusion

There is no internationally accepted definition of interception or interdiction at sea. The UNHCR even assimilates both concepts.⁴⁴⁵ We will use the concept of interception in a broad sense, namely to prevent embarkation, to prevent further onward travel or to assert control over vessels. The concept of interdiction will be used in a narrow sense, being boarding and seizure of ships at sea. Interdiction – and the legality of interdiction measures – will be particularly relevant on the high seas. Interception measures have to respect the fact that everyone has the right to leave any country, including his own. In the case *Xhavara and Others v. Italy and Albania*, the ECtHR held that this right was not violated as the interception activities were not aimed at preventing the Albanians from leaving their country, but rather at preventing them from entering Italian territory.⁴⁴⁶ The right to leave must be read in conjunction with the right to seek and to enjoy asylum in Article 14(1) UDHR. Although there is a right to seek asylum, there is no right of individuals *vis-à-vis* the State of refuge to be granted asylum.

⁴⁴² See: GRAHL-MADSEN, Atle, *Territorial Asylum* (Stockholm: Almqvist and Wiksell International, 1980), 231 p.; WEIS, Paul, "The Draft United Nations Convention on Territorial Asylum", 50 *British Yearbook of International Law* 151 (1979), 151-171.

⁴⁴³ African Charter on Human and Peoples' Rights (adopted 27 June 1987, entered into force 21 October 1986), 21 *ILM* 58.

⁴⁴⁴ American Convention on Human Rights (22 November 1969, entered into force 18 July 1978), 9 *ILM* 99.

⁴⁴⁵ ExCom, "Protection Safeguards in Interception Measures Problems Related to the Rescue of Asylum-Seekers in Distress at Sea", Conclusion No. 97 (LIV) (2003), available online: <<http://www.unhcr.org/refworld/docid/3f93b2894.html>>.

⁴⁴⁶ ECtHR, *Xhavara and Others v. Italy and Albania*, 11 January 2001, Appl. No. 39473/98 (2001).

2. Maritime interception in the territorial sea and in the contiguous zone

2.1. Interception in the territorial sea

The sovereignty of a coastal State extends to its territorial sea, a maritime area of up to 12 nautical miles measured from the State's baselines.⁴⁴⁷ All the laws of the coastal State may be made applicable. However, in this territorial sea ships of all States enjoy the right of innocent passage.⁴⁴⁸ Passage has to be continuous and expeditious and can be regarded as innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Nevertheless, States are entitled to regulate innocent passage through the territorial sea. Non-compliance with these regulations may make passage non-innocent. Article 19(2) LOSC contains a list of activities that are considered to threaten the peace, good order or security, for example the loading or unloading of any person contrary to immigration laws and regulations of the coastal State.⁴⁴⁹

Whether or not a vessel will be in breach of the conditions of innocent passage is partly a question of fact. However, also the exact scope of Article 19 LOSC is important and more particular the question whether the list in Article 19(2) LOSC is exhaustive or not. If the list is not exhaustive, one could argue that the coastal State may enjoy a discretion to characterize a broader range of migration matters as prejudicial to their peace, good order or security and also to take action against suspected vessels. Although a minority of authors takes the view that the list is exhaustive⁴⁵⁰ – thereby limiting the authority of coastal States – this position is far from being settled as a matter of law.⁴⁵¹ It is certainly arguable that coastal States may take other steps necessary to protect their security.⁴⁵² Article 19(2)(l) LOSC provides for “*any other activity not having a direct bearing on passage*”. Although this phrase was criticized during

⁴⁴⁷ LOSC, Artt. 2-3.

⁴⁴⁸ LOSC, Art. 17.

⁴⁴⁹ LOSC, Art. 19(2)(g).

⁴⁵⁰ PALLIS, Mark, “Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes”, 14 *International Journal of Refugee Law* 329 (2002), 356; GOODWIN-GILL, Guy S. & MCADAM, Jane, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed. 2008), 273.

⁴⁵¹ CHURCHILL, Robin R. & LOWE, Vaughan A., *The Law of the Sea* (Manchester: Manchester University Press, 3rd ed. 1999), 85-86.

⁴⁵² BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 122-123.

UNCLOS III – as conferring on Article 19 LOSC as a whole an ‘open-ended’ character – the attempts which were made to change this were not successful. For example, the International Chamber of Shipping expressed its concerns and suggested that – if Article 19(2)(l) LOSC could not be deleted – it should be amended to read: “*Any similar activity not having direct bearing on passage.*”⁴⁵³ The opposite view is largely based upon the ‘Joint Statement on the Uniform Interpretation of Norms of International Law Governing Innocent Passage’ concluded between the USSR and the United States.⁴⁵⁴ This document states that Article 19(2) LOSC is exhaustive. However, as the United States is not a Party to the LOSC, the statement cannot be regarded with too much weight in terms of subsequent practice for the purpose of Article 31(3) VCLT.⁴⁵⁵ Next to this, State practice supports the interception of vessels in the territorial sea for matters not explicitly listed in Article 19(2) LOSC. For example, the ‘Interdiction Principles for the Proliferation of Security Initiative’ (PSI) allow for the interception of vessels in the territorial sea reasonably suspected of carrying weapons of mass destruction.⁴⁵⁶ We can therefore conclude that a coastal State has some discretion in determining what activities could render passage of a foreign ship as not innocent. The word ‘activities’ emphasizes the behaviour of the ship as the determining factor.⁴⁵⁷

Article 25(1) LOSC stipulates that a State may take the necessary steps in its territorial sea to prevent passage that is not-innocent.⁴⁵⁸ While Article 25 LOSC does not explicitly permit removal of ships from the territorial sea, this must be considered as implicit in the Convention as vessels exercising non-innocent passage become subject to the full jurisdiction of the coastal State.⁴⁵⁹ Moreover, when passage becomes non-innocent, there is no longer a right for the vessel to be present in the territorial sea. This right of removal is also being

⁴⁵³ NORDQUIST, Myron H. (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff, 1985-2003), Vol. II, paras. 19.7-19.8.

⁴⁵⁴ USA- USSR Joint Statement on the Uniform Interpretation of Norms of International Law Governing Innocent Passage (adopted 23 September 1989), 28 *ILM* 1444.

⁴⁵⁵ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 123.

⁴⁵⁶ Interdiction Principles for the Proliferation of Security Initiative (adopted 4 September 2003), para. 4(d), available online: <<http://www.state.gov/t/isn/c27726.htm>>.

⁴⁵⁷ NORDQUIST, Myron H. (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff, 1985-2003), Vol. II, para. 19.10(l).

⁴⁵⁸ LOSC, Art. 25(1); Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964), 516 *UNTS* 205, Art. 16(1).

⁴⁵⁹ CHURCHILL, Robin R. & LOWE, Vaughan A., *The Law of the Sea* (Manchester: Manchester University Press, 3rd ed. 1999), 87 and 95-100.

regarded as being part of customary international law.⁴⁶⁰ However, the powers exercised in the territorial sea should be exercised proportionally with the need to prevent or punish such infringements.⁴⁶¹ For example, the Schengen Borders Code states “Border control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued”.⁴⁶² In all cases, the exercise of enforcement jurisdiction has to be consistent with requirements of general international law concerning the use of force and police powers. The International Tribunal for the Law of the Sea (ITLOS) stated in the *M/V Saiga Case* (No. 2), referring to the *I’m Alone Case*⁴⁶³ and the *Red Crusader Case*,⁴⁶⁴ that general international law requires that the use of force must be avoided as far as possible, both while boarding a vessel and situations arising once aboard.⁴⁶⁵ Although the use of force is a measure of last resort, where it is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. However, what amounts to a reasonable use of force can be quite subjective. For example, in the case of the *M/V Tampa* – a Norwegian vessel that rescued over 400 migrants at sea – in 2001, Australia sent out a naval vessel when the *M/V Tampa* reached its territorial waters. Although captain RINNAN entered Australian territorial waters seeking medical and humanitarian assistance, armed personnel from the Special Air Service unit took control of the vessel and demanded that the *M/V Tampa* left Australian territorial waters.⁴⁶⁶ Although in this case the use of force can be considered a measure of last resort, the measures were definitely not reasonable.

When the ship is proceeding to internal waters, which will indeed be the intent of migrant boats, the coastal State also has the right to take the necessary steps to prevent any

⁴⁶⁰ See for example: Hoge Raad, *Attican Unity Case, Staat der Nederlanden v. BV Bergings- en Transportbedrijf van den Akker, Union de Remorquage et de Sauvetage and Dissotis Shipping Corporation*, 7 February 1986, 61 *Schip & Schade* (1986).

⁴⁶¹ GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed.1996), 162.

⁴⁶² Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJL* 105/1 of 13 April 2006, Preamble para. 7.

⁴⁶³ Arbitral Award, *I’m Alone Case, United States v. Canada*, 30 June 1933 and 5 January 1935, 3 *UNRIAA* 1609 (1935).

⁴⁶⁴ Commission of Inquiry, *Red Crusader Case, United Kingdom v. Denmark*, 23 March 1962, 35 *International Law Reports* 485 (1962), 499.

⁴⁶⁵ ITLOS, *The M/V Saiga Case* (No. 2), *St. Vincent and the Grenadines v. Guinea*, 1 July 1999, *ITLOS Reports* (1999).

⁴⁶⁶ TAUMAN, Jessica E., “Rescued at Sea, But Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis”, 11 *Pacific Rim Law & Policy Journal* 461 (2002), 465.

breach of the conditions to which admission of those ships to internal waters is subject.⁴⁶⁷ Coastal States may prescribe conditions for admission to ports, such as ensuring respect for immigration rules. Next to this, the coastal State may – without discrimination in form or in fact among foreign ships – suspend temporarily the innocent passage. The reference to non-discrimination ‘in form or in fact’ requires equality of treatment.⁴⁶⁸ The suspension has to be essential for the protection of its security and has to be duly published.⁴⁶⁹ The publication requirement in combination with the non-discrimination provision prevents an *ad hoc* suspension of innocent passage in respect of any particular ship.⁴⁷⁰ A consistent and generally applied policy of suspending passage to vessels suspected in certain activities – such as illegal immigration – might satisfy the criteria. However, such a policy would be difficult to apply in practice. In addition, it would undermine the essential navigational guarantees assured by the right of innocent passage in the territorial sea.⁴⁷¹

As coastal States exercise sovereignty over their territorial sea, it is generally accepted that other States are not permitted to exercise enforcement jurisdiction. This can be problematic when for example a foreign vessel – engaged in unlawful activities beyond the territorial sea – may flee to this zone and the coastal State lacks resources or does not consider it to be a priority to police certain activities within its territorial sea. Therefore, in order to respond to certain threats, States have concluded agreements where coastal States grant permission for other States to exercise enforcement jurisdiction within their territorial sea, subject to certain conditions.⁴⁷² A recent example is the CARICOM (Caribbean

⁴⁶⁷ LOSC, Art. 25(2).

⁴⁶⁸ NORDQUIST, Myron H. (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff, 1985-2003), Vol. II, para. 24.7(b).

⁴⁶⁹ LOSC, Art. 25(3). The ‘due’ publicity required has to be differentiated from the ‘appropriate’ publicity required under other Articles in the LOSC. With regard to ‘appropriate’ publicity, the IMO Secretariat pointed out that “*the required publicity objective will be effectively achieved only if the information in question reaches the States, authorities, entities and persons that are intended to be guided by the information. IMO maintains the most direct and continuing contact with the authorities of States concerned with safety of navigation and the prevention of vessel-source pollution. Accordingly the purpose of the publicity is likely to be served by some IMO involvement.*” What will be ‘appropriate’ will depend on all the circumstances. See: LEG, “Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization”, *IMO Doc. LEG/MISC.6* (10 September 2008), 84.

⁴⁷⁰ NORDQUIST, Myron H. (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff, 1985-2003), Vol. II, para. 25.8(f).

⁴⁷¹ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 125.

⁴⁷² KLEIN, Natalie, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011), 78-79.

Community) Maritime and Airspace Security Co-operation Agreement, which allows for State Parties to patrol and conduct law enforcement operations in the territorial seas of other States Parties. This agreement covers a variety of maritime security threats. Therefore, it does not only involve illegal migration and migrant smuggling, but also piracy, terrorism, arms trafficking and drug trafficking.⁴⁷³ A major objective of this agreement is to promote co-operation among the parties to enable them to conduct such law enforcement operations as may be necessary to address more effectively the security in the region.⁴⁷⁴ The 2008 CARICOM Agreement is being supplemented by the CARICOM Arrest Warrant Treaty.⁴⁷⁵ It deals with arrest warrants issued by the issuing judicial authority of one State Party with the view to the arrest and the surrender of a requested person by the executing judicial authority of another State Party for the purposes of conducting a criminal prosecution or executing a custodial sentence.⁴⁷⁶

Another possibility is that a coastal State law enforcement official is being brought onto the host State's ship. This kind of arrangement is commonly referred to as a 'shiprider' agreement. A shiprider may – subject to specific treaty arrangements – authorize interventions aboard the host State's vessels. For example, Spain signed a MoU with Senegal and Mauritania to bring on board Senegalese and Mauritanian immigration officers for interceptions carried out in their respective territorial waters.⁴⁷⁷ In 1997, Italy and Albania signed an agreement to intercept migrants in Albanian territorial waters. Albanian officials were brought onto Italian naval vessels.⁴⁷⁸ A last example is the agreement between the

⁴⁷³ CARICOM Maritime and Airspace Security Co-operation Agreement (adopted 4 July 2008, not yet entered into force), available online:

<http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_maritime_airspace_security_cooperation.pdf> [2008 CARICOM Agreement]. The State Parties are: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.

⁴⁷⁴ 2008 CARICOM Agreement, Preamble.

⁴⁷⁵ CARICOM Arrest Warrant Treaty (adopted 4 July 2008, not yet entered into force), available online:

<http://www.caricom.org/jsp/secretariat/legal_instruments/caricom_arrest_warrant_treaty.pdf>.

⁴⁷⁶ CARICOM Arrest Warrant Treaty, Art. 1.

⁴⁷⁷ Frontex, "Longest Frontex Coordinated Operation – Hera, The Canary Islands", available online:

<<http://www.frontex.europa.eu/news/longest-frontex-coordinated-operation-hera-the-canary-islands-ZubSEM>>. Frontex denies public access to the text of the co-operation agreements signed between Spain and Senegal/Mauritania.

⁴⁷⁸ Agreement between Italy and Albania to Prevent Certain Illegal Acts and Render Humanitarian Assistance to Those Leaving Albania (2 April 1997), *Gazetta Ufficiale della Repubblica Italiana* No. 163 (15 July 1997).

United States and the Dominican Republic to bring officials of one country on board vessels of the other country while carrying out patrols in their respective territorial waters.⁴⁷⁹

2.2. *Interception in the contiguous zone*

The contiguous zone is a functional maritime area – adjacent to the territorial sea – up to 24 nautical miles from the baseline.⁴⁸⁰ The coastal State has limited competences in this area. Even before the crystallization of State competence in the 1958 Convention on the Territorial Sea and the Contiguous Zone,⁴⁸¹ it was already widely recognized that jurisdiction might be exercised – for law enforcement purposes or in order to preserve national safety – beyond the exact boundaries of a State’s territory.⁴⁸² In the contiguous zone, the coastal State may exercise the control necessary to prevent infringement of – *inter alia* – its immigration laws and regulations within its territory or territorial sea.⁴⁸³ There is some discussion with regard to what exactly constitutes the ‘control necessary’. The jurisdictional rights available in the contiguous zone do not clearly include the interception of vessels believed to be carrying asylum-seekers, premised on the notion that only those powers permitted under international law may be exercised in the contiguous zone.⁴⁸⁴ In extreme cases – for example when the incursion of illegal immigrants presents a real danger to the preservation of the State – it is clear that the coastal State will be allowed to act to prevent this.⁴⁸⁵ Nevertheless, what is the threshold in less serious cases? It is submitted that a State can act in any situation where there is a reasonable risk of any domestic law – within the limited competences in this area – being breached.⁴⁸⁶

⁴⁷⁹ Agreement between the United States of America and the Government of the Dominican Republic Concerning Cooperation in Maritime Migration Law Enforcement (20 May 2003), *TIAS UST LEXIS* 32 (2003).

⁴⁸⁰ LOSC, Art. 33(2).

⁴⁸¹ Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964), 516 *UNTS* 205.

⁴⁸² See: JESSUP, Philip C., *The Law of Territorial Waters and Maritime Jurisdiction* (New York: J.A. Jennings Co. Inc., 1927), 75-76; MCNAIR, Arnold D., *International Law Opinions* (Cambridge: Cambridge University Press, 1956), Vol. II, 186.

⁴⁸³ LOSC, Art. 33(1). See also Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964), 516 *UNTS* 205, Art. 24(1).

⁴⁸⁴ GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed. 1996), 165.

⁴⁸⁵ JOHNSON, Douglas H.N., “Refugees, Departees and Illegal Migrants”, 9 *Sydney Law Review* 11 (1980), 32; GOODWIN-GILL, Guy S. & MCADAM, Jane, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed. 2008), 276.

⁴⁸⁶ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 126-127.

Which steps can coastal States take to prevent infringements of immigration laws and regulations? First, the coastal State will be permitted to board the vessel for inspection purposes.⁴⁸⁷ Moreover, States will also be allowed to exercise a degree of coercion (e.g. warnings) sufficient to prevent the vessel entering into territorial waters, so long as this is done in a manner consistent with provisions of domestic law.⁴⁸⁸ The connotations of ‘control’ limit the preventive State action to the aforementioned acts. The act of arresting vessels will thus not be part of the preventive powers.⁴⁸⁹ Next to the prevention of infringements, coastal States may also punish infringement of the immigration laws and regulations committed within its territory or territorial sea.⁴⁹⁰ Some authors argue that this also allows for the prosecution of vessels for acts committed in the contiguous zone that produce a breach of laws applicable in the territorial sea.⁴⁹¹ This opinion is based upon the idea of objective territorial jurisdiction. This principle permits States to apply their law to acts initiated outside their territory, but completed within their territory.⁴⁹² As Judge LAING noted in his separate opinion to the *M/V Saiga Case (No. 2)*: “I believe that it is tenable that conduct occurring in the contiguous zone which is part of the jurisdictional facts or *actus reus* of conduct intended or due to occur or actually occurring in the territorial sea or other territorial areas can be punished as long as the vessel is apprehended in the course of the exercise of some legitimate means of control [...]”⁴⁹³ However, in practice few coastal States will take this course of action when it is likely to commit them to assuming responsibility for the asylum claims of those aboard any such vessel arrested.⁴⁹⁴

⁴⁸⁷ SHEARER, Ivan A., “Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels”, 35 *International & Comparative Law Quarterly* 320 (1986), 330.

⁴⁸⁸ JOHNSON, Douglas H.N., “Refugees, Departees and Illegal Migrants”, 9 *Sydney Law Review* 11 (1980), 32; SHEARER, Ivan A., “Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels”, 35 *International & Comparative Law Quarterly* 320 (1986), 329-330.

⁴⁸⁹ But see: ROACH, Ashley J. & SMITH, Robert W., *United States Responses to Excessive Maritime Claims* (London: Martinus Nijhoff Publishers, 2nd ed. 1996), 481. However, including the right of arresting vessels within the preventive powers of the coastal State, fails to give separate meanings to ‘prevent’ and ‘punish’.

⁴⁹⁰ LOSC, Art. 33(1). See also Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964), 516 *UNTS* 205, Art. 24(1).

⁴⁹¹ GUILFOYLE, Douglas, “Maritime Interdiction of Weapons of Mass Destruction”, 12 *Journal of Conflict & Security Law* 1 (2007), 7.

⁴⁹² BROWNLIE, Ian, *Principles of Public International Law* (New York: Oxford University Press, 7th ed., 2008), 301.

⁴⁹³ ITLOS, The *M/V Saiga Case (No. 2)*, *St. Vincent and the Grenadines v. Guinea*, 1 July 1999, Separate Opinion of Judge Laing, *ITLOS Reports* (1999), para. 16.

⁴⁹⁴ SHEARER, Ivan A., “Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels”, 35 *International & Comparative Law Quarterly* 320 (1986), 127; BARNES, Richard A., “The International Law of

Also the doctrine of ‘constructive presence’ can be used to justify prosecution of vessels for acts committed in the contiguous zone. This can include hovering mother-ships transferring illicit cargoes to smaller boats to complete smuggling offences within State territory.⁴⁹⁵ The narrow view on constructive presence holds that constructive presence was only made out where the mother ship’s own boats were used to make contact with the shore. The extensive view however also includes that other vessels may come out from shore to make contact with a mother ship in the contiguous zone. The latter seems to be the generally applicable rule.⁴⁹⁶ The same approach is taken in the LOSC provisions on hot pursuit.⁴⁹⁷ These allow coastal States to commence pursuing a vessel outside its territorial waters, contiguous zone or EEZ, following offences completed within an area of its jurisdiction by the vessel’s small boats or other craft working as a team with it.⁴⁹⁸

When there are thus reasonable grounds to believe that a migrant boat has the intention to enter the territorial sea in violation with immigration laws and regulations, interception will be justified. Nevertheless, the powers exercised in the territorial sea and in the contiguous zone should be exercised proportionally with the need to prevent or punish such infringements. The degree of force will have to be determined in the light of all the circumstances, such as the safety of the passengers, the consequences of the interception, the vessel’s likely next port of call, etc.⁴⁹⁹ The EU Schengen Borders Code, for example, underpins this in stating: “*Border control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued.*”⁵⁰⁰

the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 126-127.

⁴⁹⁵ O’CONNELL, Daniel P., SHEARER Ivan A. (Ed.), *The International Law of the Sea* (Oxford: Clarendon Press, 1982/1984), 1093-1094.

⁴⁹⁶ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 13.

⁴⁹⁷ LOSC, Art. 111.

⁴⁹⁸ LOSC, Artt. 111(1) and 111(4).

⁴⁹⁹ GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed. 1996), 165.

⁵⁰⁰ Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJL 105/1 of 13 April 2006, Preamble para. 7.

2.3. Conclusion

In the territorial sea, ships of all States enjoy the right of innocent passage.⁵⁰¹ Article 19(2) LOSC contains a list of activities that are considered to threaten the peace, good order or security, for example the loading or unloading of any person contrary to immigration laws and regulations of the coastal State.⁵⁰² As this list is not exhaustive, coastal States may enjoy a discretion to characterize a broader range of migration matters as prejudicial to their peace, good order or security. Interception – for example removal from the territorial sea – will be justified in these cases. However, the use of force is a measure of last resort and it must not go beyond what is reasonable and necessary in the circumstances. The force used in the case of the *M/V Tampa* was definitely not reasonable. As coastal States exercise sovereignty over their territorial sea, it is generally accepted that other States are not permitted to exercise enforcement jurisdiction. However, in order to respond to certain threats, States have concluded agreements where coastal States grant permission for other States to exercise enforcement jurisdiction within their territorial sea, subject to certain conditions.⁵⁰³ Another possibility is that a coastal State law enforcement official is being brought onto the host State's ship ('shiprider' agreement).

In the contiguous zone, the coastal State may exercise the control necessary to prevent infringement of – *inter alia* – its immigration laws and regulations within its territory or territorial sea.⁵⁰⁴ A State can act in any situation where there is a reasonable risk of any domestic law – within the limited competences in this area – being breached.⁵⁰⁵ Next to the prevention of infringements, coastal States may also punish infringement of the immigration laws and regulations committed within its territory or territorial sea.⁵⁰⁶ Based upon the idea of objective territorial jurisdiction, this also allows for the prosecution of vessels for acts committed in the contiguous zone that produce a breach of laws applicable in the territorial

⁵⁰¹ LOSC, Art. 17.

⁵⁰² LOSC, Art. 19(2)(g).

⁵⁰³ KLEIN, Natalie, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011), 78-79.

⁵⁰⁴ LOSC, Art. 33(1). See also Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964), 516 *UNTS* 205, Art. 24(1).

⁵⁰⁵ BARNES, Richard A., "The International Law of the Sea and Migration Control", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 126-127.

⁵⁰⁶ LOSC, Art. 33(1). See also Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964), 516 *UNTS* 205, Art. 24(1).

sea.⁵⁰⁷ Also the doctrine of 'constructive presence' – in case mother ships are being used – can be used to justify prosecution of vessels for acts committed in the contiguous zone. The powers exercised in the territorial sea and in the contiguous zone should at all times be exercised proportionally with the need to prevent or punish such infringements.

⁵⁰⁷ GUILFOYLE, Douglas, "Maritime Interdiction of Weapons of Mass Destruction", 12 *Journal of Conflict & Security Law* 1 (2007), 7.

3. Maritime interception in the EEZ and on the high seas

3.1. Freedom of navigation

States are not to interfere with foreign-flagged vessels pursuant to the freedom of the high seas.⁵⁰⁸ Both Article 2 of the 1958 Convention on the High Seas⁵⁰⁹ and Article 87 of the LOSC affirm the customary international law principle that the high seas are open to all countries. Also in the EEZ, all States enjoy, subject to the relevant LOSC provisions, the freedoms referred to in Article 87 LOSC.⁵¹⁰ The latter provides a non-exhaustive list of the freedoms that fall within its scope, including freedom of navigation. The ILC discussed the permissive and the obligatory nature of the freedom of the high seas as follows: “*La liberté de la haute mer, essentiellement négative, ne peut pas cependant ne pas comporter des conséquences positives. ... Tous les pavillons maritimes ont un droit égal à tirer de la haute mer les diverses utilités qu'elle peut comporter. Mais l'idée d'égalité d'usage ne vient qu'en second lieu. L'idée essentielle contenue dans le principe de liberté de la haute mer est l'idée d'interdiction d'interférence de tout pavillon dans la navigation en temps de paix de tout autre pavillon.*”⁵¹¹

This means that the essential idea contained in the principle of the freedom of the high seas is the idea of prohibition of all flag States from interference in navigation in time of peace with all other flag States. However, not all measures taken relating to a foreign vessel constitutes an actual interference. For example, a request for information does not constitute an interference with the exercise of rights of navigation, since inclusive interests are not impinged or threatened.⁵¹² The full extent of the concept of freedom of navigation itself is not defined in customary or conventional international law. However, the principal claim is the demand for freedom to enter upon the oceans and to pass there unhindered by efforts of other States or entities to prohibit that use or to subject it to regulations unsupported by a

⁵⁰⁸ LOSC, Art. 87.

⁵⁰⁹ Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962), 450 *UNTS* 11 [CHS].

⁵¹⁰ LOSC, Art. 58(1).

⁵¹¹ ILC, “Mémorandum présenté par le Secrétariat”, *UN Doc. A/CN.4/32* (1950), 2 *Yearbook of the International Law Commission* 67 (1950), *UN Doc. A/CN.4/SER.A/1950/Add.1.*, 69, available online: <http://untreaty.un.org/ilc/documentation/english/a_cn4_32.pdf>.

⁵¹² KLEIN, Natalie, “Legal Implications of Australia’s Maritime Identification System”, 55 *International and Comparative Law Quarterly* 337 (2006), 344.

general consensus among States.⁵¹³ This freedom, which may also be expressed as the right of unimpeded passage, is a theme that runs through the LOSC, taking different forms in the different maritime areas.⁵¹⁴ Freedom of navigation is at its lowest ebb in a coastal State's internal waters and at its highest level in the areas beyond 200 nautical miles. Consequently, the freedom of navigation should not be viewed as an absolute right possessed by a vessel, but rather as a continuum of freedoms available in certain marine areas.⁵¹⁵

States need to exercise their navigational freedoms: (1) subject to the conditions laid down by the LOSC; (2) subject to other rules of international law; and (3) with due regard for the interests of other States.⁵¹⁶ Although the freedom of navigation permits vessels of any State to traverse the high seas with minimal interference from any other State, the freedom is to be exercised in the interests of all entitled to enjoy it and, as such, must be regulated. Hence, the law of the high seas contains rules which are designed not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community.⁵¹⁷

First, conditions laid down by the LOSC include the definition of certain crimes such as piracy, slavery, and unauthorized offshore broadcasting, (and the situation of a vessel being stateless) which, when conducted or existing, allow enforcement measures, such as the exercise of certain policing rights towards vessels found to be in violation, by other parties to the LOSC.⁵¹⁸ Secondly, obligations under 'other rules of international law' are echoed throughout the Convention. For example, Article 88 LOSC stipulates that the high seas are to be reserved for peaceful purposes and Article 301 LOSC refers to the requirement to refrain from any threat or use of force against the territorial integrity or political independence of

⁵¹³ MCDUGAL, Myres S. and BURKE, William T., *The Public Order of the Oceans* (Yale University Press: New Haven and London, 1962), 763.

⁵¹⁴ NORDQUIST, Myron H. (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff, 1985-2003), Vol. III, para. 87.9(b).

⁵¹⁵ KRAJEWSKI, Jason M., "Out of Sight, Out of Mind? A Case for Long Range Identification and Tracking of Vessels on the High Seas", 56 *Naval Law Review* 219 (2008), 219 *et seq.*

⁵¹⁶ LOSC, Art. 87.

⁵¹⁷ ILC, "Report of the International Law Commission covering the work of its eighth session", *UN Doc. A/3159* (1956), 2 *Yearbook of the International Law Commission* 253 (1956), Commentary on its Article 27, 278, available online:

<http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1956_v2_e.pdf>.

⁵¹⁸ LOSC, Art. 110.

any State or acting in any other manner inconsistent with the principles of international law embodied in the United Nations Charter.⁵¹⁹ Lastly, navigational freedoms need to be exercised with due regard for the interests of other States. This means that all States are required to refrain from any acts that might adversely affect the use of the high seas by nationals of other States.⁵²⁰

Although Article 87 LOSC provides a ‘test of reasonableness’ by which States may evaluate their actions as either cooperative or disruptive,⁵²¹ it does not contain specific prohibitions or requirements.⁵²² Thus, where this reasonableness test is inconclusive, where the United Nations Charter contains no relevant provision and where no other rules of international law apply, the LOSC allows for multilateral regulation. Article 94 LOSC requires a State to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag and to conform to generally accepted international regulations, procedures, and practices and to take any steps which may be necessary to secure their observance. In other words, the LOSC permits States to define reasonable conduct through multilateral enactment of regulations or procedures.⁵²³ An illustration of this is the Convention for the International Regulations for Preventing Collisions at Sea (COLREGS).⁵²⁴

3.2. Exclusive flag State jurisdiction

From the principle of the freedom of the high seas flows the customary principle of exclusivity of flag State jurisdiction,⁵²⁵ as laid down in Article 6(1) of the 1958 Convention on

⁵¹⁹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945), 1 *UNTS* XVI.

⁵²⁰ ILC, “Report of the International Law Commission covering the work of its eighth session”, *UN Doc. A/3159* (1956), 2 *Yearbook of the International Law Commission* 253 (1956), Commentary on its Article 27, 278, 253, available online:

<http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1956_v2_e.pdf>.

⁵²¹ NORDQUIST Myron H. (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff, 1985-2003), Vol. III, para. 87.2.

⁵²² LOSC, Art. 87.

⁵²³ KRAJEWSKI, Jason M., “Out of Sight, Out of Mind? A Case for Long Range Identification and Tracking of Vessels on the High Seas”, 56 *Naval Law Review* 219 (2008), 219 *et seq.*

⁵²⁴ Convention on the International Regulations for Preventing Collisions at Sea (adopted 20 October 1972, entered into force 15 July 1977), 1050 *UNTS* 25 [COLREGS].

⁵²⁵ PCIJ, S.S. Lotus Case, *France v. Turkey*, 7 September 1927, *PCIJ Ser. A No. 10* (1927), 25.

the High Seas (CHS)⁵²⁶ and Article 92(1) of the LOSC.⁵²⁷ The concept of jurisdiction has many different meanings under both international and domestic law. CASSESE defines jurisdiction as the power of central authorities of a State to exercise public functions over individuals located in a territory.⁵²⁸ There are three different categories of jurisdiction in international law: prescriptive jurisdiction; enforcement jurisdiction; and adjudicative jurisdiction. Prescriptive jurisdiction refers to the authority of the law-making arm of the State to prescribe legal rules applicable in a particular context. Enforcement jurisdiction refers to the authority of the State to enforce the rules it has prescribed. Finally, adjudicative jurisdiction is the power of a court to lawfully exercise its authority over a person or property to resolve a legal dispute.⁵²⁹

There can be no enforcement jurisdiction unless there is prescriptive jurisdiction. However, there may be a prescriptive jurisdiction without the possibility of enforcement jurisdiction, for example when an accused person is outside the territory of the prescribing State and is not amenable to extradition. States enjoy prescriptive jurisdiction within their own territory, including waters under their sovereignty (territorial jurisdiction). While national law could cover any subject matter, a State may not attempt to alter the legislative, judicial or administrative framework of a foreign State by so legislating.⁵³⁰ Although the prescribing State would have no enforcement jurisdiction, also the mere act of legislating would already amount to an interference with the subject State's sovereignty.⁵³¹ Extraterritorial prescriptive jurisdiction can arise as a result of: (1) nationality or active personality; (2) passive personality; (3) the protective principle; and (4) universal jurisdiction.⁵³²

⁵²⁶ CHS, Art. 6(1).

⁵²⁷ LOSC, Art. 92(1). See generally BROWNIE, Ian, *Principles of Public International Law* (New York: Oxford University Press, 7th ed. 2008), 239-240.

⁵²⁸ CASSESE, Antonio, *International Law* (Oxford: Oxford University Press, 2nd ed. 2005), 49.

⁵²⁹ CASSESE, Antonio, *International Law* (Oxford: Oxford University Press, 2nd ed. 2005), 49-50.

⁵³⁰ PCA, *The Island of Palmas Case, United States of America vs. Netherlands*, 4 April 1928, 2 *UNRIIAA* 829 (1928); *Imperial Tobacco Co. of India vs. Commissioner of Income Tax*, 27 *International Law Reports* 103 (1958); AKEHURST, Michael, "Jurisdiction in International Law", 46 *British Yearbook of International Law* 145 (1972-1973), 179.

⁵³¹ AKEHURST Michael, "Jurisdiction in International Law", 46 *British Yearbook of International Law* 145 (1972-1973), 179.

⁵³² Introductory comment to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime, 29 *American Journal of International Law* 443 (1935). However, the Harvard Research Draft Convention did not adopt the passive personality principle, since it considered this principle of questionable permissibility (at 579). Nevertheless, the principle is now accepted in international instruments, such as in several antiterrorist

The nationality principle, or active personality principle, entails that a State has prescriptive jurisdiction over objects and persons having the nationality of that State. This principle is the basis of flag State jurisdiction: a ship is subject to the jurisdiction of the State under whose flag it sails. The exclusive flag State jurisdiction comprises prescriptive as well as enforcement jurisdiction.⁵³³ However, interdiction on the high seas, boarding and seizure, also concerns the extraterritorial exercise of enforcement jurisdiction, but by States other than the flag State.⁵³⁴ The exclusive flag State jurisdiction principle renders a vessel immune from foreign interference unless: (1) there is a permissive rule of international law allowing the interference; or (2) the flag State itself consents to the interdiction.⁵³⁵ An example of a permissive rule of international law allowing the interference is the right of visit, which is discussed below.

3.3. Flag State consent

Consent by the flag State can be *ad hoc* or stipulated in a bilateral or a multilateral agreement. For example, the 2000 Protocol Against the Smuggling of Migrants by Land, Sea, and Air (Smuggling Protocol)⁵³⁶ empowers a State Party, that has reasonable grounds to suspect that a vessel flying the flag of another State Party is engaged in the smuggling of migrants by sea, to notify the flag State and request authorization to take appropriate measures. The flag State may authorize the requesting State, *inter alia*, to board and to search the vessel. Furthermore, when evidence is found that the vessel is engaged in the smuggling of migrants by sea, the boarding State can take appropriate measures as authorized by the

conventions. See, for example: Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992), 974 *UNTS* 177 [SUA Convention], Art. 6.

⁵³³ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard and MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 129.

⁵³⁴ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 5.

⁵³⁵ PCIJ, S.S. Lotus Case, *France v. Turkey*, 7 September 1927, *PCIJ Ser. A No. 10* (1927), 52; CHS, Art. 6(1) and LOSC, Art. 92(1).

⁵³⁶ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 *UNTS* 507 [Smuggling Protocol].

flag State.⁵³⁷ A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality, may board and search the vessel. If evidence confirming the suspicion is found, the boarding State may take appropriate measures.⁵³⁸

The United States has extensive experience in conducting drug interdictions under a network of bilateral agreements which address consensual boarding on the high seas (or sometimes also in each other's territorial waters) and seizure of vessels, their cargo or crew. The consent can be either actual or presumed. The latter can occur where pursuant to a treaty no response to a request from a boarding State by a flag State within a certain amount of time after the request can be a presumed consent.⁵³⁹ For example, the United States-Guatemala Agreement states: "If there is no response [...] within two (2) hours [...] the requesting Party will be deemed to have been authorized to board the suspect vessel."⁵⁴⁰ Sometimes an agreement includes automatic consent to boarding where officials act upon reasonable suspicion.⁵⁴¹ Treaties may also contain various provisions on seizure where a crime is detected following boarding.⁵⁴² Also within the framework of PSI, State consent is required. PSI is a global effort – launched in 2003 – aiming to stop trafficking of weapons of mass destruction (WMD), their delivery systems and related materials. The system – set up by a group of 11 States – seeks to establish a set of principles based on international law that permits, *inter alia*, the boarding on the high seas of a foreign State's vessels if reasonably suspected of transporting WMD or related material. However, State consent is always necessary.⁵⁴³ The consent of the flag State

⁵³⁷ Smuggling Protocol, Art. 8.

⁵³⁸ Smuggling Protocol, Art. 8. See also GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 180-262.

⁵³⁹ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 89-90.

⁵⁴⁰ Agreement between the United States and Guatemala Concerning Cooperation to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea and Air (adopted 19 June 2003, entered into force 10 October 2003), Art. 7(3)(d), available online:

<<http://guatemala.usembassy.gov/uploads/images/COB7Udl1HS7y04mWhEcLNg/usguatmaritimeagreement.pdf>>.

⁵⁴¹ For example, the Agreement between the United States and Haiti Concerning Cooperation to Suppress Illicit Maritime Traffic (adopted 17 October 1997, entered into force 5 September 2002), *TIAS UST LEXIS* 128 (1997).

⁵⁴² For an extensive discussion, see GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 90-91.

⁵⁴³ See for example: BYERS, Michael, "Policing the High Seas: The Proliferation Security Initiative", 98 *American Journal of International Law* 526 (2004), 526-527; SYRIGOS, Angelos M.S., "Developments on the Interdiction of Vessels on the High Seas", in STRATI, Anastasia, GAVOUNELI, Maria & SKOURTOS, Nikolaos (Eds.), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Leiden: Martinus Nijhoff Publishers, 2006), 149-202; ALLEN, Craig, *Maritime Counterproliferation Operations and the*

may include the right to visit and simultaneously the right to bring the vessel to the port of the boarding State and prosecute any offences. However, it can also be given in consecutive stages. For example, in the case of the migrant smuggling vessel *F/V Jin Yinn*, Taiwan – being the flag State – gave its consent to the US Coast Guard to board the *F/V Jin Yinn* on the high seas. However, Taiwan did not give further consent to the US to prosecute the smugglers aboard.⁵⁴⁴

One strand of legal doctrine suggests that the master of a commercial vessel can provide authorization for boarding by a warship. They argue that, although there is no codified rule of international law expressly authorizing the master of a vessel to grant consent to board his vessel, both longstanding maritime custom – derived from the master’s plenary authority over the ship in international waters – and State practice, support this view.⁵⁴⁵ In the case of the United States for example, the practice of requesting the master’s consent is clearly delineated in *The Commander’s Handbook on the Law of Naval Operations*, a military publication that applies to naval operations of the United States navy, Marine Corps and Coast Guard.⁵⁴⁶ However, also other countries than the United States share this opinion. After reviewing the NATO practice in ‘Operation Active Endeavour’ – under which NATO ships patrol the Mediterranean Sea and monitor shipping to help detect, deter and protect against terrorist activity⁵⁴⁷ – SYRIGOS concluded that also German and French warships consider that they are

Rule of Law (Westport: Praeger Security International, 2007), 272 p.; MCDORMAN, Ted L., “Maritime Terrorism and the International Law of Boarding of Vessels at Sea: Assessing the New Developments”, in CARON, David D. & SCHEIBER, Harry N., *The Oceans in the Nuclear Age – Legacies and Risks* (Leiden: Martinus Nijhoff Publishers, 2010), 239-264; KLEIN, Natalie, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011), 193-207.

⁵⁴⁴ CANTY, Rachel, “Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas”, 23 *Tulane Maritime Law Journal* 123 (1998), 134-136.

⁵⁴⁵ KRASKA, James, “Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure”, 16 *Ocean & Coastal Law Journal* 1 (2010), 16-17; WILSON, David G., “Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of his Ship by Foreign Warships”, 55 *Naval Law Review* 157 (2008), 193-211.

⁵⁴⁶ Department of the Navy and Department of Homeland Security, *The Commander’s Handbook on the Law of Naval Operations* (July 2007), Section 3.11.2.5.2., available online: <http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_%28Jul_2007%29_%28NWP%29%29>. See also: ROACH, Ashley J., “An American Perspective on Crimes at Sea and Trafficking of Weapons of Mass Destruction”, in FRANCKX, Eric & GAUTIER, Philippe (Eds.), *The Exercise of Jurisdiction over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction* (Brussels: Bruylant, 2010), 154.

⁵⁴⁷ NATO, “Operation Active Endeavour”, available online: <http://www.nato.int/cps/en/natolive/topics_7932.htm>.

allowed to board as long as they get the captain's consent.⁵⁴⁸ Therefore, masters may allow anyone to come on board the vessel as their guest, including foreign law enforcement officials and military forces. The scope and duration of a consensual boarding are subject to the conditions imposed by the master and may be terminated by the master at his discretion. When the vessel's flag State is a party to a bilateral or a multilateral agreement including a provision on the right of visit, boarding shall be conducted under the terms of that agreement.⁵⁴⁹ Although the voluntary consent of the master permits the boarding, it does not allow the assertion of law enforcement authority.

Boarding and searching a ship based on the master's consent allows for rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, the cargo and the navigation records, without undue delay to the boarded vessel. Especially in urgent situations, a legal regime rooted in flag State jurisdiction can be understood to require an individual on board every ship who has the authority to take the necessary steps to maintain minimum public order at sea. When the request to board has to be made of authorities in the flag State, it can take a long time for a government bureaucracy to respond as high-level intervention may be necessary.⁵⁵⁰

Nevertheless, another strand of legal doctrine finds it difficult to understand how a master can give the necessary consent to make a boarding legal. This is based on the fact that international law does not recognize the master of a vessel, whereas it does recognize the flag State. Next to this, it is arguable that boarding with the consent of the master is either an extension of the right of approach or of the right of visit. The clear difference of State opinion on the matter undermines the existence of a customary law principle.⁵⁵¹ For example, during

⁵⁴⁸ SYRIGOS, Angelos M.S., "Developments on the Interdiction of Vessels on the High Seas", in STRATI, Anastasia, GAVOUNELI, Maria & SKOURTOS, Nikolaos (Eds.), *Unresolved Issues and new Challenges to the Law of the Sea: Time Before and After* (Leiden: Martinus Nijhoff Publishers, 2006), 183, fn 156.

⁵⁴⁹ Department of the Navy and Department of Homeland Security, *The Commander's Handbook on the Law of Naval Operations* (July 2007), Section 3.11.2.5.2. and Section 3.11.2.2.4., available online: <http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_%28Jul_2007%29_%28NWP%29>.

⁵⁵⁰ OXMAN, Bernard H., "Crimes at Sea and Trafficking of Weapons of Mass Destruction: General Report", in FRANCKX, Eric & GAUTIER, Philippe (Eds.), *The Exercise of Jurisdiction over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction* (Brussels: Bruylant, 2010), 146.

⁵⁵¹ MCDORMAN, Ted L., "Maritime Terrorism and the International Law of Boarding of Vessels at Sea: A Brief Assessment of the New Developments", in CARON, David D. & SCHEIBER, Harry N., *The Oceans in the Nuclear*

the NATO 'Operation Active Endeavour', British and Greek warships needed to know the flag State's position about the boarding.⁵⁵² The United States, an apparent proponent of the international legal sufficiency of a master's consent, has nevertheless entered into several bilateral Ship Boarding Agreements, which respect flag State consent.⁵⁵³ As a result, the master's consent – without clear authority from the flag State – will not be sufficient. Therefore, there is no codified rule of international law, nor is there a rule of international customary law, expressly authorizing the master of a vessel to grant consent to board his vessel.

The widespread use of flags of convenience can have negative effects on the ability of States to obtain flag State consent during exigent situations. The International Transport Workers' Federation (ITF) uses the term 'flags of convenience' or 'open registry' in reference to ships flagged in a State in which both the ships and their owners have little or no contact, but for the registration itself. The motivating factors behind a ship owner's decision to 'flag out' are cheap registration fees, low or no taxes and freedom to employ cheap labour. The ITF argues that because there is no 'genuine link' between the merchant ship's actual owner and the ship's nationality, open registry States fail to enforce labour standards and adhere to international standards.⁵⁵⁴ The genuine link principle was first articulated in 1955 by the ICJ

Age – Legacies and Risks (Leiden: Martinus Nijhoff Publishers, 2010), 250-252; BROWN, Neil, "Jurisdictional Problems relating to Non-Flag State Boarding of Suspect Ships in International Waters: A Practitioner's Observations", in SYMMONS, Clive R. (Ed.), *Selected Contemporary Issues in the Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2011), 77-78.

⁵⁵² SYRIGOS, Angelos M.S., "Developments on the Interdiction of Vessels on the High Seas", in STRATI, Anastasia, GAVOUNELI, Maria & SKOURTOS, Nikolaos (Eds.), *Unresolved Issues and new Challenges to the Law of the Sea: Time Before and After* (Leiden: Martinus Nijhoff Publishers, 2006), 183, fn 156.

⁵⁵³ See for example: Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related materials by Sea (adopted 11 February 2004, entered into force 9 December 2004), available online: <<http://www.state.gov/t/isn/trty/32403.htm>>. Nevertheless, the Agreement states in Article 4(3)(d): "If there is no response from the Competent Authority of the requested Party within two hours of its acknowledgment of receipt of the request, the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching the vessel to determine if it is engaged in proliferation by sea."

⁵⁵⁴ International Transport Workers' Federation, "What are Flags of Convenience?", available online: <<http://www.itfglobal.org/flags-convenience/sub-page.cfm>>. In 1970, the Rochdale Committee – a body commissioned by the British Government to study the flags of convenience phenomenon – identified six common factors of flags of convenience States: (1) The country of registry allows ownership and/or control of its merchant vessels by non-citizens (2) Access to the registry is easy; ship may usually be registered at a consulate abroad. Equally important, transfer from the registry at the owner's option is not restricted (3) Taxes on the income from the ships are not levied locally, or are very low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given (4) The country of registry is a small power with no national requirement under any

in the *Nottebohm Case*.⁵⁵⁵ Both the 1958 CHS and the 1982 LOSC require a genuine link between the flag State and a ship that flies its flag.⁵⁵⁶ There is no conclusive, globally accepted definition of 'genuine link'.⁵⁵⁷ What are the consequences if a genuine link is missing? One theoretically conceivable sanction would be to refuse to recognize the flag State's flag. CHURCHILL and LOWE suggested that the instrument of non-recognition of a flag could be a valid one.⁵⁵⁸ As a legal consequence, the vessel would probably become stateless.⁵⁵⁹ In its draft Article 29 of 1956, the ILC held "[F]or purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship."⁵⁶⁰ Although there were extensive discussions about whether a non-recognition clause in case of a missing genuine link should be inserted in the CHS,⁵⁶¹ this provision was not included in the CHS, nor in the LOSC. In the *M/V Saiga Case*, ITLOS held that the requirement for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States. Therefore, States are not supposed to rely on the apparent lack of a genuine link to challenge the validity of a ship's registration.⁵⁶² Flag State consent will therefore be necessary, even in the case of a flag of convenience State. It has been suggested in doctrine that – because of the absence of a

foreseeable circumstances for all the shipping registered, but receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments (5) Manning of ships by non-nationals is freely permitted (6) The country of registry has neither the power nor the administrative machinery effectively to impose any governmental or international regulations; nor has the country even the wish or the power to control the companies themselves. See: ROCHDALE, Viscount (Ed.), *Committee of Inquiry into Shipping*, (London: Her Majesty's Stationary Office, 1970).

⁵⁵⁵ ICJ, *Nottebohm Case, Liechtenstein v. Guatemala*, 6 April 1955, *ICJ Reports* 4 (1955).

⁵⁵⁶ CHS, Art. 5; LOSC, Art. 91.

⁵⁵⁷ See for example: NORDQUIST, Myron & WACHENFELD, Margaret, "Legal Aspects of Reflagging Kuwaiti Tankers and Laying of Mines in the Persian Gulf", 31 *German Yearbook of International Law* 138 (1988), 138-164; OUDE ELFERINK, Alex, "The Genuine Link Concept: Time for a Post Mortem", in DEKKER, Ige F. & POST, Harry H.G., *On the Foundations and Sources of International Law* (Den Haag: T.C.M. Asser Press, 2003), 41-71.

⁵⁵⁸ CHURCHILL, Robin & LOWE, Alan V., *The Law of the Sea* (Manchester: Manchester University Press, 3rd ed. 1999), 261.

⁵⁵⁹ ZWINGE, Tamo, "Duties of flag States to Implement and Enforce International Standards and Regulations – And Measures to Counter Their Failure to Do So", 10 *Journal of International Business and Law* 297 (2011), 320.

⁵⁶⁰ ILC, "Report of the International Law Commission covering the work of its eight session", *UN Doc. A/3159* (1956), 2 *Yearbook of the International Law Commission* 253 (1956), 278, available online: <http://untreaty.un.org/ilc/documentation/english/a_cn4_104.pdf>.

⁵⁶¹ The traditional maritime countries of Europe were in favour of such a clause but ultimately it did not prevail. See: BOCZEK, Boleslaw Adam, *Flags of Convenience. An International Legal Study* (Harvard University Press, Cambridge, 1962), 247-248.

⁵⁶² ITLOS, *The M/V Saiga Case (No. 2), St. Vincent and the Grenadines v. Guinea*, 1 July 1999, *ITLOS Reports* (1999), para. 83.

genuine link between flag of convenience states and their ships – the master’s role has evolved to compensate for the failure of flag of convenience states to fulfil their international duties as flag states.⁵⁶³ Therefore, when the flag State – having no genuine link to the ship – is unwilling or unable to cooperate, the master’s consent would be sufficient. Nevertheless, this opinion is not supported in State practice.

Next to the problem of flags of convenience, the ability to request consent from the flag State can be impeded in situations of political upheavals or government instability. When the flag State is unwilling or unable to exercise its rights and meet its obligations, a significant tension in the jurisdictional balance between flag States and coastal States is being created.⁵⁶⁴ However, there seems to be no immediate consequences in international law if a flag State neglects to exercise effective jurisdiction and control over its vessels despite the fact that Article 94 LOSC requires flag States to do so. The LOSC merely sets out in Article 94(6) that a State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised, may report the facts to the flag State. The flag State shall investigate the matter and – if appropriate – take any action necessary to remedy the situation. Therefore, a ship – flying the flag of a State not exercising effective control over its vessels – cannot be considered to be a stateless vessel.

Based upon the wording of Article 5 CHS, some authors are of the opinion that ‘effective jurisdiction and control’ is the definition of the ‘genuine link’ and not an additional test. Article 5(1) CHS states that there must exist a genuine link between the State and the ship and that – in particular – the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. The words ‘in particular’ lead BOCZEK to conclude: *“The failure of the second committee of the conference to define the genuine link points to the fact that the centre of gravity has been shifted by the framers of the article from the various criteria, such as ownership [...] to the exercise of jurisdiction and control. This interpretation is consonant with the institution of nationality, and is also corroborated by the*

⁵⁶³ WILSON, David G., “Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of his Ship by Foreign Warships”, 55 *Naval Law Review* 157 (2008), 193-211.

⁵⁶⁴ BROWN, Neil, “Jurisdictional Problems relating to Non-Flag State Boarding of Suspect Ships in International Waters: A Practitioner’s Observations”, in SYMMONS, Clive R. (Ed.), *Selected Contemporary Issues in the Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2011), 81-82.

French text of art. 5, where the English words “in particular” are rendered by the adverb “notamment,” which in English corresponds more to the words “that is” than “in particular.” Therefore the view [...] that “there must exist a genuine link between the state and the ship, i.e., the state must exercise its jurisdiction and control effectively in administrative, technical and other related matters,” correctly solves the problem under inquiry.”⁵⁶⁵ However, there is a very important difference between Article 91 LOSC and Article 5 CHS. The sentence “in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag” is no longer included in the Article 91 LOSC. Instead, it was moved to Article 94 LOSC, illustrating that the concept of the genuine link and flag State control have been deliberately separated. They can therefore hardly be regarded as being totally the same.⁵⁶⁶

It has to be noted that – within the international legal framework of the necessity of flag State consent for boarding and searching of its vessels on the high seas – significant change is occurring regarding the expectation and/or duty that a flag State will give consent to boarding and inspection of its vessels by other States. This is *inter alia* the case where the vessel is suspected of being engaged in or contributing to acts of terrorism.⁵⁶⁷ The 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Protocol) for example, stipulates that State Parties can directly consent to have vessels flying their flag – suspected of a terrorist offence – be boarded and inspected by other State Parties after notifying all State parties.⁵⁶⁸ Thus, flag State consent can be freely given when requested and there is no direct legal right to board and inspect a foreign flagged ship. Nevertheless, the 2005 SUA Protocol creates a certain expectation that

⁵⁶⁵ BOCZEK, Boleslaw Adam, *Flags of Convenience. An International Legal Study* (Harvard University Press, Cambridge, 1962), 275.

⁵⁶⁶ ZWINGE, Tamo, “Duties of flag States to Implement and Enforce International Standards and Regulations – And Measures to Counter Their Failure to Do So”, 10 *Journal of International Business and Law* 297 (2011), 320.

⁵⁶⁷ MCDORMAN, Ted L., “Maritime Terrorism and the International Law of Boarding of Vessels at Sea: A Brief Assessment of the New Developments”, in CARON, David D. & SCHEIBER, Harry N., *The Oceans in the Nuclear Age – Legacies and Risks* (Leiden: Martinus Nijhoff Publishers, 2010), 262-263. See also: RAYFUSE, Rosemary, “Regulation and Enforcement in the Law of the Sea: Emerging Assertions of a Right to Non-flag State Enforcement in the High Seas Fisheries and Disarmament Contexts”, 24 *Australian Yearbook of International Law* 181 (2005), 181-200.

⁵⁶⁸ 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 14 October 2005, entered into force 28 July 2010), *IMO Doc. LEG/CONF.15/21 [SUA Protocol]*, Art. 8 bis(5)(e).

where a suspect vessel is involved, the consent of the flag State will be forthcoming as a State Party is legally committed to the overall objectives of the Protocol, namely the suppression of unlawful acts against the safety of maritime navigation. The same reasoning could be made in case of migrant smuggling and flag State consent under the 2000 Smuggling Protocol.

Three months after 9/11, intelligence sources reported that the *M/V Nisha* – a cargo ship registered in St. Vincent – was believed to head for London with terrorist material. Flag State consent was asked and received for an interdiction of the Royal Navy and UK Special Forces which led to the ship being diverted and searched. Although no terrorist material was found, this case demonstrates that the requirement to gain flag State consent can be successfully managed.⁵⁶⁹ However, other cases have proven to be more problematic. For example, in the case of *Regina v. Charrington and others*, the high seas boarding of a Maltese registered merchantman – *M/V Simon de Danser* – on 5 May 1997 by members of the British Royal Marines Special Boat Squadron, was deemed unlawful as the procedural requirements to ask for flag State consent were not fulfilled.⁵⁷⁰

3.4. The right of visit

3.4.1. The concept and its relationship with the UN Charter

The right of visit is an exception to the general principle of the exclusive jurisdiction of the flag State over ships flying its flag, set out in Article 92 LOSC. The right of visit entails the right of a warship, or any other duly authorized ship, to board a vessel and, more importantly, the right to search the vessel in circumstances of extreme suspicion.⁵⁷¹ Article 110 LOSC stipulates that the right of visit is only justified when there are reasonable grounds for suspecting that the ship is engaged in piracy, slave trade, unauthorized broadcasting or when the ship is without nationality or though flying a foreign flag or refusing to show its

⁵⁶⁹ BROWN, Neil, “Jurisdictional Problems relating to Non-Flag State Boarding of Suspect Ships in International Waters: A Practitioner’s Observations”, in SYMMONS, Clive R. (Ed.), *Selected Contemporary Issues in the Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2011), 76.

⁵⁷⁰ GILMORE, William C., “Drug Trafficking at Sea: The Case of *R. v. Charrington and others*”, 49 *International & Comparative Law Quarterly* 477 (2000), 477-489.

⁵⁷¹ LOSC, Art. 110. For a historical and theoretical perspective of the right of visit on the high seas, see: PAPANASTAVRIDIS, Efthymios, “The Right of Visit on the High Seas in a Theoretical Perspective: *Mare Liberum* versus *Mare Clausum* Revisited”, 24 *Leiden Journal of International Law* 45 (2011), 45-69.

flag, the ship is, in reality, of the same nationality as the warship.⁵⁷² States can conclude treaties which confer the right of visit on the high seas to the respective Parties.⁵⁷³

There is a general consensus that high seas maritime interdiction operations authorized by Article 110 LOSC are not prohibited by the UN Charter.⁵⁷⁴ Article 2(4) of the Charter states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” These wordings can also be found in Article 301 LOSC. Further, Article 103 of the Charter states: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

ITLOS stated in the *M/V Saiga Case* (No. 2), referring to the *I’m Alone Case*⁵⁷⁵ and the *Red Crusader Case*,⁵⁷⁶ that general international law requires that the use of force must be avoided as far as possible, both while boarding a vessel and in situations arising once aboard.⁵⁷⁷ The use of force is a measure of last resort. However, where it is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. For example, firing shots across the bow of a ship does not constitute a use of force.⁵⁷⁸ However, sinking a vessel to prevent its escape, as happened in the *I’m Alone Case*, does amount to the use of force.⁵⁷⁹ An interdiction, not authorized by Article 110 LOSC or by flag State consent, will be prohibited as this automatically involves a threat or a use of force.⁵⁸⁰

⁵⁷² LOSC, Art. 110.

⁵⁷³ LOSC, Art. 110(1).

⁵⁷⁴ RANDELZHOFFER, Albrecht, “Article 2(4)”, in SIMMA, Bruno (Ed.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002), Vol. I, 112 and 124.

⁵⁷⁵ Arbitral Award, *I’m Alone Case*, *United States v. Canada*, 30 June 1933 and 5 January 1935, 3 *UNRIAA* 1609 (1935).

⁵⁷⁶ Commission of Inquiry, *Red Crusader Case*, *United Kingdom v. Denmark*, 23 March 1962, 35 *International Law Reports* 485 (1962), 499.

⁵⁷⁷ ITLOS, *The M/V Saiga Case* (No. 2), *St. Vincent and the Grenadines v. Guinea*, 1 July 1999, *ITLOS Reports* (1999).

⁵⁷⁸ ITLOS, *The M/V Saiga Case* (No. 2), *St. Vincent and the Grenadines v. Guinea*, 1 July 1999, *ITLOS Reports* (1999), para. 156.

⁵⁷⁹ Arbitral Award, *I’m Alone Case*, *United States v. Canada*, 30 June 1933 and 5 January 1935, 3 *UNRIAA* 1609 (1935), 1617.

⁵⁸⁰ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 273.

3.4.2. *Slave trade as a ground for applying the right of visit*

Another possible legal basis afforded by the LOSC for exercising the right of visit is slave trade. Article 99 LOSC on the prohibition of the transport of slaves stipulates that every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Slaves taking refuge on board a ship shall *ipso facto* be free. Already in 1956, the ILC addressed the issue of slavery specifically in terms of provisions on the high seas. In its commentary on draft Article 37, the ILC noted that the duty of States to prevent and punish the transport of slaves in ships authorized to fly their colours is generally recognized in international law.⁵⁸¹ The ILC's language was included in the 1958 CHS as Article 13: "*Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.*"

In support of the general prohibition set out in Article 99 LOSC, Article 110(1)(b) provides for the right of visit when there is reasonable ground for suspecting that a ship is engaged in slave trade. Next to this, there are also several human rights instruments that prohibit slavery and slave trade. The UDHR states in Article 4 that "*No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms*".⁵⁸² The ICCPR contains a similar prohibition against slavery and servitude in Article 8 and adds a provision which prohibits the use of forced or compulsory labour subject to certain limited exceptions.⁵⁸³ The importance accorded by the ICCPR to the slavery provision is emphasized by its status as a non-derogable right under Article 4(2). The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right to work which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or

⁵⁸¹ ILC, "Report of the International Law Commission covering the work of its eight session", *UN Doc. A/3159* (1956), 2 *Yearbook of the International Law Commission* 253 (1956), 281-282, available online: <http://untreaty.un.org/ilc/documentation/english/a_cn4_104.pdf>.

⁵⁸² UNGA, "Universal Declaration of Human Rights", *UN Doc. A/RES/217A* (III) (6 November 1948) [UDHR], available online: <<http://www.un-documents.net/a3r217a.htm>>.

⁵⁸³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 99 *UNTS* 171 [ICCPR].

accepts.⁵⁸⁴ Articles 5, 7 and 8 ICESCR further set certain conditions and rights that must be upheld and protected by the States Parties such as fair wages and equal remuneration for work of equal value and the right to form and join trade unions. Article 7(2)(c) of the 1998 Rome Statute of the International Criminal Court (ICC) characterizes ‘enslavement’ as a crime against humanity falling within the jurisdiction of the Court.⁵⁸⁵ Article 4 ECHR provides that no one shall be held in slavery or servitude and no one shall be required to perform forced or compulsory labour. Finally, the most recent reference to slavery in an international instrument is in Article 3(a) of the Protocol to Prevent and Suppress Trafficking in Persons, Especially Women and Children (Trafficking Protocol), which criminalizes trafficking in persons for the purpose of exploitation including, “*at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*”.⁵⁸⁶

The LOSC does not provide for a definition of what constitutes ‘slavery’ or ‘slave trade’. Nevertheless, Article 99 LOSC serves as a link between the general law regarding the abolition of slavery and the law of the sea.⁵⁸⁷ The 1926 Slavery Convention defines slavery as “*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*”.⁵⁸⁸ ‘Slave trade’ encompasses the capture, acquisition or disposal of a person with intent to reduce him to slavery and, in general, every act of trade and transport in slaves.⁵⁸⁹ The 1956 Supplementary Slavery Convention also provides for international protection against institutions and practices similar to slavery, such as debt bondage, serfdom, bride-purchase, inheritance or sale of wives and child indenture.⁵⁹⁰ These practices are identified collectively as ‘servile status’, not as ‘slavery’. Although several appeals have

⁵⁸⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3 [ICESCR], Art. 6(1).

⁵⁸⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90.

⁵⁸⁶ Protocol to Prevent and Suppress Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 31 May 2004), 2237 UNTS 319 [Trafficking Protocol].

⁵⁸⁷ NORDQUIST, Myron H. (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff, 1985-2003), Vol. III, para. 99.6(a).

⁵⁸⁸ Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927), 60 LNTS 254, Art. 1(1).

⁵⁸⁹ Slavery Convention, Art. 1(2).

⁵⁹⁰ Supplementary Convention on the abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957), 226 UNTS 3 [Supplementary Slavery Convention] Artt. 1 and 7(b).

been made for a redefinition of slavery in the context of today's world, the definition has actually remained unchanged.⁵⁹¹ Thus, in the international legal context, the definition has not been altered substantially since 1926.⁵⁹² For example, Article 7(2)(c) of the 1998 Rome Statute of the ICC defines 'enslavement' as "*the exercise of any or all of the powers attaching to the right of ownership over a person . . . includ[ing] the exercise of such power in the course of trafficking in persons, in particular women and children*". This definition is essentially the same as the original definition adopted in 1926, adding only a specific reference to trafficking. Clearly, this definition only goes to say that a person may be enslaved in the course of being trafficked and certainly not that all forms of exploitation constituting trafficking are slavery.⁵⁹³ In the *Kunarac Case*, the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the practice, whereby two young women had been abducted by Serb soldiers, kept in a locked apartment, threatened with murder if they left, obliged to cook, clean and wash clothes and repeatedly sexually assaulted, constituted 'enslavement'.⁵⁹⁴ However, the ICTY stated that the term 'enslavement' in this case had a broader meaning than the concept of 'slavery' in general international law.⁵⁹⁵ Practices punishable as 'enslavement' may thus include those lacking the ownership features characteristic of slavery.⁵⁹⁶

Also the definition of 'trafficking' in the Trafficking Protocol does not add new elements to the definition of 'slavery'. Article 3(a) Trafficking Protocol stipulates: "*Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve*

⁵⁹¹ See for example: ECOSOC, "Report on Slavery submitted to the Sub-Commission in 1966: Special Rapporteur – Report by Mr. Benjamin Whitaker, Special Rapporteur", *UN Doc. E/CN.4/Sub.2/1982/20* (1982).

⁵⁹² OHCHR, "Abolishing Slavery and Its Contemporary Forms", Report by David WEISSBRODT and Anti-Slavery International (2002), para. 18, available online: <<http://www.ohchr.org/Documents/Publications/slaveryen.pdf>>.

⁵⁹³ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 228.

⁵⁹⁴ ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, 22 February 2001, IT-96-23-T & IT-96-23/1-T (2001), paras. 68, 75, 587 and 747-782.

⁵⁹⁵ ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, 22 February 2001, IT-96-23-T & IT-96-23/1-T (2001), paras. 541, 542 and 781.

⁵⁹⁶ Council of Europe Convention on Action Against Trafficking in Human Beings and Its Explanatory Report (adopted 16 May 2005) *Council of Europe Treaties Series No. 197*, para. 95 available online: <http://www.coe.int/T/E/human_rights/trafficking/PDF_conv_197_trafficking_e.pdf>.

the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." This means that slavery is listed as one exploitative practice among many relevant to whether a person has been trafficked. Thus, elements of control and ownership, often accompanied by the threat of violence, will always be central to identifying the existence of slavery. In the modern context, the circumstances of the enslaved person are crucial to identifying what practices constitute slavery. These include (i) the degree of restriction of the individual's inherent right to freedom of movement; (ii) the degree of control of the individual's personal belongings; and (iii) the existence of informed consent and a full understanding of the nature of the relationship between the parties.⁵⁹⁷ Taking into account the definition of slavery, migrants at sea – when they are being trafficked into slavery-like practices – can thus not *ipso facto* be equated to slaves as the requisite element of *de jure* ownership is absent. Only when the crucial condition of ownership is present, trafficking migrants amounts to slavery.

However, PASTAVRIDIS suggests that human trafficking – or similar practices – could be connected to slavery for the purpose of the application of Article 110(1)(b) LOSC. Although he admits that there is no actual State practice or any judicial decision on this issue, he interprets the notion 'slavery' in Article 110(1)(b) LOSC in an evolutionary way, based upon Article 31(3) VCLT.⁵⁹⁸ This Article provides that any subsequent agreement or practice of the Parties regarding the interpretation of the treaty must be taken into account as well as any relevant rules of international law applicable in the relations between the Parties. The trafficking of persons today is often being viewed as the modern equivalent of the slave trade of the nineteenth century.⁵⁹⁹ Therefore, the LOSC could be interpreted in the light of a more contemporary legal meaning – also including slavery-like practices – and not only in the light of the meaning when the LOSC was drafted. Moreover, the principle of

⁵⁹⁷ OHCHR, "Abolishing Slavery and Its Contemporary Forms", Report by David WEISSBRODT and Anti-Slavery International (2002), paras. 21-22, available online: <<http://www.ohchr.org/Documents/Publications/slaveryen.pdf>>.

⁵⁹⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331 [VCLT].

⁵⁹⁹ See for example: TESSIER, Kevin, "The New Slave Trade: The International Crisis of Immigrant Smuggling", 3 *Indiana Journal of Global Legal Studies* 261 (1995), 261-265.

effectiveness (*ut res magis valeat quam pereat*) entails that the interpreter of any treaty provision should aim at an interpretation which would give full effect to the provision concerned, *in casu* the interpretation that will most effectively suppress slave trade on the high seas. As slave trade in the traditional and strict sense is almost extinct, this provision can be characterized as quasi-desuetude or obsolete. PAPANASTAVRIDIS therefore concludes that – although he does not want *de jure* equate human trafficking to ‘slavery’ – trafficking of migrants could thus come within the purview of the boarding provision of Article 110(1)(b) LOSC through an evolutionary interpretation.⁶⁰⁰ MENEFFEE similarly argues that – read in the current expansive international context – it could be argued that the provisions in the LOSC cover more than classic chattel slavery.⁶⁰¹

This approach could meet pragmatic and contemporary needs of human beings under conditions akin to slavery. However, is there really such a need? First of all, victims trafficked internationally seem more likely to be moved individually or in small groups by scheduled international flights and/or by land rather than sea.⁶⁰² Secondly, trafficked persons often enter a country legally either on tourist visas or their own passports.⁶⁰³ Lastly, it is becoming increasingly common for a person to begin his/her journey by sea as a smuggled migrant, only to become trafficked upon arrival when forced or tricked into an exploitative situation.⁶⁰⁴ But maybe the most important argument against broadening the definition for the purpose of Article 110(1)(b), is that the participating States during both UNCLOS I and III were not equally open to it. For example, at the 1971 session of the Sea-Bed Committee, Malta proposed a working paper expanding the scope of Article 13 CHS by adding

⁶⁰⁰ PAPANASTAVRIDIS, Efthymios, “Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law”, 36 *Syracuse Journal of International Law and Commerce* 145 (2009), 164-178.

⁶⁰¹ MENEFFEE, Samuel P., “The Smuggling of Refugees by Sea: A Modern Day Maritime Slave Trade”, 2 *Regent Journal of International Law* 1 (2003), 22. See also: MENEFFEE, Samuel P., “The Maritime Slave Trade: A 21st Century Problem?”, 7 *ILSA Journal of International and Comparative Law* 495 (2001); MENEFFEE, Samuel P., “Revising our Laws on the Maritime Slave Trade”, 14 *Tulane Journal of International and Comparative Law* 421 (2006); DIAZ, Leticia M. & DUBNER, Barry H., “An Examination of the Evolution of Crimes at Sea and the Emergence of the Many Legal Regimes in Their Wake”, 34 *North Carolina Journal of International Law and Commercial Regulation* 521 (2009), 563-566.

⁶⁰² UNODC, “Trafficking of Migrants: Global Patterns” (April 2006), paras. 60-62, available online: <<http://www.unodc.org/documents/human-trafficking/HT-globalpatterns-en.pdf>>.

⁶⁰³ OBOKATA, Tom, “Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System”, 54 *International and Comparative Law Quarterly* 445 (2005), 448.

⁶⁰⁴ ECOSOC, “Smuggling and trafficking in persons and the protection of their human rights – Note by the Secretary-General”, *UN Doc. E/CN.4/Sub.2/2001/26* (5 July 2001), para.13, available online: <<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/89c9696a550ba4c1c1256aa200533af5?Opendocument>>.

references to the presence of “*slaves or persons in conditions akin to slavery in the vessel*”.⁶⁰⁵ However, this proposal was not accepted. The proposition to construe migrant trafficking within the meaning of the term ‘slavery’, does not find wide support.⁶⁰⁶ Therefore it cannot be used to exercise the right of visit.

3.4.3. Statelessness as a ground for applying the right of visit

The absence of vessel nationality in Article 110(1)(d) LOSC seems to be the most relevant ground for the interdiction of vessels with migrants on board.⁶⁰⁷ Interestingly, the 1958 High Seas Convention contains no similar provision. PFEIFER, the delegate of the German Federal Republic to the Geneva Conference commented that, under the 1958 Convention, “*ships could sail without flying a flag, without having a nationality and without being subject to the legislation of any State.*”⁶⁰⁸ However, the obligation to sail under the flag of a recognized State predates the 1958 Convention, which simply failed to codify the customary right to assert the right of visit against stateless vessels. The purpose of the right of visit *vis-à-vis* stateless ships lies in the premise that there is concern about having ships sailing on the high seas which are not subject to the jurisdiction of any State and, therefore, there is a risk that they do not comply with any generally accepted international regulations to ensure the minimum public order at

⁶⁰⁵ UNGA, “Commentary on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction – Working Paper: Draft Ocean Space Treaty”, *UN Doc. A/AC.138/53*, Art. 15 (23 August 1971) (submitted by Malta), reprinted in *Sea Bed Committee Report 105* (1971), 123. See also: NORDQUIST, Myron H., (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff, 1985-2003), Vol. III, para. 99.3.

⁶⁰⁶ HINRICHS, Ximena, “Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective”, 36 *Revue belge de droit international* 413 (2003), 415; BASTID-BURDEAU, Geneviève, “Migrations clandestines et droit de la mer”, in COUSSIRAT-COUSTÈRE, Vincent (Ed.), *La mer et son droit : mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Paris: Editions A. Pedone, 2003), 59; RONZITTI, Natalino, “Coastal State Jurisdiction over Refugees and Migrants at Sea”, in ANDO, Niseku, MCWHINNEY, Edward & WOLFRUM, Rüdiger (Eds.), *Liber Amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, 2002), Vol. II, 1274.

⁶⁰⁷ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard and MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 130; GOODWIN-GILL, Guy S. & MCADAM, Jane, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed. 2007), 272; PALLIS, Mark, “Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes”, 14 *International Journal of Refugee Law* 329 (2002), 350-353; and PASTAVRIDIS, Efthymios, “Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law”, 36 *Syracuse Journal of International Law and Commerce* 145 (2009), 159.

⁶⁰⁸ Quoted in MEIERS, Herbert, *The Nationality of Ships* (The Hague: Martinus Nijhoff, 1967), 310 (statement of PFEIFFER, Delegate of the Federal Republic of Germany).

sea.⁶⁰⁹ In this regard, the ILC emphasized the importance of ships sailing under the flag of a State: “The absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State.”⁶¹⁰

According to Article 91 LOSC, ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, formal registration of ships is not required in order to enjoy nationality since many States’ legal systems allow smaller vessels to fly their flag if owned by a national and only require vessels of a certain size to be formally registered.⁶¹¹ Consequently, not every unregistered vessel is at the same time stateless as States may regard such ships as having its nationality if they are owned by its nationals.⁶¹² Stateless vessels are those lacking any claim to nationality. Nevertheless, a ship which sails under the flags of two or more States may be assimilated to a ship without nationality.⁶¹³ As a result, not every migrant boat will be a stateless vessel *ipso facto*. There are three ways in customary international law by which a vessel can establish nationality: (1) flying a flag or national emblem, (2) producing registry papers, or (3) an oral claim by the head of the vessel that the asserted state does not deny.⁶¹⁴ BARNES refers to the case of *United States v. Maynard* (1988) to determine how the status is to be established at an operational level.⁶¹⁵ In this case it was held that the test of statelessness can be satisfied in two ways. First, when a vessel makes a

⁶⁰⁹ PAPASTAVRIDIS, Efthymios, “Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law”, 36 *Syracuse Journal of International Law and Commerce* 145 (2009), 161-162 and SOHN, Louis B., “International Law of the Sea and Human Rights Issues”, in CLINGAN, Thomas A. (Ed.), *The Law of the Sea: What Lies Ahead?* (Honolulu: University of Hawaii, 1988), 58.

⁶¹⁰ ILC, “Report of the International Law Commission covering the work of its eight session”, *UN Doc. A/3159* (1956), 2 *Yearbook of the International Law Commission* 253 (1956), Commentary on its Article 30, 279, available online:

<http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1956_v2_e.pdf>.

⁶¹¹ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 16; LOWE, Alan V. & CHURCHILL, Robin, “The International Tribunal for the Law of the Sea: Survey for 2001”, 17 *International Journal of Marine and Coastal Law* 463 (2002), 474-475.

⁶¹² MCDORMAN, Ted L., “Stateless Fishing Vessels, International Law and the U.N. High Seas Fisheries Conference”, 25 *Journal of Maritime Law & Commerce* 531 (1994), 532-533.

⁶¹³ LOSC, Art. 92(2).

⁶¹⁴ ANDERSON, Andrew W., “Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law”, 13 *Journal of Maritime Law & Commerce* 323 (1982), 341.

⁶¹⁵ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 130.

claim of nationality which is denied by the flag State. Second, when the shipmaster fails to make a claim of nationality upon request.⁶¹⁶

The case of the *M/V So San* is a recent example of statelessness offering a legal basis for exercising the right of visit. In 2002, two Spanish Navy vessels boarded and searched the cargo ship on the high seas, 600 miles off the coast of Yemen as there were concerns about the nationality of the *M/V So San*. The Spanish Navy justified its boarding of the vessel on grounds that it was not flying a flag and its national markings were obscured by paint.⁶¹⁷

3.5. Seizure

3.5.1. Seizure on the high seas

The right of visit does not automatically imply the right to seize a ship and arrest the persons on board. For example, in the case of piracy on the high seas, Article 110(1)(a) LOSC allows warships – or any other duly authorized ships – to exercise the right of visit when there is reasonable ground for suspecting that a ship is engaged in piracy. However, Article 105 LOSC explicitly allows for the seizure of a piracy ship. Also, where a flag State consents with a State seeking to interdict its vessel, such permission does not always constitute a full waiver of flag State jurisdiction. Permission to board seldom automatically includes permission to seize.

3.5.2. Seizure of stateless vessels – No nexus required

Even if certain vessels with migrants on board could be regarded as stateless vessels and other States thus possess the right of visit, does this mean that the boarding States may also seize these vessels and subject them to their laws? The LOSC is silent on this question. Ship-users do not commit unlawful acts solely because they are not under the authority of a

⁶¹⁶ *United States v. Maynard*, 888 F.2d 918, 923 (1989).

⁶¹⁷ BYERS, Michael, “Policing the High Seas: The Proliferation Security Initiative”, 98 *American Journal of International Law* 526 (2004), 526-527; BROWN, Neil, “Jurisdictional Problems relating to Non-Flag State Boarding of Suspect Ships in International Waters: A Practitioner’s Observations”, in SYMMONS, Clive R. (Ed.), *Selected Contemporary Issues in the Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2011), 69-82, 78.

particular State.⁶¹⁸ Nevertheless, stateless vessels may suffer extraordinary penalties which are being justified by the danger that these vessels pose to the international regime of the high seas. Stateless vessels *ipso facto* lack a flag State competent to seek redress on its behalf and are, therefore, vulnerable to the exercise of jurisdiction by any State. Therefore, these ships are almost completely without protection.⁶¹⁹ The boarding State is substituting for a flag State in ensuring that such vessels abide by international regulations,⁶²⁰ otherwise ships without nationality would be immune from interference on the high seas.⁶²¹ Therefore, a boarding State may take enforcement measures based on its own legal provisions as there is no rule of international law that forbids this.⁶²²

This line of reasoning is supported by a number of judicial pronouncements concerning stateless vessels, either in general or specifically with regard to illegal immigration. In the case *United States v. Marino-Garcia* (1982) it was held that international law permits any nation to subject stateless vessels on the high seas to its jurisdiction as this does not result in impermissible interference with another sovereign nation's affairs.⁶²³ Pursuant to this approach no proof is needed of a nexus between the stateless vessel and the State seeking to effectuate jurisdiction. Jurisdiction exists solely as a consequence of the vessel's status as stateless. Such a status makes the vessel subject to action by all nations proscribing certain activities aboard stateless vessels and subjects the persons aboard to prosecution for

⁶¹⁸ MEIJERS, Herbert, *The Nationality of Ships* (The Hague: Martinus Nijhoff, 1967), 323.

⁶¹⁹ MCDUGAL, Myres S. & BURKE, William T., *The Public Order of the Oceans* (Yale University Press: New Haven and London, 1962), 1084-1085.

⁶²⁰ NORDQUIST, Myron H. (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff, 1985-2003), Vol. III, para. 94.1.

⁶²¹ BROWNLIE, Ian, *Principles of Public International Law* (New York: Oxford University Press, 7th ed. 2008), 235. See generally: ANDERSON, Andrew W., "Jurisdiction over Stateless Vessels on the High Seas: An Appraisal under Domestic and International Law", 13 *Journal of Maritime Law & Commerce* 335 (1982); WATTS, Arthur D., "The Protection of Merchant Vessels", 33 *British Yearbook of International Law* 67 (1957).

⁶²² MEIJERS, Herbert, *The Nationality of Ships* (The Hague: Martinus Nijhoff, 1967), 320-321; SYRIGOS, Angelos M.S., "Developments on the Interdiction of Vessels on the High Seas", in STRATI, Anastasia, GAVOUNELI, Maria & SKOURTOS, Nikolaos (Eds.), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Leiden: Martinus Nijhoff Publishers, 2006), 157-158. When discussing enforcement jurisdiction over illicit activities on the high seas, PAPANASTAVRIDIS makes a distinction between jurisdiction *in rem* – against the vessel and/or cargo – and jurisdiction *in personam*, namely to arrest, prosecute and try foreign persons. To be able to exercise this *in personam* jurisdiction, there should definitely be a jurisdictional nexus.⁶²² See: PAPANASTAVRIDIS, Efthymios, "Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas", 25 *International Journal of Marine and Coastal Law* 569 (2010), 584-585.

⁶²³ *United States v. Marino-Garcia*, 679 F.2d 1373, 1383 (11th Cir. 1982), cited in GILMORE, William C., "Narcotics Interdiction at Sea: UK-US Cooperation", 13 *Marine Policy* 218 (1989), 228. See also: *United States v. Cortes*, 588 F.2d 106, 110 (1979).

violating the proscriptions. The Court in *United States v. Juda* (1995) disposed entirely of the nexus requirement where US law had been applied to persons on stateless vessels. The Court emphasized that its conclusion was “fully supported by international law principles, which aid us in defining the jurisdictional reach of extraterritorial legislation,” and which provide that “any nation may assert jurisdiction over stateless vessels.”⁶²⁴ Individuals on board stateless vessels take the chance that any State might exercise jurisdiction over their illegal activities.⁶²⁵ *United States v. Caicedo* (1995) reaffirmed in strong terms this reliance on international law, explaining that “[t]he radically different treatment afforded to stateless vessels as a matter of international law convinces us that there is nothing arbitrary or fundamentally unfair about prosecuting” defendants with no nexus to the United States. Therefore, in the case of stateless vessels, United States prescriptive, enforcement and judicial jurisdictional authority does not need to be grounded in territorial, protective or universal jurisdiction.⁶²⁶ A recent example is the case *United States v. Matos-Luchi* (2010), where the Court of Appeals for the First Circuit decided that since the vessel failed to meet any of the criteria that would classify it as possessing nationality, the US Coast Guard had authority to seize the vessel and subject the suspected traffickers to criminal prosecution in the United States.⁶²⁷

Nevertheless, the general international principle that criminal activity aboard stateless vessels is subject to the jurisdiction of all States might not fulfil one of the notice elements, namely notice of what is illegal. Consider the case of the high-stakes Australian poker players sailing on the high seas on a stateless vessel: would the application of a US anti-gambling statute to them comply with due process simply by virtue of the vessel’s status? The answer should be no, since gambling is not a generally recognized crime.⁶²⁸ In *United States v. Gonzalez*, jurisdiction was determined to exist in cases of acts “generally recognized as a crime under the laws of States that have reasonably developed legal systems.”⁶²⁹ This theory of generally recognized crime was used in *Martinez-Hidalgo* to reject the need for a nexus in applying US law to drug smugglers on the high seas consistent with due process on the

⁶²⁴ *United States v. Juda*, 46 F.3d 961, 9th Cir. (1995), 67.

⁶²⁵ *United States v. Juda*, 46 F.3d 961, 9th Cir. (1995), 67.

⁶²⁶ *United States v. Caicedo*, 47 F.3d 370, 9th Cir. (1995), 372-373.

⁶²⁷ *United States v. Matos-Luchi*, 627 F.3d, 1st Cir.1 (2010), 6-7.

⁶²⁸ See: COLANGELO, Anthony J., “Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law”, 48 *Harvard International Law Journal* 121 (2007), 171.

⁶²⁹ *United States v. Gonzalez*, 776 F. 2d 931 139 (1985), 218.

grounds that “[i]nasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is ‘fundamentally unfair’ for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.”⁶³⁰ Asylum seekers may breach certain immigration law provisions of the State they flee to, thus facing the possibility of criminal sanction. However, PALLIS argues that seeking asylum is not an act ‘generally recognized as a crime’.⁶³¹

Although seeking asylum is not a crime, illegal migration can certainly be regarded by States as constituting a crime. For example, in the English case of *Naim Molvan v. Attorney-General for Palestine* (1948)⁶³² a British destroyer seized the stateless motor vessel *Asya* carrying illegal immigrants on the high seas and escorted the vessel to Haifa, where it was confiscated. Naim MOLVAN, the ship owner, brought an action against the seizure and confiscation of the ship. The United Kingdom Privy Council referred to a passage from Oppenheim’s, *International Law*, which says that the freedom of navigation on the high seas is a freedom of ships which fly and are entitled to fly the flag of a State.⁶³³ The Privy Council observed: “[T]he freedom of the open sea, whatever those words may connote, is a freedom of ships which fly, and are entitled to fly, the flag of a State which is within the comity of nations. The *Asya* did not satisfy these elementary conditions. [...] Having no usual ship’s papers which would serve to identify her, flying the Turkish flag, to which there was no evidence she had a right, hauling it down on the arrival of a boarding party and later hoisting a flag which was not the flag of any State in being, the *Asya* could not claim the protection of any State nor could any State claim that any principle of international law was broken by her seizure.”⁶³⁴ Similarly, in the *Pamuk and others Case* (2001), the stateless vessel ground was considered by an Italian court as sufficient for the arrest and trial of illegal migrants on the high seas bound for the coast of Italy.⁶³⁵ Italian custom officers had arrested on the high seas a stateless vessel transporting illegal immigrants who had been

⁶³⁰ *United States v. Martinez Hidalgo*, 993 F. 2d 1052 (1993), 1056.

⁶³¹ PALLIS, Mark, “Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes”, 14 *International Journal of Refugee Law* 329 (2002), 352.

⁶³² *Naim Molvan v. Attorney General for Palestine*, App. Cas. 351 P.C. (1948).

⁶³³ OPPENHEIM, Lassa, *International Law: A Treatise* (London: Longmans, Green & Co., 6th ed. 1947 by LAUTERPACHT, Hersch), Vol. I, 546.

⁶³⁴ *Naim Molvan v. Attorney General for Palestine*, App. Cas. 351 P.C. (1948), 369-70.

⁶³⁵ *Pamuk e Altri*, Tribunale di Crotone, 27 September 2001, 84 *Rivista Di Diritto Internazionale* 1155 (2001). See generally: TREVISANUT, Seline, “Droit de la Mer in Chronique de jurisprudence italienne”, 133 *Journal Du Droit International* 1035 (2006).

transferred, on the high seas, to another vessel directed to the Italian coast and had subsequently entered the Italian territorial waters.

3.5.3 Seizure of stateless vessels – Further nexus required

However, according to another strand of doctrine, some jurisdictional nexus or permissive rule is required to justify seizure of a stateless vessel.⁶³⁶ Their arguments are mainly based upon the fact that the LOSC is silent on the question of the seizure of stateless vessels contrary to, for example, the seizure of a pirate vessel expressly dealt with in Article 105 LOSC. CHURCHILL & LOWE argue that: “*Ships without nationality are in a curious position. Their statelessness’ will not, of itself, entitle each and every State to assert jurisdiction over them for there is not in every case any recognized basis upon which jurisdiction could be asserted over stateless ships on the high seas ... there is a need for some jurisdictional nexus in order that a State may extend its laws to those on board a stateless ship and enforce the laws against them.*”⁶³⁷

But even if a further jurisdictional nexus or permissive rule is necessary to seize a stateless vessel, in the case of migrant vessels the law offers several possibilities. Firstly, the protective principle (or security principle) allows States to exercise prescriptive and enforcement jurisdiction over aliens for acts done abroad which affect the security of the State. While all the elements of the crime occur outside the territory of the State, jurisdiction exists because these actions have a potentially adverse effect upon security or governmental interests.⁶³⁸ It is a concept that takes in a variety of political offences, but also currency, immigration and economic offences are frequently punished.⁶³⁹ It is true that, based on the protective principle, it is questionable whether a State can exercise enforcement jurisdiction to seize a vessel on the high seas based on the mere fact that the vessel committed an

⁶³⁶ See, for example, BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 131; GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 17; PAPASTAVRIDIS, Efthymios, “Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law”, 36 *Syracuse Journal of International Law and Commerce* 145 (2009), 162.

⁶³⁷ CHURCHILL, Robin & LOWE, Alan V., *The Law of the Sea* (Manchester: Manchester University Press, 3rd ed. 1999), 214.

⁶³⁸ See: *United States v. Pizarusso*, 388 F.2d 8, 10, 2d Cir., cert. denied, 392 U.S. 936 (1968), 10-11.

⁶³⁹ BROWNIE, Ian, *Principles of Public International Law* (New York: Oxford University Press, 7th ed. 2008), 304-305.

immigration offence. Arguably, an immigration offence alone does not seem to constitute a threat to the security of a State.⁶⁴⁰ As stated in the case *United States v. James-Robinson* (1981): “The question before the Court, however, is whether the stipulated facts could possibly show an effect on our sovereignty sufficient to allow protective principle jurisdiction. That boils down to whether, as a matter of law, the presence of foreign crewmen on a stateless ship carrying marijuana on the high seas 400 miles from the United States by definition represents a threat to our national security or to our government’s functions. It does not. More than that must be alleged and proven.”⁶⁴¹ However, when the vessel that commits an immigration offence is also stateless, and hundreds of these vessels try to reach Europe by sea every year, it is highly likely that this can constitute a threat to the security of a State. As GUILFOYLE writes: “[A]s irregular migration by sea increases worldwide there appears a growing perception among ‘point of entry’ states that they are unable to cope with the numbers arriving and preventative maritime patrols are a legally permissible response.”⁶⁴²

Second, in *United States v. Davis* (1990), the Court applied the territorial principle and more specifically the objective territorial principle according to which jurisdiction is founded when any essential constituent element of a crime is consummated on State territory.⁶⁴³ It was decided that: “[w]here an attempted transaction is aimed at causing criminal acts within the United States, there is sufficient basis for the United States to exercise its jurisdiction.”⁶⁴⁴ Other US drug cases similarly have relied upon such a territorial link to uphold the application of US law to conduct on the high seas where it ‘was likely to have effects in the United States’.⁶⁴⁵ Therefore, in US law an actual effect within the State is required under the objective territorial principle. When the ship with drugs is bound ultimately for the United States, a sufficient nexus exists. The same reasoning could be made for migrant vessels. Also

⁶⁴⁰ PAPANASTAVRIDIS, Efthymios, “Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law”, 36 *Syracuse Journal of International Law and Commerce* 145 (2009), 195.

⁶⁴¹ *United States v. James-Robinson*, 515 F.Supp. 1340, 1344 n.6, S.D. Fla. (1981), 1346.

⁶⁴² GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 225.

⁶⁴³ BROWNLIE, Ian, *Principles of Public International Law* (New York: Oxford University Press, 7th ed. 2008), 301.

⁶⁴⁴ *United States v. Davis*, 905 F.2d 245, 249, 1990 AMC 2289, 9th Cir. 2293 (1990), 249 (quoting *United States v. Peterson*, 812 F.2d 486, 9th Cir. (1987), 493).

⁶⁴⁵ *United States v. Khan*, 35 F.2d 426, 9th Cir. (1994), 429-30. See also: *United States v. Medjuck*, 156 F.3d 916, 9th Cir. (1998), 919; *United States v. Klimavicius-Vilorio*, 144 F.3d 1249, 9th Cir. (1998), 1257-1258; *United States v. Aikins*, 946 F.2d 608, 9th Cir. (1990), 614.

MCDUGAL & BURKE hint at a nexus in cases of prevention of infringement of a State's laws and regulations within its territory or territorial sea.⁶⁴⁶

3.6. Conclusion

States are not to interfere with foreign-flagged vessels pursuant to the freedom of the high seas.⁶⁴⁷ It must not be viewed as an absolute right possessed by a vessel, but rather as a continuum of freedoms available in certain marine areas.⁶⁴⁸ From the principle of the freedom of the high seas flows the customary principle of exclusivity of flag State jurisdiction.⁶⁴⁹ However, the flag State may authorize the requesting State, *inter alia*, to board and to search the vessel. As there is no rule in international law expressly authorizing the master of a vessel to grant consent to board his vessel, the flag State itself has to give its consent. The widespread use of flags of convenience can have negative effects on the ability of States to obtain flag State consent during exigent situations. Also, the ability to request consent from the flag State can be impeded in situations of political upheavals or government instability. However, a ship – flying the flag of a State not exercising effective control over its vessels – will not be considered to be a stateless vessel.

The right of visit is an exception to the general principle of the exclusive jurisdiction of the flag State over ships flying its flag, set out in Article 92 LOSC. Article 110 LOSC stipulates that the right of visit is only justified when there are reasonable grounds for suspecting that the ship is engaged in piracy, slave trade, unauthorized broadcasting or when the ship is without nationality or though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.⁶⁵⁰ States can conclude treaties which confer the right of visit on the high seas to the respective Parties.⁶⁵¹

⁶⁴⁶ MCDUGAL, Myres S. & BURKE, William T., *The Public Order of the Oceans* (Yale University Press: New Haven and London, 1962), 868.

⁶⁴⁷ LOSC, Art. 87.

⁶⁴⁸ KRAJEWSKI, Jason M., “Out of Sight, Out of Mind? A Case for Long Range Identification and Tracking of Vessels on the High Seas”, *56 Naval Law Review* 219 (2008), 219 *et seq.*

⁶⁴⁹ PCIJ, S.S. Lotus Case, *France v. Turkey*, 7 September 1927, *PCIJ Ser. A No. 10* (1927), 25.

⁶⁵⁰ LOSC, Art. 110.

⁶⁵¹ LOSC, Art. 110(1).

The proposition to construe migrant trafficking within the meaning of the term ‘slavery’, does not find wide support.⁶⁵² As a result, it cannot be used to exercise the right of visit. The absence of vessel nationality in Article 110(1)(d) LOSC seems to be the most relevant ground for the interdiction of vessels with migrants on board.⁶⁵³ Nevertheless, not every migrant boat will be a stateless vessel *ipso facto*. There are three ways in customary international law by which a vessel can establish nationality: (1) flying a flag or national emblem, (2) producing registry papers, or (3) an oral claim by the head of the vessel that the asserted state does not deny.⁶⁵⁴

The right of visit does not automatically imply the right to seize a ship and arrest the persons on board. However, a boarding State may take enforcement measures *vis-à-vis* stateless vessels based on its own legal provisions as there is no rule of international law that forbids this.⁶⁵⁵ This line of reasoning is supported by a number of judicial pronouncements concerning stateless vessels, either in general or specifically with regard to illegal immigration. Even if a further jurisdictional nexus or permissive rule would be necessary to seize a stateless vessel, in the case of migrant vessels the law offers several possibilities, such as the protective principle (or security principle) and objective territorial principle.

⁶⁵² HINRICHS, Ximena, “Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective”, 36 *Revue belge de droit international* 413 (2003), 415; BASTID-BURDEAU, Geneviève, “Migrations clandestines et droit de la mer”, in COUSSIRAT-COUSTÈRE, Vincent (Ed.), *La mer et son droit : mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Paris: Editions A. Pedone, 2003), 59; RONZITTI, Natalino, “Coastal State Jurisdiction over Refugees and Migrants at Sea”, in ANDO, Niseku, MCWHINNEY, Edward & WOLFRUM, Rüdiger (Eds.), *Liber Amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, 2002), Vol. II, 1274.

⁶⁵³ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard and MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 130; GOODWIN-GILL, Guy S. & MCADAM, Jane, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed. 2007), 272; PALLIS, Mark, “Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes”, 14 *International Journal of Refugee Law* 329 (2002), 350-353; and PAPASTAVRIDIS, Efthymios, “Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law”, 36 *Syracuse Journal of International Law and Commerce* 145 (2009), 159.

⁶⁵⁴ ANDERSON, Andrew W., “Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law”, 13 *Journal of Maritime Law & Commerce* 323 (1982), 341.

⁶⁵⁵ MEIJERS, Herbert, *The Nationality of Ships* (The Hague: Martinus Nijhoff, 1967), 320-321; SYRIGOS, Angelos M.S., “Developments on the Interdiction of Vessels on the High Seas”, in STRATI, Anastasia, GAVOUNELLI, Maria & SKOURTOS, Nikolaos (Eds.), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Leiden: Martinus Nijhoff Publishers, 2006), 157-158. When discussing enforcement jurisdiction over illicit activities on the high seas, PAPASTAVRIDIS makes a distinction between jurisdiction *in rem* – against the vessel and/or cargo – and jurisdiction *in personam*, namely to arrest, prosecute and try foreign persons. To be able to exercise this *in personam* jurisdiction, there should definitely be a jurisdictional nexus. See: PAPASTAVRIDIS, Efthymios, “Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas”, 25 *International Journal of Marine and Coastal Law* 569 (2010), 584-585.

4. Maritime interception in case of migrant smuggling

4.1. The problem of migrant smuggling

Smuggling of migrants by sea takes place in four main known areas: across the Mediterranean and the Atlantic into Europe, across the Red Sea and the Gulf of Aden into Yemen, from Central America towards the United States and from Asia to Australia.⁶⁵⁶ Although the proportion of migration that occurs by use of smuggling by sea must be put into perspective, it is probably the riskiest *modus operandi*. Although more migrant smuggling occurs by land and by air, more deaths occur by sea. Yet, sea smuggling can be considered the predominant means of smuggling when considered from the perspective of particular categories of smuggled migrants. It involves for example a much lower risk of detection than land and air routes.⁶⁵⁷ Moreover, in some parts of the world, for some people it may be the only means of travel available. For example, economically disempowered persons at the low-cost sector of the smuggling market may undertake risky sea journeys because of the lack of resources to afford safer methods of travel. Therefore, while smuggling by sea accounts only for a small portion of overall migrant smuggling around the world, some States are disproportionately being affected. Added to this is the fact that the particular dangers of irregular travel at sea make it a priority concern for response.⁶⁵⁸

Migrant smuggling itself is considered to be a 'crime against maritime security'.⁶⁵⁹ For example, the money earned may be used for other criminal activities, such as drug traffic and arms trade.⁶⁶⁰ Some States try to reduce migrant smuggling purely through national

⁶⁵⁶ UNODC, "Smuggling of Migrants by Sea", Issue Paper (2011), 12-19, available online: <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf>.

⁶⁵⁷ SCHLOENHARDT, Andreas, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Leiden: Martinus Nijhoff Publishers, 2003), 138.

⁶⁵⁸ UNODC, "Smuggling of Migrants by Sea", Issue Paper (2011), 1-12, available online: <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf>.

⁶⁵⁹ On maritime security at sea, see: KLEIN, Natalie, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011). On migrant smuggling by sea as a security problem, see: MALLIA, Patricia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (The Hague: Martinus Nijhoff Publishers, 2009).

⁶⁶⁰ IOM, "Organized Crime moves into Migrant Trafficking", *Trafficking in Migrants* No. 11 (June 1996), available online: <http://www.caim.com.pt/cms/docs/prv/docs/DPR46000c5313907_1.pdf>.

measures, even though the phenomenon is transnational. Just as the crimes of terrorism, arms smuggling, piracy and illicit trafficking in narcotic drugs, migrant smuggling involves not only a single nation, but rather the whole community of States.⁶⁶¹ Cooperation among States is therefore crucial for dealing with the problem. As a result, the transnational nature of migrant smuggling does not seem to allow for a purely national or unilateral solution. During smuggling operations, several countries can be affected, for example the State of origin, the transit State, the flag State (when being transported by sea) and the State of destination.⁶⁶² As States realized that the problem was international in nature, several initiatives were taken on both the international and the regional level to combat smuggling.

4.2. *The IMO interim measures*

In October 1997, Italy submitted a proposal to the IMO for an international convention to combat the smuggling of illegal migrants by sea. This initiative resulted from a considerable increase in the phenomenon in the Adriatic Sea during previous years.⁶⁶³ In view of the importance of the problem, a significant number of States supported this proposal, although they also expressed several doubts about its inclusion in the work of the IMO.⁶⁶⁴ First, many delegations questioned whether the IMO was the appropriate body to prepare a convention involving international criminal law. Second, the IMO could only deal with smuggling by sea, not by air or by land. Lastly, it was upheld that it might cause overlaps, confusion and other problems, as the matter had also been taken up by other bodies of the UN. In September 1997, Austria's Permanent Representative to the UN had already addressed a letter to the UN Secretary-General, presenting a draft 'International Convention Against the Smuggling of Illegal Migrants'. This draft was submitted at the 52nd Session of the UN General Assembly.⁶⁶⁵

⁶⁶¹ KIRCHNER, Andree & DI PEPE, Lorenzo Schiano, "International Attempts to Conclude a Convention to Combat Illegal Migration", 10 *International Journal of Refugee Law*, 662 (1998), 662.

⁶⁶² UNGA, "Measures to combat alien-smuggling - Report of the Secretary-General", *UN Doc. A/49/350* (30 August 1994), 3, para. 4.

⁶⁶³ KIRCHNER, Andree & DI PEPE, Lorenzo Schiano, "International Attempts to Conclude a Convention to Combat Illegal Migration", 10 *International Journal of Refugee Law*, 662 (1998), 665.

⁶⁶⁴ LEG, "Draft report of the legal committee on the work of its seventy-sixth session", *IMO Doc. LEG 76/WP.3* (16 October 1997).

⁶⁶⁵ UNGA, "Letter dated 16th September 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary General", Annex: "Draft international convention against the smuggling of illegal migrants", *UN Doc. A/52/357* (17 September 1997).

Consequently, the IMO General Assembly declared itself not competent in the matter, but the appropriate IMO bodies were invited in Resolution A.867(20) of 27 November 1997 to consider the issue of trafficking and transport of migrants by sea.⁶⁶⁶ To this end, the MSC established an *ad hoc* correspondence group to further develop the provisional elements on combating unsafe practices associated with the trafficking or transport of illegal migrants by sea.⁶⁶⁷ In 2001, an IMO Circular was approved on interim measures for combating unsafe practices associated with the trafficking or transport of illegal migrants by sea.⁶⁶⁸ MSC also implemented a biannual reporting procedure to keep track of incidents of unsafe practices associated with the trafficking or transport of illegal migrants by sea. To this end, governments and international organizations were urged to report promptly such practices of which they became aware. Nonetheless, not all States are using this procedure. For the moment, only Italy, Turkey and Greece are making the reports according to the official format.⁶⁶⁹

The IMO measures are intended to achieve the following objectives: (1) adequate protection of human life at sea; (2) compliance with the relevant provisions of safe navigation; and (3) prompt and efficient international co-operation for the purpose of attaining the above two objectives.⁶⁷⁰ Although the IMO circular is of a recommendatory nature and is thus not binding, the relevant provisions are also reflected in Chapter II ‘Smuggling of Migrants by Sea’ of the Protocol Against the Smuggling of Migrants by Land, Sea, and Air (Smuggling Protocol).⁶⁷¹ Under the Smuggling Protocol, the rather technical criterion of ‘unsafe practices associated with the trafficking or transport of illegal migrants by

⁶⁶⁶ IMO, “Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants at Sea”, Resolution A.867(20) (5 December 1997), para. 6.

⁶⁶⁷ MSC, “Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea – Report of the Correspondence Group (Submitted by the United States)”, *IMO Doc.* MSC 70/17/Rev.1 (22 October 1998).

⁶⁶⁸ MSC, “Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea”, *IMO Doc.* MSC.1/Circ. 896/Rev. I (12 June 2001).

⁶⁶⁹ See for example: MSC, “Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea – First Biannual Report”, *IMO Doc.* MSC.3/Circ.18 (18 February 2010).

⁶⁷⁰ MSC, “Combatting unsafe practices associated with the trafficking or transport of migrants by sea”, Annex: “Draft Guidelines for the prevention and suppression of unsafe practices associated with the trafficking or transport of migrants by sea”, *IMO Doc.* MSC 69/21/2 (29 December 1997), 2, para. 8.

⁶⁷¹ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004), 2241 *UNTS* 507 [Smuggling Protocol].

sea', is being replaced by the concept of 'smuggling of migrants', an illegal activity and moreover a crime.⁶⁷² Safety concerns make thus place for security considerations.

4.3. The UN Smuggling Protocol

4.3.1. Defining migrant smuggling

In Resolution 52/85 of 12 December 1997, the UN General Assembly decided to establish an inter-sessional open-ended intergovernmental group of experts to prepare a draft of a possible comprehensive international convention against organized transnational crime.⁶⁷³ As a result, both the Protocol to Prevent and Suppress Trafficking in Persons, Especially Women and Children⁶⁷⁴ (Trafficking Protocol) and the Smuggling Protocol were attached to UNTOC in 2000.⁶⁷⁵ Thus, both migrant trafficking and smuggling are regarded as a form of organized crime. The Protocols give a definition of human trafficking and human smuggling under international law. The crime of trafficking is defined as forcing clear victims into activities against their will to which they did not consent or understand⁶⁷⁶, while smuggling is regarded as an explicit and mutually beneficial arrangement between two parties involving illegal entry (crossing borders without complying with the necessary requirements for legal entry into the receiving State) into a given country.⁶⁷⁷

Therefore, the mere transport of migrants is excluded from the scope of the Protocol. Also stowaways do not do not fall under the application of the Protocol. A stowaway is “[a] person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the ship owner or the master or any other responsible person and who is detected on board

⁶⁷² Smuggling Protocol, Preamble. For an extensive comparison between the IMO Circular provisions and the Smuggling Protocol provisions concerning smuggling by sea, see: HINRICHS, Ximena, “Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective”, 36 *Revue belge de droit international* 413 (2003).

⁶⁷³ UNGA, “Follow-Up to Naples Political Declaration and Global Action Plan Against Organized Transnational Crime”, *UN Doc. A/RES/52/85* (12 December 1997).

⁶⁷⁴ Protocol to Prevent and Suppress Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 31 May 2004), 2237 *UNTS* 319 [Trafficking Protocol].

⁶⁷⁵ United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003), 2225 *UNTS* 209 [UNTOC].

⁶⁷⁶ Trafficking Protocol, Art. 3(a).

⁶⁷⁷ Smuggling Protocol, Artt. 3(a) and 3(b).

the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities."⁶⁷⁸ In this case, the vessel as a unit is not engaged in an illicit activity.⁶⁷⁹

While we will only deal with the crime of migrant smuggling, trafficking and smuggling are related and sometimes even overlap.⁶⁸⁰ Nevertheless, they are regulated separately in international law. For example, a person who was smuggled into a country could end up in a situation of debt bondage and therefore may be considered a victim of human trafficking instead of smuggling. Consequently, the examination of such circumstances must go beyond a mere consideration of the initial purpose of contact between the victim and the smuggler to inquire whether exploitation is taking place at the point of destination.⁶⁸¹ As trafficking however requires attention to be given to post-arrival conduct – in order to prove the element of coercion – enforcement action may well not be taken in maritime zones or at the border.⁶⁸² Therefore, this paper is limited to analysing the legal framework that deals with smuggling.

4.3.2. Criminalizing migrant smuggling

The Smuggling Protocol requires States to take all necessary measures within their domestic legal systems to criminalize the behaviour of parties involved in the smuggling of migrants.⁶⁸³ In doing so, the Protocol aims to achieve a sense of harmonization in States

⁶⁷⁸ Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967), 591 *UNTS* 265, as amended [FAL Convention], Annex: Section 1 – Definitions and general provisions. See also: FAL, “Revised Guidelines on the Prevention of Access by Stowaways and the Allocation of Responsibilities to Seek the Successful Solution of Stowaway Cases”, FAL Resolution 11(37) (9 September 2011).

⁶⁷⁹ HINRICHS, Ximena, “Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective”, 36 *Revue belge de droit international* 413 (2003), 428.

⁶⁸⁰ UNHCR, “Refugee Protection and Migration Control: Perspectives from UNHCR and IOM”, Global Consultations on International Protection, *UN Doc. EC/GC/01/11* (31 May 2001), para. 9.

⁶⁸¹ See for example: OBOKATA, Tom, “Smuggling of Human beings from a Human Rights perspective: Obligations of Non-State and State Actors under International Human Rights Law”, 17 *International Journal of Refugee Law* 394 (2005); OBOKATA, Tom, “The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 152-153.

⁶⁸² MALLIA, Patricia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (The Hague: Martinus Nijhoff Publishers, 2009), 11.

⁶⁸³ Smuggling Protocol, Art. 6.

Parties' domestic law. Without such a comprehensive uniform approach, States would act inconsistently, perhaps making one State more attractive to the smuggler than the other. This would unfairly burden the attractive State.⁶⁸⁴ According to a report submitted to the Conference of Parties – which monitors the implementation of the UNTOC as well as the Trafficking and Smuggling Protocols – most State Parties either already had legislation, or have adopted legislation subsequent to the adoption of the Smuggling Protocol to criminalize the act of smuggling and related offences.⁶⁸⁵ Article 4 Smuggling Protocol limits the scope of application to the prevention, investigation and prosecution of offences that are transnational in nature and involve an organized criminal group. However, evidence of a link with a criminal group sometimes seems to be difficult to establish in case of smuggling by sea.⁶⁸⁶

Concerning the prosecution of migrant smugglers, Article 15(1) UNTOC states: “*Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences [...] when [t]he offence is committed on board a vessel that is flying the flag of that State Party [...] at the time that the offence is committed.*” This entails an obligation upon flag States to exercise jurisdiction over masters, officers and crew members in the service of their ships who are involved in the smuggling of migrants.⁶⁸⁷ Furthermore, a State Party **may** establish jurisdiction over any such offence when the offence is committed by or against a national of that State Party.⁶⁸⁸ Therefore, the flag State has been granted preferential jurisdiction, while the jurisdiction of the State of nationality is discretionary.⁶⁸⁹

⁶⁸⁴ BROLAN, Claire, “An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective”, 14 *International Journal of Refugee Law* 561 (2002), 594.

⁶⁸⁵ Second session of the Conference of the Parties to the United Nations Convention against Transnational organized Crime, “Implementation of the Protocol against Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime: Updated Information Based on Additional Responses received from States for the First Reporting Cycle”, *UN Doc. CTOC/COP/2005/4/Rev. 1* (8 August 2006), paras. 21–23 and 29–30.

⁶⁸⁶ MOMTAZ, Djamchid, “La lutte contre ‘l’introduction clandestine’ de migrants par mer”, 4 *Annuaire du droit de la mer* 49 (1999), 52.

⁶⁸⁷ See: MSC, “Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea”, *IMO Doc. MSC.1/Circ. 896/Rev. I* (12 June 2001), Annex para. 4(3).

⁶⁸⁸ UNTOC, Art. 15(2)

⁶⁸⁹ HINRICHS, Ximena, “Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective”, 36 *Revue belge de droit international* 413 (2003), 427.

4.3.3. Migrant smuggling by sea

4.3.3.1. Obligation to cooperate

Article 7 Smuggling Protocol stipulates that States must cooperate ‘to the fullest extent possible’ to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea. The *travaux préparatoires* indicate that the international law of the sea includes the LOSC as well as other relevant international instruments. Nevertheless, references to the LOSC do not prejudice or affect in any way the position of any State in relation to that Convention.⁶⁹⁰ The LOSC imposes a duty of cooperation on States with a view to repressing criminal activities. For example, Article 108(1) LOSC mentions the obligation to cooperate to suppress illicit traffic in narcotic drugs and psychotropic substances. With respect to this duty to cooperate, TREVES notes that it “[...] *ne font que confirmer le droit exclusif de l’Etat du pavillon. Celui-ci peut demander la coopération d’autres Etats au cas où un de ses navires est soupçonné de se livrer au trafic de stupéfiants ou de substances psychotropes, mais on ne mentionne pas la situation où un Etat différent de celui du pavillon demanderait la coopération de l’Etat don’t le navire est soupçonné.*”⁶⁹¹

A number of loopholes seriously impair the effectiveness of the duty to cooperate.⁶⁹² For example, the wordings of the obligation leaves it unclear as to the specific conduct required in fulfilment of that obligation. Although this duty to cooperate ‘to the fullest possible extent’ may seem a strong obligation, the international community has not agreed that it has any

⁶⁹⁰ UNGA, “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime”, *UN Doc. A/55/383.Add.1* (3 November 2000), para. 98.

⁶⁹¹ TREVES, Tullio, “Intervention en haute mer et navires étrangers”, 41 *Annuaire français de droit international* 651 (1995), 653.

⁶⁹² DELBRÜCK, Jost, “The International Obligation to Cooperate – An Empty Shell or a Hard Law Principle of International Law? – A Critical Look at a Much Debated Paradigm of Modern International Law”, in HESTERMEYER, Holger P. *et al.* (Eds.), *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum* (Leiden: Martinus Nijhoff Publishers, 2012), 13-14; PINTO, Christopher W., “The Duty of Co-operation and the United Nations Convention on the Law of the Sea”, in BOS, Adriaan & SIBLESZ, Hugo (Eds.), *Realism in Law-Making – Essays on International Law in Honour of Willem Riphagen* (Dordrecht: Martinus Nijhoff Publishers, 1986), 1337-1338.

specific minimum content. Identifying a breach of a duty to cooperate will be notoriously difficult.⁶⁹³

4.3.3.2. Measures against non-flag State vessels

Article 8(2) of the Smuggling Protocol empowers a State Party that has reasonable grounds to suspect that a vessel – exercising the freedom of navigation and flying the flag of another State Party – is engaged in the smuggling of migrants by sea, may so notify the flag State and may request authorization to take appropriate measures. The term ‘reasonable grounds to suspect’ appears to exclude situations of mere suspicion, although it does not require actual knowledge of an offence.⁶⁹⁴ The flag State may authorize the requesting State, *inter alia* to board and to search the vessel. Furthermore, when evidence is found that the vessel is engaged in the smuggling of migrants by sea, the State can take appropriate measures as authorized by the flag State. This is consistent with the right of visit on the high seas enclosed in Article 110 LOSC. The right of visit entails the right to board the vessel and, more importantly, the right to search the vessel in circumstances of extreme suspicion.⁶⁹⁵ For example, flag State consent can allow for this right of visit to be exercised. Where the grounds for measures taken pursuant to Article 8 Smuggling Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.⁶⁹⁶ States are at least partially obliged to compensate even for their lawful conduct.⁶⁹⁷

It has to be noted that – within the international legal framework of the necessity of flag State consent for boarding and searching of its vessels on the high seas – significant change is occurring regarding the expectation and/or duty that a flag State will give consent to boarding and inspection of its vessels by other States. This is *inter alia* the case where the

⁶⁹³ GUILFOYLE, Douglas, “The Challenges in Fighting Piracy”, in VAN GINKEL, Bibi & VAN DER PUTTEN, Frans-Paul (Eds.), *The International Response to Somali Piracy* (Leiden: Martinus Nijhoff Publishers, 2010), 130.

⁶⁹⁴ HINRICHS, Ximena, “Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective”, 36 *Revue belge de droit international* 413 (2003), 431; O’CONNELL, Daniel P. (Ed. by SHEARER, Ivan A.), *The International Law of the Sea* (Oxford: Clarendon Press, 1982/1984), Vol. II, 1088 (on the equivalent term ‘good reason to believe’ that qualifies the right of hot pursuit).

⁶⁹⁵ LOSC, Art. 110.

⁶⁹⁶ Smuggling Protocol, Art. 9(2).

⁶⁹⁷ WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007), 122.

vessel is suspected of being engaged in or contributing to or transporting individuals or materials to terrorism.⁶⁹⁸ The 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Protocol) for example, stipulates that State Parties can directly consent to have vessels flying their flag – suspected of a terrorist offence – be boarded and inspected by other State Parties after notifying all State parties.⁶⁹⁹ Thus, flag State consent can be freely given when requested and there is no direct legal right to board and inspect a foreign flagged ship. Nevertheless, the 2005 SUA Protocol creates a certain expectation that where a suspect vessel is involved, the consent of the flag State will be forthcoming as a State Party is legally committed to the overall objectives of the Protocol, namely the suppression of unlawful acts against the safety of maritime navigation. The same reasoning could be made in case of migrant smuggling and flag State consent under the 2000 Smuggling Protocol.

The original language of Article 8(2) Smuggling Protocol is derived from Article 17(3) of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Drugs Convention)⁷⁰⁰ and from paragraph 12 of the IMO interim measures.⁷⁰¹ Presumably, Article 8(2) reflects a similar intent that these measures are ‘disjunctive’ – meaning that permission to board does not automatically include permission to seize the vessel – and sequential.⁷⁰² For example, in the case of the migrant smuggling vessel *F/V Jin Yinn*, Taiwan – being the flag State – gave its consent to the US Coast Guard to

⁶⁹⁸ MCDORMAN, Ted L., “Maritime Terrorism and the International Law of Boarding of Vessels at Sea: A Brief Assessment of the New Developments”, in CARON, David D. & SCHEIBER, Harry N. (Eds.), *The Oceans in the Nuclear Age – Legacies and Risks* (Leiden: Martinus Nijhoff Publishers, 2010), 262-263. See also: RAYFUSE, Rosemary, “Regulation and Enforcement in the Law of the Sea: Emerging Assertions of a Right to Non-flag State Enforcement in the High Seas Fisheries and Disarmament Contexts”, 24 *Australian Yearbook of International Law* 181 (2005).

⁶⁹⁹ 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 14 October 2005, entered into force 28 July 2010), *IMO Doc. LEG/CONF.15/21* [SUA Protocol], Art. 8 bis(5)(e).

⁷⁰⁰ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990), 95 *UNTS* 1582 [Drugs Convention].

⁷⁰¹ MSC, “Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea – Report of the Correspondence Group (Submitted by the United States)”, *IMO Doc. MSC 70/17/Rev.1* (22 October 1998), para. 11; MSC, “Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea”, *IMO Doc. MSC.1/Circ. 896/Rev. I* (12 June 2001), para. 12.

⁷⁰² GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 185.

board the *F/V Jin Yinn* on the high seas. However, Taiwan did not give further consent to the US to prosecute the smugglers aboard.⁷⁰³

As mentioned, some authors suggests that the master of a vessel can provide authorization for boarding by a warship. They argue that, although there is no codified rule of international law expressly authorizing the master of a vessel to grant consent to board his vessel, both longstanding maritime custom – derived from the master’s plenary authority over the ship in international waters – and State practice, support this view.⁷⁰⁴ However, it is difficult to understand how a master can give the necessary consent to make a boarding internationally legal. This is based on the fact that international law does not recognize the master of a vessel, whereas it does recognize the flag State. Next to this, it is arguable that boarding with the consent of the master is either an extension of the right of approach or of the right of visit. The clear difference of State opinion on the matter undermines the existence of a customary law principle.⁷⁰⁵ For example, during the NATO ‘Operation Active Endeavour’, British and Greek warships needed to know the flag State’s position about the boarding.⁷⁰⁶

4.3.3.3. Measures against stateless vessels

Many boats used by migrant smugglers are stateless vessels.⁷⁰⁷ Article 8(7) Smuggling Protocol stipulates that a State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality may board and

⁷⁰³ CANTY, Rachel, “Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas”, 23 *Tulane Maritime Law Journal* 123 (1998), 134-136.

⁷⁰⁴ KRASKA, James, “Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure”, 16 *Ocean & Coastal Law Journal* 1 (2010), 16-17; WILSON, David G., “Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of his Ship by Foreign Warships”, 55 *Naval Law Review* 157 (2008), 193–211.

⁷⁰⁵ MCDORMAN, Ted L., “Maritime Terrorism and the International Law of Boarding of Vessels at Sea: A Brief Assessment of the New Developments”, in CARON, David D. & SCHEIBER, Harry N. (Eds.), *The Oceans in the Nuclear Age – Legacies and Risks* (Leiden: Martinus Nijhoff Publishers, 2010), 250-252; BROWN, Neil, “Jurisdictional Problems relating to Non-Flag State Boarding of Suspect Ships in International Waters: A Practitioner’s Observations”, in SYMMONS, Clive R. (Ed.), *Selected Contemporary Issues in the Law of the Sea*, (Leiden: Martinus Nijhoff Publishers, 2011), 77-78.

⁷⁰⁶ SYRIGOS, Angelos M.S., “Developments on the Interdiction of Vessels on the High Seas”, in STRATI, Anastasia, GAVOUNELI, Maria & SKOURTOS, Nikolaos (Eds.), *Unresolved Issues and new Challenges to the Law of the Sea: Time Before and After* (Leiden: Martinus Nijhoff Publishers, 2006), 183, fn. 156.

⁷⁰⁷ UNGA, “Oceans and Law of the Sea: Report of the Secretary-General”, *UN Doc. A/53/456* (5 October 1998), para. 135.

search the vessel. The word 'engaged' should be understood broadly as including vessels engaged both directly and indirectly in the smuggling of migrants.⁷⁰⁸ This is consistent with the right of visit in Article 110 LOSC,⁷⁰⁹ which is when there is reasonable ground for suspecting that the ship is without nationality or – though flying a foreign flag or refusing to show its flag – the ship is, in reality, of the same nationality as the warship.⁷¹⁰ Although the 1958 Convention on the High Seas contains no provision on a right of visit against stateless vessels, it simply failed to codify this customary right.⁷¹¹ If evidence confirming the suspicion is found, Article 8(7) Smuggling Protocol says that the boarding State shall take 'appropriate measures' in accordance with relevant domestic and international law. At the informal consultations during the 9th session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, the term 'shall' was replaced by 'may'.⁷¹² OBOKATA suggests that, as the obligation is not absolute, many migrant vessels may go unnoticed.⁷¹³ Moreover, it is difficult to establish accountability for non-compliance.⁷¹⁴

But what exactly are 'appropriate measures'? For example, is the seizure of a stateless ship allowed according to this provision? To understand why the words 'appropriate measures' were included and what they exactly imply, we have to take a look at the drafting history. The language of Article 8(7) Smuggling Protocol is derived from paragraph 16 of the IMO Circular on interim measures for combating unsafe practices associated with the trafficking or transport of illegal migrants by sea.⁷¹⁵ The latter stipulates: "*When there are*

⁷⁰⁸ UNGA, "Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime", *UN Doc. A/55/383.Add.1* (3 November 2000), para. 100.

⁷⁰⁹ LOSC, Art. 110.

⁷¹⁰ LOSC, Art. 110.

⁷¹¹ *Naim Molvan v. Attorney General for Palestine*, App. Cas. 351 P.C. (1948), 369–70.

⁷¹² Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, "Revised Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime", *UN Doc. A/AC.254/4/add.1/Rev.6* (19 July 2000), fn. 74. The IMO interim measures of 2001 use the term 'should' in para. 16.

⁷¹³ OBOKATA, Tom, "The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 159.

⁷¹⁴ OBOKATA, Tom, "The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 163.

⁷¹⁵ MSC, "Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea", *IMO Doc. MSC.1/Circ. 896/Rev. I* (12 June 2001).

*reasonable grounds to suspect that a ship is engaged in unsafe practices associated with trafficking or transport of migrants by sea and it is concluded in accordance with the international law of the sea that the ship is without nationality, or has been assimilated to a ship without nationality, States should conduct a safety examination of the ship, as necessary. If the results of the safety examination indicate that the ship is engaged in unsafe practices, States should take **appropriate measures** in accordance with **relevant domestic and international law**.”⁷¹⁶*

Originally, the draft version read as follows: “When there are reasonable grounds to suspect that a vessel is engaged in unsafe practices associated with trafficking or transport of illegal migrants by sea and it is concluded in accordance with the international law of the sea that the vessel is without nationality, States should conduct a safety examination of the vessel, as necessary. If the results of the safety examination indicate that the vessel is engaged in unsafe practices, States should take **appropriate measures** in accordance with **relevant law**.”⁷¹⁷ In the drafting stage of the interim measures, the Russian Federation already stated that – in view of the political, financial, and legal aspects of the problem – the term ‘appropriate measures’ and ‘relevant law’ were insufficient and should be clarified. According to this delegation it was however obvious that the legal grounds for such action in respect of the vessels mentioned will be in each case defined by the international law regime of the region where the stoppage, visit and arrest of the vessels are undertaken (high seas, exclusive economic zone, contiguous zone or territorial sea).⁷¹⁸ Denmark added that international law does not give States a general right to adopt and enforce measures on the high seas with respect to vessels having no nationality. According to the LOSC, a ship without nationality may be boarded and inspected in order to establish its nationality. Nevertheless, as the LOSC does not contain provisions which permit further action with regard to safety measures, Denmark concludes that seizure for example is not allowed.⁷¹⁹

⁷¹⁶ MSC, “Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea”, *IMO Doc. MSC.1/Circ. 896/Rev. I* (12 June 2001), para. 16.

⁷¹⁷ MSC, “Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea – Report of the Correspondence Group (Submitted by the United States)”, *IMO Doc. MSC 70/17/Rev.1* (22 October 1998), para. 16.

⁷¹⁸ MSC, “Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea – Report of the Correspondence Group (Submitted by the United States)”, *IMO Doc. MSC 70/17/Rev.1* (22 October 1998), para. 16 – Comment by the Russian Federation.

⁷¹⁹ MSC, “Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea – Report of the Correspondence Group (Submitted by the United States)”, *IMO Doc. MSC 70/17/Rev.1* (22 October 1998), para. 16 – Comment by Denmark.

As a result of these remarks, ‘relevant law’ was replaced by ‘with relevant domestic and international law’. Yet, the term ‘appropriate measures’ was not being clarified. Thus, some authors suggest that there must be a form of jurisdictional link to exercise further enforcement action (other than to board and to search the ship), for example to actually seize the ship and apprehending the persons on board.⁷²⁰ However, MALLIA refers to Article 8(1) Smuggling Protocol: “A State Party that has reasonable grounds to suspect **that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned** is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.” She argues that in the context of drug smuggling, a similar provision – namely Article 17(2) 1988 Drugs Convention – has been interpreted as placing a ship without nationality in the same category as a ship in respect of which a state exercises jurisdiction by virtue of the fact that it sails under its flag. As a result, a State can take the same enforcement measures with respect to ships without nationality as it can with respect to ships flying its flag.⁷²¹

4.4. Conclusion

Smuggling is regarded as an explicit and mutually beneficial arrangement between two parties involving illegal entry (crossing borders without complying with the necessary requirements for legal entry into the receiving State) into a given country.⁷²² Migrant smuggling by sea is considered to be a ‘crime against maritime security’.⁷²³ Article 8(2) Smuggling Protocol is consistent with the right of visit on the high seas enclosed in Article 110 LOSC as it requires flag State consent to exercise the right of visit *vis-à-vis* a vessel on the

⁷²⁰ MORENO-LAX, Violeta, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, 23 *International Journal of Refugee Law* 174 (2011), 188.

⁷²¹ MALLIA, Patricia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (The Hague: Martinus Nijhoff Publishers, 2009), 70.

⁷²² Smuggling Protocol, Artt. 3(a) and 3(b).

⁷²³ On maritime security at sea, see: KLEIN, Natalie, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011). On migrant smuggling by sea as a security problem, see: MALLIA, Patricia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (The Hague: Martinus Nijhoff Publishers, 2009).

high seas suspected of being engaged in migrant smuggling. Nevertheless, the Smuggling Protocol influences the expectation and/or duty that a flag State will give consent to boarding and inspection of its vessels by other States.

Many boats used by migrant smugglers are stateless vessels.⁷²⁴ Article 8(7) Smuggling Protocol stipulates that a State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality may board and search the vessel. If evidence confirming the suspicion is found, Article 8(7) Smuggling Protocol says that the boarding State shall take ‘appropriate measures’ in accordance with relevant domestic and international law. ‘Appropriate measures’ means that a State can take the same enforcement measures with respect to ships without nationality as it can with respect to ships flying its flag.⁷²⁵

⁷²⁴ UNGA, “Oceans and Law of the Sea: Report of the Secretary-General”, *UN Doc. A/53/456* (5 October 1998), para. 135.

⁷²⁵ MALLIA, Patricia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (The Hague: Martinus Nijhoff Publishers, 2009), 70.

5. Return

After interception, migrants at sea are often returned to the place where they embarked. However, the *non-refoulement* principle entails that a person cannot be returned to a place where their life or freedom would be threatened. According to the Italian Prime Minister Silvio BERLUSCONI in 2009, it is almost a theoretical exception that migrants at sea in the Mediterranean are in need of international protection. He stated: “*There’s hardly anyone on these boats who has the right to asylum, as the statistics show. Only in exceptional cases.*”⁷²⁶ However, official numbers show a different picture. In 2009, 1,475 persons arrived by boat in Malta; 1,308 of these persons asked for asylum and 65% of these asylum seekers were granted international protection. Due to the recent developments in countries like Tunisia and Libya, this percentage amounted to 91% of all migrants that arrived in Malta during the first half of 2011.⁷²⁷ In this part, we will take a look at the content of the *non-refoulement* principle – in the refugee law context, the human rights context and in customary international law – and its application at sea.

5.1. Refugee law context

5.1.1. Concept

The 1951 Convention relating to the Status of Refugees⁷²⁸ (Refugee Convention) was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held in Geneva from 2 to 25 July 1951. The object of the Refugee Convention is to endeavour to assure refugees the widest possible exercise of the fundamental rights and freedoms enshrined in the Charter of the United Nations⁷²⁹ as well as the UDHR.⁷³⁰ Originally, the application of the Refugee Convention was limited to the

⁷²⁶ Cited in Human Rights Watch, “Pushed Back, Pushed Around” (21 September 2009), available online: <<http://www.hrw.org/en/node/85582/section/8>>.

⁷²⁷ Migrants at Sea, “1,400 Migrant Landings in Malta in First 5 Months of 2011” (16 June 2011), available online: <<http://migrantsatsea.wordpress.com/2011/06/16/1400-migrant-landings-in-malta-in-first-5-months-of-2011-91-of-protection-applications-approved/>>.

⁷²⁸ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 *UNTS* 137 [Refugee Convention].

⁷²⁹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945), 1 *UNTS* XVI.

⁷³⁰ Refugee Convention, Preamble.

refugee who acquired such status as a result of events occurring before 1 January 1951.⁷³¹ An optional geographical limitation also permitted States to limit their obligations to refugees resulting from events occurring in Europe.⁷³² The 1967 Protocol relating to the Status of Refugees removed geographical and temporal restrictions from the Refugee Convention.⁷³³ The Protocol is often referred to as ‘amending’ the 1951 Convention, but it is in fact an independent instrument and not a revision. 147 States are Parties to the 1951 Refugee Convention and/or its 1967 Protocol.⁷³⁴

Article 33(1) of the Refugee Convention states that: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Article 42(1) Refugee Convention precludes the making of reservations in respect *inter alia* of Article 33 concerning *non-refoulement*. The *ratio legis* of this article is that the turning back of a refugee to the frontiers of a country where his life or freedom would be threatened, would be tantamount to delivering him into the hands of his persecutors.⁷³⁵ Reference is made not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened for the reasons mentioned.⁷³⁶ *Non-refoulement* is not limited to those formally recognized as refugees. Therefore, the prohibition on States is applicable to recognized refugees as well as for all asylum-seekers. Any other approach would significantly undermine the effectiveness and utility of the protective arrangements of the Refugee Convention.⁷³⁷

⁷³¹ Refugee Convention, Art. 1A.

⁷³² Refugee Convention, Art. 1B.

⁷³³ Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 [Refugee Protocol].

⁷³⁴ UNHCR, “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol”, Status of Ratifications As of 1 April 2011, available online: <<http://www.unhcr.org/3b73b0d63.html>>.

⁷³⁵ *Ad Hoc* Committee on Statelessness and Related Problems, “Report *Ad Hoc* Committee on Statelessness and Related Problems – Annex II: Comments of the Committee on the Draft Convention relating to the Status of refugees”, *UN Doc.* E/1618 (17 February 1950), 61, available online: <<http://www.unhcr.org/40aa15374.html>>.

⁷³⁶ *Ad Hoc* Committee on Statelessness and Related Problems, “Report *Ad Hoc* Committee on Statelessness and Related Problems – Annex II: Comments of the Committee on the Draft Convention relating to the Status of refugees”, *UN Doc.* E/1618 (17 February 1950), 61, available online: <<http://www.unhcr.org/40aa15374.html>>.

⁷³⁷ BETHLEHEM Daniel & LAUTERPACHT, Elihu, “The scope and content of the principle of non-refoulement: Opinion”, in FELLER, Erika, TÜRK, Volker & NICHOLSON, Frances (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 116-118; UNHCR, “The protection of asylum-seekers and refugees rescued at sea,” in ALENIKOFF, Alexander T. & CHETAIL, Vincent (Eds.), *Migration and International Legal Norms* (The Hague: Asser Press, 2003), 137-150.

The idea that a State ought not to return persons to other States in certain circumstances was already referred to in Article 3 of the 1933 Convention relating to the International Status of Refugees.⁷³⁸ The State Parties to this Convention undertook not to remove resident refugees or keep them from their territory, by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), unless dictated by national security or public order. Next to this, each State agreed not to refuse entry to refugees at the frontiers of their countries of origin. Although the 1933 Convention was not widely ratified, a new era began with the UNGA Resolution 8(I) of 1946 that endorsed the principle that refugees with valid objections should not be compelled to return to their country of origin.⁷³⁹

Article 35(1) Refugee Convention provides that the Contracting States undertake to cooperate with UNHCR in the exercise of its functions, particularly its supervisory responsibility. In 1946, the International Refugee Organization (IRO) was established by the UNGA as a UN Specialized Agency of limited duration.⁷⁴⁰ As a result of the prospective termination of the IRO mandate and the continuing concerns over refugees, the UNGA decided to establish the UNHCR.⁷⁴¹ The UNHCR Statute describes the functions of the UNHCR as follows: *“The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”*⁷⁴² Although

⁷³⁸ Convention Relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935), 159 *LNTS* 199.

⁷³⁹ UNGA, “Question of Refugees”, *UN Doc. A/RES/8 (I)* (12 February 1946), available online: <<http://www.un.org/depts/dhl/resguide/r1.htm>>.

⁷⁴⁰ UNGA, “Constitution of the International Refugee Organization, and Agreement on Interim Measures to be taken in respect of refugees and displaced persons”, *UN Doc. A/RES/62(I)-I* (15 December 1946), available online: <<http://www.un.org/depts/dhl/resguide/r1.htm>>; UNGA, “Arrangements and measures to be taken by Members of the United Nations in connexion with displaced persons, refugees, prisoners of war and persons of similar status, pending the Establishment of the International Refugee Organization”, *UN Doc. A/RES/62(I)-II* (15 December 1946), available online: <<http://www.un.org/depts/dhl/resguide/r1.htm>>.

⁷⁴¹ UNGA, “Refugees and stateless persons”, *UN Doc. A/RES/319 (IV)* (3 December 1949), available online: <<http://www.unhcr.org/refworld/docid/3b00f1ed34.html>>.

⁷⁴² UNGA, “Statute of the Office of the United Nations High Commissioner for Refugees”, *UN Doc. A/RES/428 (V)* (14 December 1950), available online: <<http://www.unhcr.org/refworld/docid/3ae6b3628.html>>.

the UNHCR is accorded a special status as the guardian of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, it is not limited to the application of the substantive provisions of these two treaties in the exercise of its protective functions.

ExCom was established by the UN Economic and Social Council (ECOSOC) at the request of the UNGA.⁷⁴³ Therefore, ExCom is formally independent of the UNHCR and it operates as a distinct body of the United Nations. It determines the general policies under which the UNHCR shall plan, develop and administer its programmes and projects.⁷⁴⁴ In the exercise of its mandate, ExCom adopts Conclusions on International Protection addressing particular aspects of UNHCR's work. While ExCom Conclusions are not formally binding, regard may properly be had to them as elements relevant to the interpretation of the Refugee Convention.⁷⁴⁵ ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of the international community. Moreover, the specialist knowledge of ExCom and the fact that its Conclusions are taken by consensus add further weight.⁷⁴⁶

5.1.2. Application at the borders of a State

Although the *non-refoulement* principle could be violated with regard to all asylum seekers who are already present on the territory of a State, it is not always clear whether this is also the case for people who are at the border and want to be admitted to the territory of a State.

⁷⁴³ ECOSOC, "Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees", *UN Doc. E/RES/672 (XXV)* (30 April 1958), available online: <<http://www.unhcr.org/3ae69eccc.html>>.

⁷⁴⁴ ECOSOC, "Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees", *UN Doc. E/RES/672 (XXV)* (30 April 1958), para. 2(a), available online: <<http://www.unhcr.org/3ae69eccc.html>>.

⁷⁴⁵ BETHLEHEM, Daniel & LAUTERPACHT, Elihu, "The scope and content of the principle of non-refoulement: Opinion", in FELLER, Erika, TÜRK, Volker & NICHOLSON, Frances (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 98.

⁷⁴⁶ UNHCR, "ExCom Conclusions on International Protection", available online: <<http://www.unhcr.org/pages/49e6e6dd6.html>>.

5.1.2.1. Maritime frontier

First of all, we will have to answer the question of what the maritime frontier exactly is. The sovereignty of a coastal State extends – beyond its land territory and internal waters – to the territorial sea.⁷⁴⁷ Article 29 VCLT says: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” The ILC already stated in 1956 that the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over other parts of its territory.⁷⁴⁸ The maritime frontier will thus be the territorial sea border. Therefore, one strand of legal doctrine is convinced that the *non-refoulement* principle will be applicable within the territorial waters as it is on land territory.⁷⁴⁹

However, another opinion is that – while sovereignty certainly follows from a State’s possession of territory – the exercise of sovereignty or sovereign rights over a space or object does not make it territory. Consequently, the argument that territorially limited international obligations would necessarily apply in the territorial sea in the same manner as on land is thus unconvincing.⁷⁵⁰ In this case, the maritime frontier is being transferred into the internal waters of a State. Nevertheless, the *non-refoulement* principle will still be applicable within territorial waters. It seems consistent with the spirit of the Refugee Convention that a person should be able to claim asylum once they are within the jurisdiction of a State.⁷⁵¹ The far reaching *de jure* jurisdiction of the coastal State into its territorial waters is a very strong indication for corresponding *de facto* control. For example, vessels exercising non-innocent

⁷⁴⁷ LOSC, Art. 2(1). See also Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964), 516 *UNTS* 205, Art. 1(1).

⁷⁴⁸ ILC, “Report of the International Law Commission covering the work of its eight session”, *UN Doc. A/3159* (1956), 2 *Yearbook of the International Law Commission* 253 (1956), 265, available online: <http://untreaty.un.org/ilc/documentation/english/a_cn4_104.pdf>.

⁷⁴⁹ PALLIS, Mark, “Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes”, 14 *International Journal of Refugee Law* 329 (2002), 343-344; TREVISANUT, Seline, “The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection”, in VON BOGDANDY, Armin & WOLFRUM, Rüdiger (Eds.), *Max Planck Yearbook of United Nations Law* (Leiden: Martinus Nijhoff Publishers, 2008), Vol. XXII, 222.

⁷⁵⁰ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 226.

⁷⁵¹ BARNES, Richard A., “Refugee Law at Sea”, 53 *International and Comparative Law Quarterly* 47 (2004), 70.

passage become subject to the full jurisdiction of the coastal State.⁷⁵² As such, the prohibition of *non-refoulement* will apply in the territorial sea.⁷⁵³

Despite the fact that the link between territory and territorial sea is strong, it is not settled that the territorial sea is to be considered as territory *strictu sensu*.⁷⁵⁴ As pointed out by GOODWIN-GILL & MCADAM, the question of whether entering a State's territorial waters constitutes entry – where 'entry' is the judicial fact necessary and sufficient to trigger the application of a particular system of international rules – to State territory remains unresolved.⁷⁵⁵ Although entry within territorial waters may be an 'entry' for certain purposes, it is not correct to generalize.⁷⁵⁶ Indeed, if all the provisions of the Refugee Convention became operative upon entry into the territorial waters, then a potential conflict arises between Article 31(1) Refugee Convention and Article 25(1) LOSC. The former states: "*The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*" The latter on the contrary permits coastal States to take action necessary to prevent non-innocent passage. The full application of the Refugee Convention to the territorial sea would effectively negate or severely constrain the authority of a coastal State to control non-innocent passage. As the potential interference posed to the right to regulate navigation in the territorial sea goes far beyond limited aims of the Refugee Convention to restrict the undue penalization of irregular migrants, the full application of the Refugee Convention to the territorial sea would provide an unworkable basis for dealing with migration issues.⁷⁵⁷

⁷⁵² CHURCHILL, Robin R. & LOWE, Vaughan A., *The Law of the Sea* (Manchester: Manchester University Press, 3rd ed. 1999), 87 and 95-100.

⁷⁵³ KLUG, Anja & HOWE, Tim, "Extraterritorial Interception Measures", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 93.

⁷⁵⁴ O'CONNELL, Daniel P., "The Juridical Nature of the Territorial Sea", 45 *British Yearbook of International Law* 303 (1971), 381.

⁷⁵⁵ GOODWIN-GILL, Guy S. & MCADAM, Jane, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed. 2008), 279. See also O'CONNELL, Daniel P. (Ed. by SHEARER, Ivan A.), *The International Law of the Sea* (Oxford: Clarendon Press, 1982/1984), 80-81.

⁷⁵⁶ See for example: *The Ship "May" v. R.*, SCR 374 (1931).

⁷⁵⁷ BARNES, Richard A., "The International Law of the Sea and Migration Control", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 125.

However, there appears to be little reason to doubt the applicability of *non-refoulement* in the territorial sea, irrespectively of which approach is applied.⁷⁵⁸ As ExCom noted: “*The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons.*”⁷⁵⁹

5.1.2.2. Non-admittance at the borders of a State

It is important to note that the Refugee Convention – and also international law generally – does not contain any right to asylum for individuals. Therefore, international law, as it stands today, does not guarantee asylum seekers a right to enter a State's territory. Article 33 Refugee Convention does not imply that a refugee must in all cases be admitted to the country where he seeks entry.⁷⁶⁰ However, BETHLEMEM & LAUTERPACHT argue that this does not mean that States are free to reject at the frontier, without constraint, those who have a well-founded fear of persecution.⁷⁶¹ First, the words ‘in any manner whatsoever’ would seem to indicate that the provision also applies to non-admittance at the frontier. Secondly, in Belgian and French law ‘*refoulement*’ covers rejection at the frontier.⁷⁶² Thirdly, several key instruments in the field of refugee protection concluded subsequent to 1951 explicitly refer to ‘rejection at the frontier’ in their recitation of the nature of the act prohibited. This is the case, for example, in the Asian-African Refugee Principles of 1966⁷⁶³, the 1967 UNGA Declaration on Territorial Asylum⁷⁶⁴ and the Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969.⁷⁶⁵ While these provisions cannot be regarded as determinative of

⁷⁵⁸ BARNES, Richard A., “Refugee Law at Sea”, 53 *International and Comparative Law Quarterly* 47 (2004), 69.

⁷⁵⁹ ExCom, “Protection Safeguards in Interception Measures Problems Related to the Rescue of Asylum-Seekers in Distress at Sea”, Conclusion No. 97 (LIV) (2003), available online: <<http://www.unhcr.org/refworld/docid/3f93b2894.html>>.

⁷⁶⁰ *Ad Hoc* Committee on Statelessness and Related Problems, “Report *Ad Hoc* Committee on Statelessness and Related Problems – Annex II: Comments of the Committee on the Draft Convention relating to the Status of refugees”, *UN Doc. E/1618* (17 February 1950), 61, available online: <<http://www.unhcr.org/40aa15374.html>>.

⁷⁶¹ BETHLEMEM, Daniel & LAUTERPACHT, Elihu, “The scope and content of the principle of non-refoulement: Opinion”, in FELLER, Erika, TÜRK, Volker and NICHOLSON, Frances (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 113.

⁷⁶² WEIS, Paul, *The Refugee Convention, 1951 – The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (Cambridge: Cambridge University Press, 1995), 342.

⁷⁶³ Bangkok Principles on the Status and Treatment of Refugees (adopted 31 December 1966), Art. III(1), available online: <<http://www.aalco.int/Final%20text%20of%20Bangkok%20Principles.pdf>>.

⁷⁶⁴ UNGA, “Declaration on Territorial Asylum”, *UN Doc. A/RES/2312* (XXII) (14 December 1967), Art. 3(1), available online: <<http://www.unhcr.org/refworld/docid/3b00f05a2c.html>>.

⁷⁶⁵ Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974), 1001 *UNTS* 45, Art. II(3).

the meaning of Article 33(1) of the 1951 Convention, they could nevertheless offer useful guidance for the purposes of interpretation. Lastly, this view is also supported by various ExCom Conclusions. ExCom has confirmed that it is of utmost importance that the principle not be violated on the territory of a State or at the borders.⁷⁶⁶

But what are the actual consequences for States at their borders? Where *non-refoulement* applies, a series of related procedural guarantees could become applicable as well. There appears to be a growing support for a norm of refugee status determination – implicitly present in the Refugee Convention – in both doctrine and the iterations of the UNHCR.⁷⁶⁷ This means that, as non-admittance would constitute *refoulement*, asylum-seekers should be admitted to refugee status determination. Refugee status determination is declaratory, meaning that a person is a refugee by virtue of the fact of being outside the country of nationality, having fled due to a well-founded fear of persecution. Therefore, status as a refugee does not depend on any constitutive act of the State processing the claim. A person does not become a refugee because of recognition, but is recognized because he or she is a refugee.⁷⁶⁸ In order to enable States Parties to the Refugee Convention to implement their provisions, refugees have to be identified.⁷⁶⁹ Thus, UNHCR believes that States will be required to grant individuals seeking international protection access to fair and efficient asylum procedures in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol.⁷⁷⁰

⁷⁶⁶ ExCom, “Non-Refoulement”, Conclusion No. 6 (XXVIII) (1977), available online: <<http://www.unhcr.org/refworld/type,EXCONC,UNHCR,,3ae68c43ac,0.html>>; ExCom, “Protection Safeguards in Interception Measures Problems Related to the Rescue of Asylum-Seekers in Distress at Sea”, Conclusion No. 97 (LIV) (2003), available online: <<http://www.unhcr.org/refworld/docid/3f93b2894.html>>.

⁷⁶⁷ See for example: BATTJES, Hemme, *European Asylum Law and International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 467.

⁷⁶⁸ UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”, *UN Doc. HCR/IP/4/Eng/REV 3* (December 2011), para. 28, available online: <<http://www.unhcr.org/refworld/docid/4f33c8d92.html>>.

⁷⁶⁹ UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”, *UN Doc. HCR/IP/4/Eng/REV 3* (December 2011), para. 189, available online: <<http://www.unhcr.org/refworld/docid/4f33c8d92.html>>.

⁷⁷⁰ UNHCR, “Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol” (26 January 2007), para. 8, available online: <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>>. See also: UNHCR, “Asylum Processes – Fair and efficient Asylum Procedures”, *UN Doc. EC/GC/01/12* (31 May 2001), paras. 4-5, available online: <<http://www.unhcr.org/refworld/docid/3b36f2fca.html>>; ExCom, “General”, Conclusion No. 81 (XLVIII) (1997), para. h; ExCom, “Safeguarding Asylum”, Conclusion No. 82 (XLVIII) (1997), para. d(iii); ExCom, “International Protection”, Conclusion No. 85 (XLIX) (1998), para. q; ExCom, “General Conclusion on International Protection”, Conclusion No. 99 (LV) (2004), para. l, all available online:

This view has very important consequences in the maritime context, as asylum-seekers arriving by sea who manage to reach a State's territorial waters should not be turned away. PALLIS takes the view that any interdiction and re-direction of vessels may amount to a breach of an obligation to determine the status of asylum-seekers.⁷⁷¹ Thus, a refusal to refugee status determination would amount to a breach of international law, unless the State adopts another course that does not amount to *refoulement*, for example the removal to a safe third country or temporary protection.⁷⁷² TREVISANUT for example bases herself on the 1967 UNGA Declaration on Territorial Asylum⁷⁷³ to argue that the first State of arrival has a duty to at least temporarily host the asylum seekers.⁷⁷⁴ She considers vessels – except those enjoying the right of innocent passage – that have entered the territorial sea to have 'arrived' at a State. As a result, this State should carry out a first screening of the persons. Vessels with asylum seekers can therefore not be redirected towards the high seas.

However, this expansive reading of an obligation of refugee status determination is rejected by other authors. The aforementioned arguments could make sense with regard to land boundaries, as rejection at one State's border could result in *refoulement* if the neighbouring State is the country of persecution.⁷⁷⁵ With respect to asylum-seekers arriving by sea however, this would require bringing the vessel and the people on board into port. This would contradict the fact that there is no right of entry into ports, nor under the law of the sea, nor under refugee law.⁷⁷⁶

<<http://www.unhcr.org/41b041534.html>>.

⁷⁷¹ PALLIS, Mark, "Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes", 14 *International Journal of Refugee Law* 329 (2002), 354.

⁷⁷² BETHLEHEM, Daniel & LAUTERPACHT, Elihu, "The scope and content of the principle of non-refoulement: Opinion", in FELLER, Erika, TÜRK, Volker and NICHOLSON, Frances (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 113.

⁷⁷³ UNGA, "Declaration on Territorial Asylum", *UN Doc. A/RES/2312 (XXII)* (14 December 1967), available online: <<http://www.unhcr.org/refworld/docid/3b00f05a2c.html>>.

⁷⁷⁴ TREVISANUT, Seline, "The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection", in VON BOGDANDY, Armin & WOLFRUM, Rüdiger (Eds.), *Max Planck Yearbook of United Nations Law* (Leiden: Martinus Nijhoff Publishers, 2008), Vol. XXII, 223.

⁷⁷⁵ MILTNER, Barbara, "Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception", 30 *Fordham International Law Journal* 75 (2006), 94.

⁷⁷⁶ BARNES, Richard A., "The International Law of the Sea and Migration Control", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 114-117 and 127.

This view is also supported by State practice. It is quite common for States to apply migration law only to those arriving on 'dry land', e.g. persons presenting themselves within the geographic area of a port.⁷⁷⁷ For example, Article 3(1) Dublin II Regulation says: "*Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum.*"⁷⁷⁸ This application has to be examined in conformity with Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.⁷⁷⁹ The Directive applies to all applications for asylum made in the territory, including at the border of the Member States.⁷⁸⁰ However, Article 2(2) Schengen Borders Code defines an external border as the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders.⁷⁸¹ Thus, as sea ports are considered to be located at the external border, it is doubtful whether the territorial sea border could be regarded as constituting an external border for the purpose of applying refugee status determination.⁷⁸²

Nevertheless, an obligation of refugee status determination – or another act that does not amount to *refoulement*, such as temporary protection – may exist when the act of rejection **necessarily** results in the person being returned to the place of persecution. Theoretically, the vessel – where seaworthy and adequately supplied – could travel to any coastal State in the world.⁷⁸³ However, when every country would send migrant boats back into the ocean, those on board become persons 'in orbit'. These people are looking for a place to request asylum,

⁷⁷⁷ GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed. 1996), 163; GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 222.

⁷⁷⁸ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ L* 50 of 25 February 2003.

⁷⁷⁹ European Commission Proposal for a Council Regulation of 26 July 2001 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, COM (2001) 447 final, Explanatory Memorandum.

⁷⁸⁰ Council Directive (EC) No. 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ L* 326/13 of 13 December 2005, Article 3(1).

⁷⁸¹ Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ L* 105/1 of 13 April 2006.

⁷⁸² But see: DEN HEIJER, Maarten, "Europe beyond its Borders", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 176-180.

⁷⁸³ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 223.

but are pushed back to sea each time.⁷⁸⁴ As a result, if the combined effect of multiple States expelling the same vessel from their waters is that a refugee must return to a place of persecution, this is said to constitute ‘chain’ or ‘collective’ *refoulement*.⁷⁸⁵ Therefore, in order to be able to give effect to their obligations, Parties to the Refugee Convention should, at a minimum, conduct some form of individual refugee screening process when actually repatriating persons, turning boats back to their points of departure or in case of collective *refoulement*.⁷⁸⁶ This has to be opposed to mere rejection at the frontier.⁷⁸⁷ The simple denial of entry of ships to internal waters or territorial waters does not necessarily amount to the return of these persons to a place where their life or freedom would be threatened. In its commentary on the draft text of the Refugee Convention, the *Ad Hoc* Committee on Statelessness and Related Problems noted that the prohibition of *refoulement* does not entail a duty for the State to accept a person onto its own territory. The Committee illustrated this by saying that the return of a migrant ship to the high seas would not constitute a *refoulement*.⁷⁸⁸ Therefore, this refusal must be differentiated from the physical return of persons on a ship to a place where their life or freedom would be threatened.⁷⁸⁹

We can conclude that the duty of *non-refoulement* not only encompasses non-return at the frontier, but also non-rejection at the frontier, **only** when the latter poses an actual threat.⁷⁹⁰

⁷⁸⁴ LAMBERT, Hélène, *Seeking Asylum: Comparative Law and Practice in Selected European Countries*, (Dordrecht: Martinus Nijhoff Publishers, 1995), 4.

⁷⁸⁵ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 223.

⁷⁸⁶ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 223.

⁷⁸⁷ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 116-117.

⁷⁸⁸ *Ad Hoc* Committee on Statelessness and Related Problems, “Comments of the Committee on the Draft Convention”, *UN Doc. E/AC.32/L.32/Add.1* (10 February 1950), Art. 28, available online: <<http://www.unhcr.org/3ae68c1a14.html>>.

⁷⁸⁹ GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed. 1996), 166; BARNES, Richard A., “Refugee Law at Sea”, *53 International and Comparative Law Quarterly* 47 (2004), 70.

⁷⁹⁰ HATHAWAY, James C., *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 301.

5.1.3. Extraterritorial application

A point of discussion, and probably the most debated one, is the question whether the *non-refoulement* principle is applicable extraterritorially during interdictions on the high seas. According to an advisory opinion the UNHCR, the principle is definitely applicable extraterritorially, based upon the ordinary meaning of the text, the context and the humanitarian object and purpose of the Refugee Convention as well as subsequent State practice and relevant rules of international law.⁷⁹¹ First, the extraterritorial scope is said to be clear from the ordinary meaning of the text of the provision itself as the obligation set out in Article 33(1) Refugee Convention is subject to a geographic restriction only with regard to the country where a refugee may not be sent to. Next to this, the terms ‘return’ and ‘refouler’ do not support an interpretation which would restrict its scope to conduct within the territory of the State concerned, nor is there any indication that these terms were understood by the drafters of the Refugee Convention to be limited in this way.⁷⁹² As HELTON stated: “The right of non-refoulement becomes a hollow promise if nations can circumvent it by stopping the refugees before arrival.”⁷⁹³ Secondly, subsequent State practice is for example expressed through ExCom Conclusions which attest to the overriding importance of the principle of *non-refoulement* irrespective of whether the refugee is in the national territory of the State concerned.⁷⁹⁴ Lastly, other international refugee and human rights instruments – treaties as well as non-binding texts – drawn up since 1951 do not place territorial restrictions on States’ *non-refoulement* obligations. These include for example the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa,⁷⁹⁵ the 1969 American Convention on Human

⁷⁹¹ UNHCR, “Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol” (26 January 2007), available online: <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>>.

⁷⁹² UNHCR, “Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol” (26 January 2007), paras. 26-27, available online: <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>>.

⁷⁹³ HELTON, Arthur C., “The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects”, 10 *New York Law School Journal of Human Rights* 325 (1993), 341.

⁷⁹⁴ ExCom, “Non-Refoulement”, Conclusion No. 6 (XXVIII) (1977), para. c; ExCom, “Refugees without an Asylum Country”, Conclusion No. 15 (XXX) (1979), paras. b and c; ExCom, “Protection of Asylum-Seekers in Situations of Large-Scale Influx”, Conclusion No. 22 (XXXII) (1981), para. II.A.2.; ExCom, “Stowaway Asylum-Seekers”, Conclusion No. 53 (XXXIX) (1988), para. 1, all available online: <<http://www.unhcr.org/41b041534.html>>.

⁷⁹⁵ Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974), 1001 *UNTS* 45.

Rights,⁷⁹⁶ the 1984 Cartagena Declaration on Refugees⁷⁹⁷ and 1967 UNGA Declaration on Territorial Asylum.⁷⁹⁸ Next to the advisory opinion of the UNHCR, the Inter-American Commission on Human Rights also asserted that Article 33 Refugee Convention has no geographical limitations.⁷⁹⁹

Although UNHCR's interpretation of the provisions of the 1951 Refugee Convention and the 1967 Protocol is considered an authoritative view and is being supported by some authors,⁸⁰⁰ this opinion is not shared by everyone. It is argued that the UNHCR interpretation of the Refugee Convention reads into the *non-refoulement* provisions a far more liberal principle than the language can bear.⁸⁰¹ A restrictive reading of Article 33 of the Refugee Convention suggests that *non-refoulement* is limited to those who have already entered the territory of a receiving State. This reading is consistent with the text of the Convention, based on the drafters' choice to use the key words 'expel or return', as these words imply that only asylum seekers within the territory of the receiving State cannot be subject to refoulement. Records from the Conference of the Plenipotentiaries in 1951 indicate that several delegates had this conception of Article 33, including, for example, the Swiss, French and Dutch delegations.⁸⁰² Furthermore, with regard to expulsion, Article 32 specifically addresses refugees in the territory of a receiving State.⁸⁰³

⁷⁹⁶ American Convention on Human Rights (22 November 1969, entered into force 18 July 1978), 9 *ILM* 99.

⁷⁹⁷ Cartagena Declaration on Refugees (adopted 22 November 1984), available online: <<http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/international-refugee-law/1984-cartagena-declaration-on-refugees.html>>.

⁷⁹⁸ UNGA, "Declaration on Territorial Asylum", *UN Doc. A/RES/2312 (XXII)* (14 December 1967), available online: <<http://www.unhcr.org/refworld/docid/3b00f05a2c.html>>.

⁷⁹⁹ Inter-Am. CHR, *The Haitian Centre for Human Rights et al. v. United States*, 13 March 1997, Case 10.675, Report No. 51/96, para. 157.

⁸⁰⁰ See for example: MORENO-LAX, Violeta, "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", 23 *International Journal of Refugee Law* 174 (2011), 200-211.

⁸⁰¹ GLEN, Patrick J., "Is the United States Really not a Safe Third Country?: A Contextual Critique of the Federal Court of Canada's Decision in *Canadian Council for Refugees, et al. v. Her Majesty The Queen*", 22 *Georgetown Immigration Law Journal* 587 (2008), 614.

⁸⁰² UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 16th mtg., *UN Doc. A/CONF.2/SR.16* (23 November 1951), available online: <<http://www.unhcr.org/protect/PROTECTION/3ae68cdc14.html>> and UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 35th mtg., *UN Doc. A/CONF.2/SR.35* (3 December 1951), available online: <<http://www.unhcr.org/protect/PROTECTION/3ae68ceb4.html>>.

⁸⁰³ D'ANGELO, Ellen F., "Non-Refoulement: The Search for a Consistent Interpretation of Article 33", 42 *Vanderbilt Journal of Transnational Law* 279 (2009), 284-286.

The British Court of Appeals upheld the restrictive approach in a 2003 case reasoning that no permissible construction of Article 33 confers a right on refugees to access the territory of another country. The Court concluded that States are entitled to take active steps to prevent their arrival.⁸⁰⁴ In the case of *Sale v. Haitian Ctr. Council*, the US Supreme Court ruled that the correct textual interpretation of Article 33 did not prohibit the US Coast Guard from intercepting Haitian refugees before they reached the border.⁸⁰⁵ Although in doctrine this case is criticized, no State Party to the Refugee Convention, including the UNHCR, issued an official complaint regarding the US Supreme Court's interpretation of Article 33.⁸⁰⁶ As D'ANGELO concludes: "*Strong normative principles drive the 1951 Convention; however, only those principles the treaty embodies can provide the source of binding legal obligations on states.*"⁸⁰⁷

5.2. Human rights context

5.2.1. Concept

The *non-refoulement* principle is also included, explicitly or implicitly, in several human rights treaties. Next to the express prohibition of *refoulement* in Article 3 of the 1984 Convention Against Torture (CAT)⁸⁰⁸, the principle has been construed as being implicitly present in the pertinent prohibition of torture or cruel, inhuman or degrading treatment enshrined in various human right treaties, such as the ICCPR⁸⁰⁹ (Article 7), the ECHR⁸¹⁰ (Article 3) and the African Charter on Human and Peoples' Rights⁸¹¹ (Article 22(8)).

⁸⁰⁴ *European Roma Rights Ctr. and others v. Immigration Officer at Prague Airport*, E.W.C.A. Civ. 666 (2003), 37-43.

⁸⁰⁵ *Sale v. Haitian Ctr. Council, Inc.*, 509 U.S. 158 (1993). See also decisions of the High Court of Australia: High Court of Australia, *Minister for Immigration and Multicultural Affairs v Hali Ibrahim*, 26 October 2000, (2000) HCA 55, para. 136 and High Court of Australia, *Minister for Immigration and Multicultural Affairs v Khawar*, 11 April 2002, (2002) HCA 14, para. 42.

⁸⁰⁶ Inter-Am. CHR, *The Haitian Centre for Human Rights et al. v. United States*, 13 March 1997, Case 10.675, Report No. 51/96.

⁸⁰⁷ D'ANGELO, Ellen F., "Non-Refoulement: The Search for a Consistent Interpretation of Article 33", 42 *Vanderbilt Journal of Transnational Law* 279 (2009), 291-297.

⁸⁰⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 1465 *UNTS* 85 [CAT].

⁸⁰⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 99 *UNTS* 171 [ICCPR].

⁸¹⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 *UNTS* 222 [ECHR].

⁸¹¹ African Charter on Human and Peoples' Rights (adopted 27 June 1987, entered into force 21 October 1986), 21 *ILM* 58.

The protection enjoyed against *non-refoulement* in the human rights context is considered to be much broader than the one in Article 33 of the Refugee Convention, both *ratione personae* and *ratione materiae*. In contrast to the principle in the refugee context, *non-refoulement* in the human rights context is not predicated on any given status of the individuals at risk. Therefore, it applies to all persons – not only asylum-seekers – compelled to remain or return in a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture or cruel, inhuman, or degrading treatment. Moreover, while the Refugee Convention prescribes exceptions to *non-refoulement* in Articles 32 and 33(2), the principle of *non-refoulement* in the human rights context is absolute and non-derogable, preventing extradition, expulsion, or removal in any manner whatsoever.

5.2.2. Extraterritorial application

The Human Rights Committee has stated that States are required by Article 2(1) ICCPR to respect and to ensure the Covenant rights to all persons who may be within their territory as well as to all persons subject to their jurisdiction.⁸¹² A State Party must thus respect and ensure the rights laid down in the ICCPR to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. Consequently, States can be held accountable for violations of rights under the ICCPR which its agents commit on the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.⁸¹³ In certain circumstances, persons may fall under the subject-matter of a State Party to the ICCPR, even when outside that State's territory.⁸¹⁴ Also

⁸¹² Human Rights Committee, "General Comment No. 31 – Nature of the General Legal Obligation Imposed on States Parties to the ICCPR", *UN Doc. CCPR/C/21/Rev.1/Add.13* (26 May 2004), para. 10, available online: <<http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>>.

⁸¹³ See for example: Human Rights Committee, *Lopez Burgos v. Uruguay*, *UN Doc. CCPR/C/13/D/52/1979* (29 July 1981), para. 12.3; Human Rights Committee, *Celiberti de Casariego v. Uruguay*, *UN Doc. CCPR/C/13/D/56/1979* (29 July 1981), para. 10.3; Human Rights Committee, *Pereira Montero v. Uruguay*, *UN Doc. CCPR/C/18/D/106/1981* (31 March 1983), para. 5.

⁸¹⁴ See for example: Human Rights Committee, "Concluding Observations of the Human Rights Committee – United States of America", *UN Doc. CCPR/C/79/Add.50* (3 October 1995), para. 284, available online: <<http://www1.umn.edu/humanrts/usdocs/hrcuscomments.html>>; Human Rights Committee, "Concluding Observations of the Human Rights Committee – Israel", *UN Doc. CCPR/C/79/Add.93* (18 August 1998), para. 10, available online: <<http://www.unhcr.ch/tbs/doc.nsf/0/7ea14efe56ecd5ea8025665600391d1b?Opendocument>>; Human Rights

the ICJ has confirmed that the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.⁸¹⁵ The Court observed that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. In the latter case, considering the object and purpose of the ICCPR, States Parties to the ICCPR should therefore be bound to comply with its provisions.⁸¹⁶ Similarly, the Committee against Torture has affirmed that the *non-refoulement* obligation – contained in Article 3 CAT – applies in any territory under a State Party’s jurisdiction, including all areas under the *de facto* effective control of the State Party, by whichever military or civil authorities such control is exercised. The provision applies to, and is fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.⁸¹⁷ The *Marine I Case* was the first case involving a European State in which an international human rights body, the Committee against Torture, offered some guidance on determining responsibility for safeguarding the human rights of migrants who are rescued at sea. Although the Committee against Torture declared the case inadmissible, it noted that Spain exercised constant *de facto* control over the migrants from the time of their rescue and throughout their detention in Mauritania. Consequently, the alleged victims were subject to Spanish jurisdiction and Spain incurred responsibility for their protection under the CAT.⁸¹⁸

KLUG and HOWE argue that *de jure* jurisdiction over vessels on the high seas *ipso facto* provides evidence for a sufficient level of *de facto* control to trigger the application of human

Committee, “Concluding Observations of the Human Rights Committee – Israel”, *UN Doc. CCPR/CO/78/ISR* (21 August 2003), para. 11, available online:

<<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.CO.78.ISR.En?OpenDocument>>; Human Rights Committee, “Concluding Observations of the Human Rights Committee – United States of America”, *UN Doc. CCPR/C/USA/CO/3/Rev.1* (18 December 2006), para. 10, available online:

<<http://www.unhchr.ch/tbs/doc.nsf/0/34d0a773a44de02bc125725a0034cbdf?OpenDocument>>.

⁸¹⁵ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, 9 July 2004, *ICJ Reports* 136 (2004), para. 111; ICJ, Case Concerning Armed Activities on the Territory of the Congo, *Democratic Republic of the Congo v. Uganda*, 19 December 2005, *ICJ Reports* 168 (2005), para. 216.

⁸¹⁶ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, 9 July 2004, *ICJ Reports* 136 (2004), para. 109.

⁸¹⁷ Committee against Torture, “Consideration of Reports Submitted by States Parties under Article 19 of the Convention – Conclusions and Recommendations of the Committee against Torture: United States of America”, *UN Doc. CAT/C/USA/CO/2* (25 July 2006), paras. 15 and 20, available online:

<<http://www2.ohchr.org/english/bodies/cat/cats36.htm>>.

⁸¹⁸ Committee against Torture, *Marine I Case, J.H.A. v. Spain*, 21 November 2008, Communication No. 323/2007, *UN Doc. CAT/C/41/D/323/2007*, para. 8.2. For an extensive discussion on this case see: WOUTERS, Kees & DEN HEIJER, Maarten, “The *Marine I Case*: A Comment”, 22 *International Journal of Refugee Law* 1 (2010), 1-19.

rights law. In any case, physical control over intercepted persons would trigger State jurisdiction. But even where the level of *de facto* control is limited, it is likely that human rights bodies would consider that the intercepting State has established jurisdiction.⁸¹⁹ The Committee against Torture interpreted the term jurisdiction – as the crucial condition for enlivening a State’s extraterritorial human rights obligations – based on the tenet that ‘factivity creates normativity’.⁸²⁰ Therefore, a State’s human rights obligations are triggered whenever there is *de facto* control, even when there is no *de jure* jurisdiction. In the *Marine I Case*, it would therefore not have mattered whether the factual exercise of control was duly grounded in the diplomatic agreement concluded with Mauritania, which allowed for the temporary presence on Mauritanian territory of Spanish security forces. While such an agreement is important in determining whether Spain has the authority to act outside its own territory – and possibly also for the determination of the ‘lawfulness’ of certain infringements of human rights – it is not as such relevant in establishing whether Spain’s human rights obligations were engaged. As a result, as soon as, and for as long as, the passengers were under the actual *de facto* control of Spain, Spain was responsible for their human rights protection.⁸²¹

Also at the regional level, the extraterritorial applicability of human rights treaties is established. The question of extraterritorial applicability of the *non-refoulement* principle – as implicitly present in Article 3 ECHR – on the high seas was decided by the European Court of Human Rights on 23 February 2012 in the case *Hirsi Jamaa and Others v. Italy*.⁸²² The applicants – 11 Somali and 13 Eritrean nationals – relied on Article 3 of the ECHR to argue that the decision of the Italian authorities to intercept the vessels on the high seas, and send the applicants directly back to Libya, exposed them to the risk of ill-treatment there, as well as to a serious threat of being sent back to their countries of origin, where they might also

⁸¹⁹ KLUG, Anja & HOWE, Tim, “Extraterritorial Interception Measures”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 95.

⁸²⁰ SCHEININ, Martin, “Extraterritorial Effect of the International Covenant on Civil and Political Rights”, in COOMANS, Fons & KAMMINGA, Menno T. (Eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004), 73-82.

⁸²¹ WOUTERS, Kees & DEN HEIJER, Maarten, “The Marine I Case: A Comment”, 22 *International Journal of Refugee Law* 1 (2010), 10-11.

⁸²² ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012). See also: UNHCR, “UNHCR’s oral intervention at the European Court of Human Rights Hearing of the case *Hirsi and Others v. Italy* (Application No. 27765/09), Strasbourg, June 22, 2011”, available online: <<http://www.unhcr.org/refworld/pdfid/4e0356d42.pdf>>.

face ill-treatment. The applicants were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast. However, after they were noticed by ships of the Italian Coast Guard, the persons on board were transferred onto Italian military ships and returned to Tripoli. This return was carried out based on a bilateral agreement between Italy and Libya.⁸²³

Although the European Court of Human Rights affirmed that only in exceptional cases could acts of the Member States performed, or producing effects, outside their territories constitute an exercise of jurisdiction by them, it held that in this case there had been a violation of Article 3 of the ECHR because the applicants had been exposed to: (1) the risk of ill-treatment in Libya; and (2) of repatriation to Somalia or Eritrea. The Court found that the applicants had fallen within the jurisdiction of Italy in the period between boarding on to the Italian ships on the high seas and being handed over to the Libyan authorities and that during this period the applicants had been under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. Finally, the Court stated that the transfer of the applicants to Libya had been carried out without any examination of each individual situation and thus constituted a form of collective expulsion, in breach of Article 4 of Protocol No. 4 to the ECHR.⁸²⁴ It can be concluded that the *non-refoulement* principle in Article 3 of the ECHR applies extraterritorially when there is a continuous and effective control over the persons concerned.

5.2.3. *The relationship between international refugee law and human rights law*

International refugee law and international human rights law are complementary and mutually reinforcing legal regimes.⁸²⁵ Therefore, Article 33(1) – embodying the humanitarian essence of the Refugee Convention and safeguards fundamental rights of refugees – must be interpreted in a manner which is consistent with developments in international human rights law. As a result, the scope *ratione loci* of States' *non-refoulement* obligations under international human rights law is particularly pertinent to the question of the extraterritorial

⁸²³ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), paras. 9-11.

⁸²⁴ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), para. 70 *et seq.*

⁸²⁵ ExCom, "General Conclusion on International Protection", Conclusion No. 95 (LIV) (2003), para. 1, available online: <<http://www.unhcr.org/41b041534.html>>.

applicability of the prohibition on returning a refugee to a danger of persecution under international refugee instruments.⁸²⁶ Given the similar nature of the obligations and the object and purpose of the treaties which form their legal basis, the reasoning adopted by courts and human rights treaty bodies in their authoritative interpretation of the relevant human rights provisions is – according to the UNHCR – also relevant to the prohibition of *refoulement* under international refugee law.⁸²⁷ Therefore, as with *non-refoulement* obligations under international human rights law, the decisive criterion is not whether such persons are on the State’s territory, but rather, whether they come within the effective control and authority of that State.⁸²⁸

5.3. *International customary law*

The majority doctrinary opinion is that the principle of *non-refoulement* has acquired the status of customary international law. Article 38(1)(b) of the ICJ Statute defines international custom as evidence of a general practice accepted as law.⁸²⁹ For a rule to become part of customary international law, two elements are required: (1) consistent State practice and (2) *opinio juris*. The latter means the understanding held by States that the practice is obligatory due to the existence of a rule requiring it.⁸³⁰ The evolution of customary international law rules is important with regard to States that are not Parties to the 1951 Refugee Convention and the 1967 Protocol.⁸³¹ Also, some States Parties did not implement the *non-refoulement* principle into domestic legislation. Domestic courts might be able to treat customary international law as part of the law of the land. For example, in 2008 the customary legal

⁸²⁶ UNHCR, “Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol” (26 January 2007), para. 34, available online: <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>>.

⁸²⁷ UNHCR, “Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol” (26 January 2007), para. 42, available online: <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>>.

⁸²⁸ UNHCR, “Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol” (26 January 2007), para. 43, available online: <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>>.

⁸²⁹ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945), 33 *UNTS* 993 [ICJ Statute].

⁸³⁰ ICJ, North Sea Continental Shelf Cases, *Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands*, 20 February 1969, *ICJ Reports* 3 (1969), para. 74; ICJ, Case concerning Military and Paramilitary Activities In and Against Nicaragua, *Nicaragua v. United States of America*, 27 June 1986, *ICJ Reports* 14 (1986), para. 77.

⁸³¹ There are some 50 States that are currently not a Party to either the 1951 Refugee Convention or the 1967 Protocol.

argument found favour before Justice HARTMANN of the Hong Kong Court of First Instance.⁸³² The applicants argued that *non-refoulement* was allowed,⁸³³ this was refused by the Court since it determined that it must be recognized that the principle of *non-refoulement* – as it applies to refugees – has grown beyond the confines of the Refugee Convention and has matured into a universal norm of customary international law.⁸³⁴

As the ICJ accepted in the *North Sea Continental Shelf Cases*, conventional principles can exist side-by-side with customary principles of similar content.⁸³⁵ In the *Nicaragua Case*, the ICJ stated that the fact that the customary principle was embodied in a multilateral convention did not mean that it ceased to exist as a principle of customary law, even as regards States that were parties to the convention.⁸³⁶ Moreover, the existence of a conventional principle not only precludes the existence of a customary principle of similar content, but it even may influence the creation of such a rule of custom.⁸³⁷ Could the conventional principle of *non-refoulement* be regarded as reflecting or crystallising – at least emergent – rules of customary international law? Three elements will be material to determine of whether such a process of crystallization has occurred: (1) the conventional rule should – at all events potentially – be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law,⁸³⁸ (2) even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected⁸³⁹ and (3) within whatever period has passed since the first expression of the conventional rule, State practice, including that of States whose

⁸³² *C. v. Director of Immigration*, [2008] HKEC 281 (C.F.I.), HCAL No. 132/2006. For a detailed description of this case, see: JONES, Oliver, “Customary Non-Refoulement of Refugees and Automatic Incorporation into the Common Law: A Hong Kong Perspective”, 58 *International & Comparative Law Quarterly* 443 (2009), 447-468.

⁸³³ *C. v. Director of Immigration*, [2008] HKEC 281 (C.F.I.), HCAL No. 132/2006, 36.

⁸³⁴ *C. v. Director of Immigration*, [2008] HKEC 281 (C.F.I.), HCAL No. 132/2006, 27-34.

⁸³⁵ ICJ, *North Sea Continental Shelf Cases*, *Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands*, 20 February 1969, *ICJ Reports* 3 (1969), paras. 64 and 70-74.

⁸³⁶ ICJ, *Case concerning Military and Paramilitary Activities In and Against Nicaragua*, *Nicaragua v. United States of America*, 27 June 1986, *ICJ Reports* 14 (1986), paras. 174-179.

⁸³⁷ ICJ, *North Sea Continental Shelf Cases*, *Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands*, 20 February 1969, *ICJ Reports* 3 (1969), paras. 70-71.

⁸³⁸ ICJ, *North Sea Continental Shelf Cases*, *Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands*, 20 February 1969, *ICJ Reports* 3 (1969), para. 72.

⁸³⁹ ICJ, *North Sea Continental Shelf Cases*, *Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands*, 20 February 1969, *ICJ Reports* 3 (1969), para. 73.

interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.⁸⁴⁰ BETHLEHEM & LAUTERPACHT extensively argue that these conditions are fulfilled. Next to the near-universal acceptance of a *non-refoulement* duty in various international and regional treaties as well as in the 1967 UNGA Declaration on Territorial Asylum,⁸⁴¹ there is an absence of express opposition to the principle by the States which neither signed a relevant treaty nor were present in the UNGA when the 1967 Declaration was adopted.⁸⁴²

Nevertheless, a minority of authors does contest the customary international law character of *non-refoulement*. The most prominent opposing argument concerns the lack of general practice in certain regions. FELICIANO, HYNDMAN & KÄLIN all expressed degrees of cautious reservation with respect to the scope of any customary international law rule in 1982.⁸⁴³ Yet, taking into account numerous ratifications of the Refugee Convention since 1982, party-membership is now widespread. However, more recently, it has been pointed out that the Arabic and Asian regions – which are specially affected – still show no significant increase in Convention ratifications.⁸⁴⁴ HATHAWAY adds that – as compliance is not in fact advanced by the assertion of words alone as customary international law⁸⁴⁵ – there is no necessity to claim that *non-refoulement* is customary international law.⁸⁴⁶ In contrast, if the scope of extant legal obligation would be exaggerated, we impliedly jettison accrued gains

⁸⁴⁰ ICJ, North Sea Continental Shelf Cases, *Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands*, 20 February 1969, *ICJ Reports* 3 (1969), para. 74.

⁸⁴¹ UNGA, “Declaration on Territorial Asylum”, *UN Doc. A/RES/2312 (XXII)* (14 December 1967), available online: <<http://www.unhcr.org/refworld/docid/3b00f05a2c.html>>.

⁸⁴² BETHLEHEM, Daniel & LAUTERPACHT, Elihu, “The scope and content of the principle of non-refoulement: Opinion”, in FELLER, Erika, TÜRK, Volker and NICHOLSON, Frances (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 143-149.

⁸⁴³ FELICIANO, Florentino P., “The Principle of Non-Refoulement: A Note on International Legal Protection of Refugees and Displaced Persons”, *57 Philippine Law Journal* 598 (1982), 608-609; HYNDMAN, Patricia, “Asylum and Non-Refoulement – Are These Obligations Owed to Refugees under International Law?”, *57 Philippine Law Journal* 43 (1982), 68-69; KÄLIN, Walter, *Das Prinzip des non-refoulement : Das Verbot der Zurückweisung, Ausweisung und Auslieferung von Flüchtlingen in den Verfolgerstaat im Völkerrecht und im schweizerischen Landesrecht* (Bern: Lang, 1982), 65.

⁸⁴⁴ COLEMAN, Nils, “Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law”, *5 European Journal of Migration & Law* 23 (2003), 48; HATHAWAY, James C., “Leveraging Asylum”, *45 Texas International Law Journal* 503 (2010), 513.

⁸⁴⁵ KELLY Patrick J., “The Twilight of Customary International Law”, *40 Vanderbilt Journal of International Law* 449 (2000), 540-541.

⁸⁴⁶ HATHAWAY, James C., “Leveraging Asylum”, *45 Texas International Law Journal* 503 (2010), 527.

and descend into the realm of pure policy. As the latter is a space in which refugee rights are far too often deemed dispensable in the pursuit of narrow definitions of state self-interest, we must avoid this.⁸⁴⁷

However, this opinion cannot be shared. It is true that questions remained as to the customary nature of the norm of *non-refoulement* during the Cold War era. However, after the Soviet era the norm quickly attained a customary nature as no State – Party or not to the Refugee Convention – will claim it has a general right to commit *refoulement*.⁸⁴⁸ Also, violations of *non-refoulement* may in fact even strengthen the norm. The ICJ stressed that if a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then – whether or not the State’s conduct is in fact justifiable on that basis – the significance of that attitude is to confirm rather than to weaken the rule.⁸⁴⁹ Although serious breaches of the principle have been signalled, none have been deemed of sufficient weight to question the customary nature of the norm. Moreover, according to a number of authors, if States do act contrary to the principle, they do so with a certain attempt at justification, which indicates that they feel they are infringing upon a rule of law.⁸⁵⁰ At present, it is thus clear that the norm prohibiting *refoulement* is part of customary international law and therefore binding on all States whether or not they are party to the 1951 Convention.

Still, it remains uncertain whether that norm has achieved the status of *jus cogens*. Claims have been made that the principle of *non-refoulement* is not only customary international law, but that it has even attained the status of a norm of *jus cogens*. Doctrine confirming this is

⁸⁴⁷ HATHAWAY, James C., “Leveraging Asylum”, 45 *Texas International Law Journal* 503 (2010), 536.

⁸⁴⁸ STENBERG, Gunnel, *Non-Expulsion and Non-Refoulement: The Prohibition Against Removal of Refugees with Special References to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Uppsala: Iustus Förlag, 1989), 279; GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed. 1996), 168-169. For State practice before 1989, see: STENBERG, Gunnel, *Non-Expulsion and Non-Refoulement: The Prohibition Against Removal of Refugees with Special References to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Uppsala: Iustus Förlag, 1989), 288. For State practice after 1989, see: 132-134.

⁸⁴⁹ ICJ, Case concerning Military and Paramilitary Activities In and Against Nicaragua, *Nicaragua v. United States of America*, 27 June 1986, *ICJ Reports* 14 (1986), para. 186.

⁸⁵⁰ STENBERG, Gunnel, *Non-Expulsion and Non-Refoulement: The Prohibition Against Removal of Refugees with Special References to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Uppsala: Iustus Förlag, 1989), 279; GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed. 1996), 168-169.

primarily based on ExCom Conclusions.⁸⁵¹ In Conclusion No. 25 of 1982, ExCom observed that the principle of *non-refoulement* was progressively acquiring the character of a peremptory rule of international law.⁸⁵² By the late 1980s, ExCom concluded that all States are bound to refrain from *refoulement* on the basis that such acts are contrary to fundamental prohibitions against these practices.⁸⁵³ In 1996, ExCom concluded that *non-refoulement* determined that the principle of *non-refoulement* is not subject to derogation.⁸⁵⁴ Next to the ExCom Conclusions, the 1984 Cartagena Declaration on Refugees – on the international protection of refugees in Latin America – stipulates that the prohibition of *non-refoulement* “is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.”⁸⁵⁵ The acceptance by Latin American States of the norm of *non-refoulement* as *jus cogens* is regarded to be manifest in intergovernmental bodies like the Inter-American Commission on Human Rights and the Organization of American States General Assembly, which have acknowledged the conclusions of the Cartagena colloquium with approval.⁸⁵⁶ Although it would undoubtedly be of beneficial effect to the overall international protection of refugees, the existence of a peremptory norm of *non-refoulement* cannot be considered realistic.⁸⁵⁷ ExCom Conclusions are not sufficient by themselves to generate customary norms. There has to be evidence of additional State practice which is consistent with those Conclusions. As a result, the state of the art is not yet permitted to affirm the peremptory nature of the principle of *non-refoulement*.

⁸⁵¹ HONGJU KOH, Harold, “The Haitian Centers Council Case: Reflections on *Refoulement* and Haitian Centers Council”, 35 *Harvard International Law Journal* 30 (1994); ALLAIN, Jean, “The Jus Cogens Nature of Non-Refoulement”, 13 *International Journal of Refugee Law* 533 (2001), 533-558.

⁸⁵² ExCom, “General Conclusion on International Protection”, Conclusion No. 25 (XXXIII) (1982), para. b, available online: <<http://www.unhcr.org/3ae68c434c.html>>.

⁸⁵³ ExCom, “General Conclusion on International Protection”, Conclusion No. 55 (XL) (1989), para. d, available online: <<http://www.unhcr.org/refworld/pdfid/4b28b1f2.pdf>>.

⁸⁵⁴ ExCom, “General Conclusion on International Protection”, Conclusion No. 79 (XLVII) (1996), para. i, available online: <<http://www.unhcr.org/refworld/pdSfid/4b28b1f2.pdf>>.

⁸⁵⁵ Cartagena Declaration on Refugees (adopted 22 November 1984), para. 5, available online: <<http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/international-refugee-law/1984-cartagena-declaration-on-refugees.html>>.

⁸⁵⁶ Inter-Am. C.H.R., Ann. Rep. 1984-1985, OEA/Ser.L/II.66, doc.10 rev.1, 190-93 (1985). See: FITZPATRICK, Joan, “Temporary Protection of Refugees: Elements of a Formalized Regime”, 94 *American Journal of International Law* 279 (2000), 284.

⁸⁵⁷ HANNIKAINEN, Lauri, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status* (Helsinki: Lakimiesliiton Kustannus – Finnish Lawyers’ Publishing Company, 1988), 261-662; COLEMAN, Nils, “Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law”, 5 *European Journal of Migration & Law* 23 (2003), 46, fn. 114; TREVISANUT Seline, “The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection”, in VON BOGDANDY, Armin & WOLFRUM, Rüdiger (Eds.), *Max Planck Yearbook of United Nations Law* (Leiden: Martinus Nijhoff Publishers, 2008), Vol. XXII, 218.

The substantive content of the customary international law obligation is generally thought to more or less mirror the CAT and ICCPR *non-refoulement* obligations in relation to all persons and – with regard to refugees specifically – additionally to mirror the Refugee Convention obligation.⁸⁵⁸ But is the extraterritorial character of *non-refoulement* also part of the customary obligation? Some authors state that the *non-refoulement* obligation in customary international law is engaged upon an asylum seeker coming within the effective control of an agent of that State, wherever in the world this occurs.⁸⁵⁹ Nevertheless, many States are not prepared to concede that this position is correct.⁸⁶⁰ For example, during the Caribbean Interdiction Program, the preliminary screening of Haitian asylum claims by the United States on the high seas was suspended by Executive Order 12.807, also known as the Kennebunkport Order.⁸⁶¹ Fleeing persecution and/or poverty, Haitian asylum seekers began arriving in the United States by boat in 1963. Numbers started becoming significant in the 1970s and surged dramatically in 1980 and 1981. In response to this influx, President Ronald Reagan entered into an agreement with the Haitian government. The agreement authorized the United States to board Haitian vessels on the high seas and question the passengers.⁸⁶² When a violation of either US or Haitian law occurred, the US could return the boat to Haiti. Nevertheless, anyone found to be a refugee would not be returned to Haiti.⁸⁶³ However, as reception facilities were felt to be at full capacity, the government changed course in 1992.⁸⁶⁴

⁸⁵⁸ BETHLEHEM, Daniel & LAUTERPACHT, Elihu, “The scope and content of the principle of non-refoulement: Opinion”, in FELLER, Erika, TÜRK, Volker and NICHOLSON, Frances (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 163-164; GOODWIN-GILL, Guy S. & MCADAM, Jane, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed. 2008), 345-354; TAYLOR, Savitri, “Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?”, in MCADAM, Jane, *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008), 116.

⁸⁵⁹ BETHLEHEM, Daniel & LAUTERPACHT, Elihu, “The scope and content of the principle of non-refoulement: Opinion”, in FELLER, Erika, TÜRK, Volker and NICHOLSON, Frances (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 149-160 ; GOODWIN-GILL, Guy S. & MCADAM, Jane, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed. 2008), 244-253.

⁸⁶⁰ TAYLOR, Savitri, “Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?”, in MCADAM, Jane, *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008), 117.

⁸⁶¹ Executive Order 12.807, “Interdiction of Illegal Aliens”, 57 FR 23133 (24 May 1992).

⁸⁶² Exchange of Diplomatic Letters Between E.H. PREEG, US Ambassador to Haiti, and E. FRANCISQUE, Haiti’s Secretary of State for Foreign Affairs, *TIAS* No. 10241 (23 September 1981); Presidential Proclamation 4865, “High Seas Interdiction of Illegal Aliens”, 46 FR 48107 (29 September 1981).

⁸⁶³ Executive Order 12.324, “Interdiction of Illegal Aliens”, 46 FR 48109 (29 September 1981).

⁸⁶⁴ For a recent discussion see: LEGOMSKY, Stephen H., “The USA and the Caribbean Interdiction Program”, 18 *International Journal of Refugee Law* 677 (2006), 677-695.

Executive Order 12.807 asserted that the Refugee Convention *non-refoulement* principle did not apply outside US territory, stating: “*The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees [...] to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States.*”⁸⁶⁵

However, the ICJ noted in the *Nicaragua Case*: “*The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.*”⁸⁶⁶ The aforementioned decisions of the Committee against Torture and the Human Rights Committee already constituted this kind of evidence. Moreover, since the *Hirsi Case* there is also a court decision dealing with this issue. Therefore, this case plays a crucial role towards the possible future recognition of the extraterritorial application of the *non-refoulement* principle as international customary law.

5.4. The concept of effective control and the ECtHR

5.4.1. Effective control and extraterritorial jurisdiction

The scope of application of the ECHR is governed by Article 1 ECHR, under which the States Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. In the *Bankovic Case* (2001), the ECtHR ruled that jurisdiction in international law is generally framed territorially.⁸⁶⁷ The application in this case was brought by six people living in Belgrade (Serbia) against 17 NATO member States which were also State Parties to the ECHR. The applicants complained about the NATO bombing, as part of its campaign of air strikes during the Kosovo conflict, of the Serbian Radio-Television

⁸⁶⁵ Executive Order 12.807, “Interdiction of Illegal Aliens”, 57 FR 23133 (24 May 1992), para. 2.

⁸⁶⁶ ICJ, Case concerning Military and Paramilitary Activities In and Against Nicaragua, *Nicaragua v. United States of America*, 27 June 1986, *ICJ Reports* 14 (1986), para. 186.

⁸⁶⁷ ECtHR, *Bankovic and Others v. Belgium and Others*, 12 December 2001, Appl. No. 52207/99 (2001), para. 73.

headquarters in Belgrade which caused damage to the building and several deaths. The ECtHR stressed that, while international law does not exclude a State's exercise of jurisdiction extraterritorially, jurisdiction was – as a general rule – defined and limited by the sovereign territorial rights of the other relevant States. The Court found that other bases of jurisdiction are exceptional. As the ECHR is a multilateral treaty operating in an essentially regional context and notably in the legal space of the Contracting States and as – at that time – the Federal Republic of Yugoslavia clearly did not fall within that legal space, the ECtHR was not persuaded that there was any jurisdictional link between the victims and the respondent States. Therefore, it declared the application inadmissible.⁸⁶⁸ Although the ECtHR conclusion in this case has attracted a lot of criticism, the premise set out here is in line with general international law.

Nevertheless, extraterritoriality does not prevent human rights obligations from being engaged in particular circumstances.⁸⁶⁹ The ECtHR considers the exercise of 'effective control' over the territory (for example the *Loizidou Case*⁸⁷⁰) or over the persons concerned (for example *Issa Case*⁸⁷¹) to be the crucial element giving rise to state responsibility. In the case of *Al-Saadoon and Mufdhi v. United Kingdom* (2009), for example, the ECtHR decided that the UK authorities had had total and exclusive control over the detention facilities in which the applicants were held, first through the exercise of military force and then by law. The ECtHR found that the applicants had been within the UK's jurisdiction and had remained so until their physical transfer to the custody of the Iraqi authorities.⁸⁷²

MILLER states that existing categories of extraterritorial jurisdiction must be understood as limited exceptions to the rule of territorial jurisdiction because they all require some significant connection between a signatory State's physical territory and the individual

⁸⁶⁸ ECtHR, *Bankovic and Others v. Belgium and Others*, 12 December 2001, Appl. No. 52207/99 (2001), para. 73.

⁸⁶⁹ For a detailed discussion see: MORENO-LAX, Violeta, "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", 23 *International Journal of Refugee Law* 174 (2011), 174-220.

⁸⁷⁰ ECtHR, *Loizidou v. Turkey*, 23 March 1995, Appl. No. 15318/89 (1995).

⁸⁷¹ ECtHR, *Issa and Others v. Turkey*, 16 November 2004, Appl. No. 31821/96 (2004).

⁸⁷² ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, 30 June 2009, Appl. No. 61498/08 (2009), para. 88.

whose rights are implicated.⁸⁷³ However, the ways in which the ECtHR has interpreted extraterritorial jurisdiction bear little resemblance to the terms' meaning in public international law. The word 'jurisdiction' is meant to denote solely a sort of factual power that a State exercises over persons or territory. However, it cannot be regarded as being a legal competence, nor as the notion of jurisdiction in general international law which delimits the municipal legal orders of States.⁸⁷⁴ Therefore, exercising 'effective control' over a territory or over a person does not mean that the State is necessarily exercising its 'jurisdiction' – as general international law speaks of the term – over the territory or persons.⁸⁷⁵ In the human rights context, the question of jurisdiction is about whether in a specific instance a particular State is bound to respect relevant human rights obligations, rather than whether the State's claim to exercise authority or some legal competence is lawful.⁸⁷⁶

5.4.2. *Effective control and State responsibility*

It is also necessary to distinguish the notion of State jurisdiction in human rights treaties from that of State responsibility, attribution or imputability in particular. As MILANOVIC points out,⁸⁷⁷ 'effective control' is a homonym as there is (1) the effective control test for the purposes of attribution, as developed by the ICJ in the *Nicaragua Case*,⁸⁷⁸ (2) effective control of an area as sometimes used in humanitarian law to describe the threshold of the beginning of a belligerent occupation of a territory,⁸⁷⁹ (3) effective (overall) control of an area as a test developed by the ECtHR for the purpose of determining a State's jurisdiction over territory

⁸⁷³ MILLER, Sarah, "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention", 20 *European Journal of International Law* 1223 (2009), 1223-1246.

⁸⁷⁴ MILANOVIC, Marko, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", 8 *Human Rights Law Review* 411 (2008), 417.

⁸⁷⁵ MILANOVIC, Marko, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", 8 *Human Rights Law Review* 411 (2008), 423.

⁸⁷⁶ ROXSTROM, Erik, GIBNEY, Mark & EINARSEN, Terje, "The NATO Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection", 23 *Boston University International Law Journal* 56 (2005), 112.

⁸⁷⁷ MILANOVIC, Marko, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", 8 *Human Rights Law Review* 411 (2008), 446-447. For an extensive overview see also: MILANOVIC, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford/New York: Oxford University Press, 2011), 276 p.

⁸⁷⁸ ICJ, Case concerning Military and Paramilitary Activities In and Against Nicaragua, *Nicaragua v. United States of America*, 27 June 1986, *ICJ Reports* 14 (1986), para. 115.

⁸⁷⁹ ICTY, *Prosecutor v Tadić*, Trial Chamber Judgment, 7 May 1997, IT-94-I-T (1997), para. 580.

or persons, and (4) effective control as used in international criminal law to describe the relationship a superior has to have over a subordinate so his command responsibility could be engaged.⁸⁸⁰

The purpose of the doctrine of jurisdiction in general international law is to establish whether a claim by a State to regulate some conduct is lawful or unlawful.⁸⁸¹ However, when it comes to the notion of ‘jurisdiction’ in various human rights treaties, the notion of jurisdiction refers to a power which a State exercises over a territory and its inhabitants. The scope of human rights obligations of States depend on the degree of control and authority they exercise.⁸⁸² The ‘control entails responsibility’ approach elides the distinction between jurisdiction and responsibility the ECtHR has made. As the ECtHR stated in the *Loizidou* Case: “The Court would emphasise that it is not called upon at the preliminary objections stage of its procedure to examine whether Turkey is actually responsible under the Convention for the acts which form the basis of the applicant’s complaints. Nor is it called upon to establish the principles that govern State responsibility under the Convention in a situation like that obtaining in the northern part of Cyprus. Such questions belong rather to the merits phase of the Court’s procedure. The Court’s enquiry is limited to determining whether the matters complained of by the applicant are capable of falling within the “jurisdiction” of Turkey even though they occur outside her national territory.”⁸⁸³

Jurisdiction under the ECHR is a procedural hurdle intended to delineate the scope of the ECHR. If the ECHR had been intended to look only to State responsibility, it could have omitted the words ‘within their jurisdiction’ from Article 1 ECHR. Although signatory States are clearly responsible under international law for acts outside the *espace juridique* of the ECHR in violation of international human rights law, the ECtHR is not necessarily obliged to

⁸⁸⁰ ICTY, *Prosecutor v Sefer Halilović*, Appeals Chamber Judgment, 16 October 2007, IT-01-48-A (2007), para. 59.

⁸⁸¹ OXMAN, Bernard H., “Jurisdiction of States”, in BERNHARDT, Rudolph (Ed.), *Encyclopaedia of Public International Law* (Amsterdam: North-Holland, 1997), 55.

⁸⁸² LAWSON, Rick, “Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights”, in COOMANS, Fons & KAMMINGA, Menno T. (Eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004), 84; WILDE, Ralph, “Legal ‘Black Hole’? Extraterritorial State Action and International Treaty Law on Civil and Political Rights”, 26 *Michigan Journal of International Law* 739 (2005), 806.

⁸⁸³ ECtHR, *Loizidou v. Turkey*, 23 March 1995, Appl. No. 15318/89 (1995), para. 61.

seize jurisdiction over all such violations.⁸⁸⁴ Next to this, it is not desirable to uphold the ‘control entails responsibility’ approach from a policy perspective. As this approach sets the threshold for jurisdiction at such a low level, it would – in practice – transform the current character of the ECHR system. As millions of individuals around the world would have the ability to mount a challenge to such practices in the forum of the ECtHR, this would be unworkable.⁸⁸⁵

5.4.3. *Effective control and legal fictions*

Positively establishing extraterritorial jurisdiction has been motivated by a desire to avoid double standards or – as was stated by the ECtHR in the *Cyprus v. Turkey Case* (2001) – a regrettable vacuum in human rights protection.⁸⁸⁶ This case related to the situation that has existed in northern Cyprus since the conduct of military operations there by Turkey in July and August 1974 and the continuing division of the territory of Cyprus. Cyprus, on the one hand, contended that – despite the proclamation of the ‘Turkish Republic of Northern Cyprus’ (TRNC) in November 1983 – the TRNC was an illegal entity under international law. Therefore Turkey was the accountable State for a broad range of ECHR violations there. Turkey, on the other hand, argued that the TRNC was politically independent from Turkey. Consequently, Turkey could not be held responsible for its acts. However, the ECtHR stressed that Turkey’s responsibility under the ECHR could not be confined to the acts of its own soldiers and officials operating in northern Cyprus, but was also engaged by virtue of the acts of the local administration (the TRNC), which survived by virtue of Turkish military and other support. As a result, Turkey had jurisdiction under the ECHR.

A number of States have claimed that certain international areas or transit zones in ports or airports do not legally form part of their national territory. For example, in the case of *Amuur v. France*, France held before the ECtHR that the international zone at Paris-Orly

⁸⁸⁴ O’BOYLE, Michael, “The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on ‘Life After Bankovic’”, in COOMANS, Fons & KAMMINGA, Menno T. (Eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004), 125-139.

⁸⁸⁵ MILLER, Sarah, “Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention”, 20 *European Journal of International Law* 1223 (2009), 1235.

⁸⁸⁶ ECtHR, *Cyprus v. Turkey*, 10 May 2001, Appl. No. 25781/94 (2001), paras. 78 and 91.

airport was different from French territory.⁸⁸⁷ Within this international zone, no interpreters, legal assistance or private assistance was allowed to asylum-seekers. The legal status of the international zone was considered as different from that of French territory. As a result, the 'French Office for the Protection of Refugees and Stateless Persons' (OFPRA) was not legally obliged to examine the request as they would have been if the request had been made by someone already on French territory. Therefore, OFPRA denied the applicants access to the asylum procedure on the grounds that it lacked jurisdiction. The ECtHR, however, confirmed that despite its name, the international zone did not have extraterritorial status and that the ECHR did apply in this case.⁸⁸⁸

Also Australia has a somewhat original way of dealing with the problem of asylum-seekers. This country created 'territorial excision' of more than 3.500 of its islands. The Australian 2001 Migration Amendment (Excision from Migration Zone) Act defines certain places as 'excised offshore places'. The effect of this excision legislation is that non-citizens who have first entered Australia at an excised offshore place without lawful authority – namely without a valid visa that is in effect – are barred from making valid visa applications on arrival or during their stay in Australia. These non-citizens may be detained and removed from Australia.⁸⁸⁹ HRW has criticized this practice of excluding parts of Australian territory from the Australian migration zone as asylum seekers processed in excised places such as Christmas Island do not enjoy the same legal rights as those processed on mainland Australia. According to HRW, all asylum seekers under Australian jurisdiction should be able to file a claim for asylum and have full access to legal assistance, an independent appeal process, work permits and community support.⁸⁹⁰ However, Australia claims to meet its international obligations through the protection assessment process which includes a

⁸⁸⁷ ECtHR, *Amuur v. France*, 25 June 1996, Appl. No. 19776/92 (1996). See: BELLO, Judith H. & KOKOTT, Juliane, "Amuur v. France", 91 *American Journal of International Law* 147 (1997), 147-152.

⁸⁸⁸ ECtHR, *Amuur v. France*, 25 June 1996, Appl. No. 19776/92 (1996), para. 52.

⁸⁸⁹ Migration Amendment (Excision from Migration Zone) Act 2001, Act No. 127 (2001), available online: <<http://www.comlaw.gov.au/Details/C2004A00887>>.

⁸⁹⁰ Human Rights Watch, "Letter to Australian Prime Minister Kevin Rudd", Letter by Kenneth Roth (18 December 2007), available online: <<http://www.hrw.org/news/2007/12/16/letter-australian-prime-minister-kevin-rudd>>.

primary assessment against protection obligations under the Refugee Convention and complementary protection obligations.⁸⁹¹

We can conclude that situations of extraterritoriality do not arise despite legal fictions in national legislation. A State must be assumed to exercise jurisdiction within its entire territory, unless this assumption can specifically be rebutted. However, we must bear in mind that the applicability of refugee law or human rights law does not preclude States from installing special border procedures under national law, as long as they are consistent with international obligations.⁸⁹²

5.4.4. *Effective control and extraterritorial migration control*

But when is extraterritorial migration control equivalent to effective control? Merely denying onward passage or escorting vessels back may be insufficient to establish extraterritorial jurisdiction over the individuals. Although the establishment of jurisdiction is the premise for subjecting States to relevant obligations under international refugee and human rights law, not any exercise of migration control will necessarily entail an exercise of jurisdiction.⁸⁹³ First of all, situations such as detention or arrest constitute an exercise of control over persons on board vessels sufficient to trigger human rights responsibility. For example, in the *Medvedyev Case*⁸⁹⁴, the ECtHR noted that from the date on which the *Winner* was arrested and until it arrived in Brest, the *Winner* and its crew were under the control of French military forces. Although they were outside French territory, they were within the jurisdiction of France for the purposes of Article 1 ECtHR. What remained unclear until the *Hirsi Case* is whether situations other than those amounting to detention or arrest constitute an exercise of control over persons on board vessels sufficient to trigger human rights responsibility.

⁸⁹¹ Australian Government – Department of Immigration and Citizenship, “Fact Sheet 81- Australia’s Excised Offshore Places”, available online: <<http://www.immi.gov.au/media/fact-sheets/81excised-offshore.htm>>. For a discussion on this topic see: MORENO-LAX, Violeta, “The Legality of the ‘Safe Third Country’ Notion Revisited: An Appraisal in Light of General International Rules on the Law of Treaties”, in GOODWIN-GILL, Guy S. (Ed.), *2010 Study Session, The Hague Academy of International Law* (The Hague: Martinus Nijhoff Publishers, 2012).

⁸⁹² GAMMELTOFT-HANSEN, Thomas, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011), 119.

⁸⁹³ GAMMELTOFT-HANSEN, Thomas, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011), 100.

⁸⁹⁴ ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Appl. No. 3394/03 (2008), para. 50.

In the *Hirsi Case*, the ECtHR observed that – although the persons were not arrested or detained – there was effective control as the events took place entirely on board ships of the Italian armed forces and the crews were composed exclusively of Italian military personnel.⁸⁹⁵ Article 29 LOSC gives a definition of a warship: “For the purposes of this Convention, “warship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.” An important element in this definition is that a warship is under the direct command of an officer duly commissioned by the government of the State. Therefore, SHAW considers a warship “a direct arm of the sovereign of the flag State”.⁸⁹⁶ Also, the Italian Navigation Code stipulates: “Italian vessels on the high seas [...] are considered to be Italian territory.”⁸⁹⁷ This provision – together with the principle of exclusive flag State jurisdiction – led the Court to recognize cases of extraterritorial exercise of the jurisdiction of that State with respect to acts carried out on board vessels flying its flag. This is *de jure* control exercised by the State, capable of engaging State responsibility. Moreover, there was also *de facto* continued and uninterrupted control.⁸⁹⁸ It must, however, be noted that in the case of *Hirsi Jamaa and Others v. Italy* the migrants were brought onto an Italian military ship and physically handed over to the Libyan authorities. Therefore, whether this effective control is also present when a vessel’s course is diverted is not clear. This point will be discussed in detail in Chapter III of this dissertation.

5.5. Physical return

As mentioned, there is a lot of discussion concerning the exact scope of the *non-refoulement* principle in relation to the interdiction of migrants at sea, especially when the migrant vessel is forced to change its course. However, in certain situations it does happen that migrants at sea are not simply returned to the high seas, but to a certain country,

⁸⁹⁵ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), para. 81.

⁸⁹⁶ SHAW, Malcolm N., *International Law* (Cambridge: Cambridge University Press, 6th ed. 2008), 558.

⁸⁹⁷ Italian Navigation Code (adopted 30 March 1942, as amended in 2002), Art. 4.

⁸⁹⁸ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), para. 70 *et seq.*

sometimes based upon an agreement with that State. In certain cases, this can be in violation of the *non-refoulement* principle. In 2009, the UNHCR reported that Frontex had admitted that 'it may be helping' the Italian Coast Guard in its policy of interdicting boats of migrants in the Mediterranean and sending them back to Libya.⁸⁹⁹ Libya was considered a 'safe' place, since it was only a country of transit for most asylum seekers. The practice of return to Libya has long been controversial since Libya has not signed the Refugee Convention and it does not have a sufficient asylum system. Before 2011, return to Libya could therefore be seen as a form of indirect *refoulement* for asylum seekers coming from Sub-Saharan Africa, since Libya would send them back to their country of origin without an adequate asylum procedure.

As a response to the large numbers of persons seeking to cross the Mediterranean to reach Europe, extraterritorial processing is on the agenda. Extraterritorial processing involves the interception of migrants at sea and their removal to a 'safe third country' (STC) for processing.⁹⁰⁰ Although some authors consider the STC concept an attack on the fundamental principle of asylum,⁹⁰¹ States are not obliged to process asylum applications or to grant asylum. Therefore, States may choose to remove individuals to third countries without considering their protection claims, provided that the principle of *non-refoulement* is being respected. As the STC has managed to ground itself so firmly in the discourse of governments, academics and even NGOs, the debate does not address the lawfulness of the practice itself, but rather focuses on the specific requirements that are to be met for a State to be considered a safe third country.⁹⁰² The right of States to remove refugees is conditional on a determination that 'effective protection' is in fact available in the destination country. Although the UNHCR and others has used the term 'effective protection' frequently, no comprehensive definition has been advanced.⁹⁰³ Many of the third countries to which asylum

⁸⁹⁹ UNHCR, "Frontex 'may be helping' Italian migration policy", *Refugees Daily* (24 September 2009), available online: <<http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=4abb0eff5>>.

⁹⁰⁰ KNEEBONE, Susan, "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The 'Safe Third Country' Concept", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 129.

⁹⁰¹ KNEEBONE, Susan, "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The 'Safe Third Country' Concept", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 153.

⁹⁰² GIL-BAZO, Maria-Teresa, "The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited", 18 *International Journal of Refugee Law* 571 (2006), 595.

⁹⁰³ See for example: UNHCR, "Asylum Processes (Fair and Efficient Asylum Procedures)", Global Consultations on International Protection, 2nd meeting, *UN Doc. EC/GC/01/12* (31 May 2001), paras. 15 and

seekers are returned under safe third country provisions are assumed to be safe because they are not likely to persecute the particular applicants and do not consciously *refouler* people to their persecutors (indirect *refoulement*). When an inadequate refugee status determination procedure prevents an actual refugee from establishing his or her status, this can also result in *refoulement*.⁹⁰⁴ Therefore, third countries should have sufficiently developed asylum procedures in order to be regarded as 'safe'. This means that – in order to avoid (indirect) *refoulement* – States willing to deport or return individuals to a third country, should base their action on a careful assessment.⁹⁰⁵

Could countries that are not a Party to the Refugee Convention or the Protocol be regarded as a STC? In these non-party States, UNHCR has less access to refugees, less opportunity to supervise and less capacity to verify and promote the safety of those refugees who are returned there. Therefore, UNHCR raises a strong objection against the designation of a non-party State as a STC.⁹⁰⁶ HATHAWAY submits STC determinations are not restricted to States parties to the Refugee Convention or Protocol. A country can be deemed a STC if it will respect in practice whatever Convention rights the refugee has already acquired by virtue of having come under the jurisdiction or entered the territory of a State party to the Refugee Convention. Moreover, there has to be a judicial or comparable mechanism in place to enable the refugee to insist upon real accountability by the host state to implement those rights.⁹⁰⁷ Although the *non-refoulement* principle is traditionally of a negative character, States will thus be under a positive obligation to make an assessment that – primarily – concerns the receiving country's ratification of international refugee law instruments as well

50(b); UNHCR, "Overview of Protection Issues in Europe – Legislative Trends and Positions Taken by UNHCR", 1 *European Series* 20 (1995), 20 *et seq.*, available online: <<http://www.unhcr.org/46e65e1e2.pdf>>; Council of Europe – Committee of Ministers, "Recommendation R (1997) 22 of the Committee of Ministers to Member States containing Guidelines on the Application of the Safe Third Country Concept" (25 November 1997), paras. 1(d) and 7, available online: <<http://www.unhcr.org/refworld/docid/3ae6b39f10.html>>.

⁹⁰⁴ LEGOMSKY, Stephan H., "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection", 15 *International Journal of Refugee Law* 567 (2003), 585.

⁹⁰⁵ TONDINI, Matteo, "The Legality of Intercepting Boat People under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the Hirsi Case", 18 *Journal of International Maritime Law* 59 (2012), 67 and 73.

⁹⁰⁶ UNHCR, "UNHCR's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status" (July 2001), para. 35, available online: <<http://www.unhcr.org/refworld/category,LEGAL,,COMMENTARY,,3c0e3f374,0.html>>.

⁹⁰⁷ HATHAWAY, James C., *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), 332-333.

as the formal adoption of domestic legislation on asylum, including assistance to migrants upon their arrival.⁹⁰⁸

In the *MSS Case* – on the return of an Afghan national from Belgium to Greece based on the Dublin II Regulation⁹⁰⁹ – the ECtHR found Belgium to be in violation of the prohibition of *refoulement* for having not verified the practical application by the Greek authorities of their legislation on asylum. Belgium knew or should have known that the applicant’s asylum claim would not have been seriously examined by the Greek authorities.⁹¹⁰ Moreover, in order to comply with the *non-refoulement* principle, it is not sufficient for the removing country to rely on diplomatic assurances offered by the receiving country, when such assurances only concern the legislation in force without containing any relevant information about the situation in practice.⁹¹¹ The European Court of Justice (ECJ) also upheld this reasoning in two cases of 2011. The ECJ concluded that States may not transfer an asylum seeker to a country where systematic deficiencies in the asylum procedure and in the reception conditions of asylum seekers amount to a real risk for the asylum seeker of being subjected to inhuman or degrading treatment.⁹¹² Although Belgium, Italy and Poland upheld that they lacked the ability to assess in practical terms both the other States’ compliance with fundamental rights and the risks to which asylum seekers would be exposed, the ECJ information such as UNHCR’s reports makes this entirely possible.⁹¹³ In the aforementioned *Hirsi Case*, the ECtHR reiterated the importance of reliable and independent information, stating that “[T]he numerous reports by international bodies and nongovernmental organisations paint a disturbing picture of the treatment meted out to clandestine immigrants in Libya at the material time.”⁹¹⁴

⁹⁰⁸ TONDINI, Matteo, “The Legality of Intercepting Boat People under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the *Hirsi Case*”, 18 *Journal of International Maritime Law* 59 (2012), 67 and 73.

⁹⁰⁹ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ L* 50 of 25 February 2003.

⁹¹⁰ ECtHR, *MSS v. Belgium and Greece*, 21 January 2011, Appl. No. 30696/09 (2012), para. 358.

⁹¹¹ ECtHR, *MSS v. Belgium and Greece*, 21 January 2011, Appl. No. 30696/09 (2012), para. 354.

⁹¹² ECJ, *NS v. Secretary of State for the Home Department*, 21 December 2011, Case C-411/10 (2011) and ECJ, *ME et al v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, Case C-493/10 (2011), para. 106.

⁹¹³ ECJ, *NS v. Secretary of State for the Home Department*, 21 December 2011, Case C-411/10 (2011) and ECJ, *ME et al v. refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, Case C-493/10 (2011), para. 91.

⁹¹⁴ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), 123.

Also the High Court of Australia dealt with the STC issue in 2011. The Court decided that the deportation of two Afghan asylum seekers from Christmas Island to Malaysia violated the *non-refoulement* principle. The deportation was based upon a bilateral agreement between the two States stating that asylum claims – from people that had irregularly traveled to Australia by sea and had been intercepted – would be dealt with directly in Malaysia.⁹¹⁵ Although the Court did not conclude that such an agreement was unlawful *per se*, it said that – in order to comply with the *non-refoulement* principle – three conditions have to be met. The receiving State must be legally bound by international law or its own domestic law to provide asylum seekers: (1) access to ‘effective procedures’ for assessing their claim for protection, (2) protection pending determination of their refugee status, and (3) protection in case – after the acknowledgement of their refugee status – they decide to return to their country of origin or resettle in another country.⁹¹⁶ According to the Court, Malaysia did not fulfil these conditions.⁹¹⁷

However, effective protection is not the only relevant factor to determine whether return to a third country is permissible. Also issues concerning the necessary links between the applicant and the third country require discussion. UNHCR has already expressed its concerns about the absence of attention to the applicant’s ties. Mere presence in a territory is often the result of fortuitous circumstances. Therefore it does not necessarily imply the existence of any meaningful link or connection.⁹¹⁸ Additionally, there should be respect for human rights and human needs. One specific and highly controversial issue is detention of asylum-seekers. Although UNHCR has laid out careful and detailed standards on detention,⁹¹⁹ many countries – including prominent third countries – do not meet them.

⁹¹⁵ Agreement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement (adopted 25 July 2011), available online: <http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf>.

⁹¹⁶ High Court of Australia, *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*, 31 August 2011, (2011) HCA 32, paras. 125-126 and 243.

⁹¹⁷ High Court of Australia, *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*, 31 August 2011, (2011) HCA 32, para. 135.

⁹¹⁸ UNHCR, “UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status” (July 2001), para. 37, available online: <<http://www.unhcr.org/refworld/category,LEGAL,,COMMENTARY,,3c0e3f374,0.html>>.

⁹¹⁹ UNHCR, “Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers” (February 1999), available online: <<http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf>>; ExCom,

Detention practices have been questionable throughout large regions of the world. Also other human rights and human needs are not always fully observed. STC provisions seldom take housing and other basic subsistence needs into account.⁹²⁰

5.6. Conclusion

The *non-refoulement* principle in Article 33(1) of the Refugee Convention states that: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” *Non-refoulement* is not limited to those formally recognized as refugees. Therefore, the prohibition on States is applicable to recognized refugees as well as for all asylum-seekers. There appears to be little reason to doubt the applicability of *non-refoulement* in the territorial sea.⁹²¹ The duty of *non-refoulement* not only encompasses non-return at the frontier, but also non-rejection at the frontier, **only** when the latter poses an actual threat.⁹²²

The most debated point of discussion, is the question whether the *non-refoulement* principle is applicable extraterritorially during interdictions on the high seas. Concerning *non-refoulement* obligations under international and European human rights law, the decisive criterion is not whether such persons are on the State’s territory, but rather, whether they come within the effective control and authority of that State.⁹²³ As international refugee law and international human rights law are complementary and mutually reinforcing legal regimes, this view has also an impact in refugee law.⁹²⁴ The principle of *non-refoulement* is considered to have the status of customary international law. Moreover, the *Hirsi Case* plays

“Detention of Refugees and Asylum-Seekers”, Conclusion No. 44 (XXXVII) (1986), available online: <<http://www.unhcr.org/refworld/docid/3ae68c43c0.html>>.

⁹²⁰ See: LEGOMSKY, Stephan H., “Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection”, 15 *International Journal of Refugee Law* 567 (2003).

⁹²¹ BARNES, Richard A., “Refugee Law at Sea”, 53 *International and Comparative Law Quarterly* 47 (2004), 69.

⁹²² HATHAWAY, James C., *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 301.

⁹²³ UNHCR, “Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol” (26 January 2007), para. 43, available online: <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>>.

⁹²⁴ ExCom, “General Conclusion on International Protection”, Conclusion No. 95 (LIV) (2003), para. 1, available online: <<http://www.unhcr.org/41b041534.html>>.

a crucial role towards the possible future recognition of the extraterritorial application of the *non-refoulement* principle as international customary law.

Situations of extraterritoriality do not arise despite legal fictions in national legislation. Australia for example created a 'territorial excision' of more than 3.500 of its islands. Although the applicability of refugee law or human rights law does not preclude States from installing special border procedures under national law, they have to be consistent with international obligations.⁹²⁵

In certain situations it does happen that migrants at sea are not simply returned to the high seas, but to a certain country, sometimes based upon an agreement with that State. The removal of asylum-seekers to STCs for processing is considered to be lawful. The debate rather focuses on the specific requirements that are to be met for a State to be considered a STC. Effective protection is the most relevant factor to determine whether return to a third country is permissible. However, also necessary links between the applicant and the STC as well as detention conditions require attention.

⁹²⁵ GAMMELTOFT-HANSEN, Thomas, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011), 119.

6. Regional initiatives

6.1. Migration by sea in the Mediterranean

6.1.1. Migration towards Europe – The creation of Frontex

Europe has to protect as much as 42,672 km of external sea borders.⁹²⁶ In 2010 almost 10,000 irregular arrivals by sea were reported in Greece, Spain, Italy and Malta. In 2011, this number amounted to nearly 70,000, due to the uprisings in Tunisia and Libya.⁹²⁷ The creation of Frontex – the European agency for the management of operational cooperation between the Member States at the external borders of the European Union – was an important step towards promoting solidarity between the Member States in the field of effective control and surveillance of external borders.⁹²⁸

Frontex was set up in 2004 by EU Council Regulation No. 2007/2004 (the Frontex Regulation).⁹²⁹ The Frontex Regulation was later amended by Regulation 863/2007, which established a mechanism for the creation of Rapid Border Intervention Teams (RABIT)⁹³⁰ and by Regulation (EU) No. 1168/2011.⁹³¹ Frontex has a mandate that includes the coordination of the operational cooperation between Member States, assisting Member States on the training of border guards, carry out risk analyses, facilitating the attainment of research and development, providing a rapid crisis-response capability available to all Member States and

⁹²⁶ Frontex, “Origin”, available online: <http://www.frontex.europa.eu/origin_and_tasks/origin/>.

⁹²⁷ UNHCR, “Key Facts & Figures”, available online: <<http://www.unhcr.org/pages/4a1d406060.html>>.

⁹²⁸ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJL* 349/1 of 25 November 2004, Preamble, para. 5.

⁹²⁹ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJL* 349/1 of 25 November 2004.

⁹³⁰ Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *OJL* 199 of 31 July 2007.

⁹³¹ Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJL* 304/1 of 22 November 2011.

assisting Member States in joint return operations.⁹³² Frontex is a community body with a legal personality⁹³³ as well as operational and budgetary autonomy.⁹³⁴ Although Frontex is a specialized and independent body, the responsibility for the control and surveillance of external borders lies with the Member States.⁹³⁵ Under a new mandate approved by the European Parliament in September 2011,⁹³⁶ Frontex will be able to acquire its own assets, such as helicopters, to monitor the borders of the European Union. Frontex will also appoint human rights officers to monitor whether human rights are respected at border checks. Further, a Consultative Forum on fundamental rights – open to the EU Fundamental Rights and Asylum Support agencies, the UNHCR and non-governmental organizations (NGOs) – will be established to assist the agency's management board.⁹³⁷

Frontex coordinates joint surveillance operations at sea between Member States with the aim of strengthening external sea border security. First, an operational plan is formulated on the basis of a risk analysis. Participating States are fully involved. The project is then financed, funded and managed by Frontex, though it is always led by a Member State or a Schengen-associated country hosting the operation. According to Frontex, its most successful joint operation at sea to date was *Operation Hera*, which targeted the passage of irregular migrants and the criminal organizations that transported them from West Africa to the Canary Islands. By stemming the flow of people through this highly dangerous route,

⁹³² Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJL* 349/1 of 25 November 2004, Art. 2(1).

⁹³³ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJL* 349/1 of 25 November 2004, Art. 15.

⁹³⁴ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJL* 349/1 of 25 November 2004, Chapter IV.

⁹³⁵ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJL* 349/1 of 25 November 2004, Preamble, para. 4.

⁹³⁶ European Parliament legislative resolution of 13 September 2011 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), COD (2010) 0039.

⁹³⁷ Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJL* 304/1 of 22 November 2011, Art. 26a.

Frontex stated that hundreds if not thousands of lives were saved.⁹³⁸ Not only was this route perilous. The UNHCR stated that more than 1,500 people drowned or went missing trying to cross the Mediterranean in 2011.⁹³⁹

However, the primary goal of Frontex is not saving the lives of migrants at sea. After 9/11, States began to consider migrants as a possible threat to their security.⁹⁴⁰ Article 12(1) of the Schengen Borders Code, the Community Code on the rules governing the movement of persons across borders, stipulates that the main purpose of border surveillance is to prevent unauthorized border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.⁹⁴¹ Measures taken in the course of a surveillance operation against vessels, with regard to which there are reasonable grounds for suspecting that they carry persons intending to circumvent the checks at border crossing points, may include, *inter alia*: (1) approaching the vessel; (2) a request for information; (3) stopping, boarding and searching the ship; (4) seizing the ship and apprehending persons on board; and (5) ordering the ship to modify its course outside of or towards a destination other than the territorial waters or contiguous zone or escorting the vessel or steaming nearby until the ship is heading on such course.⁹⁴²

6.1.2. *Interception by Frontex – Conformity with the law of the sea*

In the course of a surveillance operation, Frontex is authorized to take interception measures when there are reasonable grounds for suspecting that a vessel carries persons

⁹³⁸ Frontex, “Tasks”, available online: <http://www.frontex.europa.eu/origin_and_tasks/tasks/>.

⁹³⁹ UNHCR, “More than 1,500 drown or go missing trying to cross the Mediterranean in 2011” (31 January 2012), available online: <<http://www.unhcr.org/4f2803949.html>>.

⁹⁴⁰ See: Migration Policy Institute (MPI), “Report on The New ‘Boat People’: Ensuring Safety and Determining Status” (January 2006), 19-21, available online:

<http://www.migrationpolicy.org/pubs/Boat_People_Report.pdf>; ExCom, “Proposals for an Executive Committee Conclusion on Rescue at Sea” (10 January 2007), para. 4,

<<http://www.unhcr.org/excom/EXCOM/45a752d12.pdf>>. See also: HODGKINSON, Sandra L., COOK, Edward, FICHTER, Thomas & FLEMING, Christian, “Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap”, 22 *American University International Law Review* 583 (2007), 583-672.

⁹⁴¹ Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1 of 13 April 2006.

⁹⁴² Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, OJ L 111/20 of 4 May 2010, Annex Part I: “Rules for sea border operations coordinated by the Agency”, para. 2.4.

intending to circumvent the checks at border crossing points.⁹⁴³ EU Council Decision 2010/252 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders uses the notion of ‘interception’ in a broad sense, for example, by also including the communication of information about the vessel.⁹⁴⁴ These measures may include:

(a) requesting information and documentation on ownership, registration and elements relating to the voyage, and on the identity, nationality and other relevant data on persons on board;

(b) stopping, boarding and searching the ship, its cargo and persons on board, and questioning persons on board;

(c) making persons on board aware that they are not authorized to cross the border and that persons directing the craft may face penalties for facilitating the voyage;

(d) seizing the ship and apprehending persons on board;

(e) ordering the ship to modify its course outside of or towards a destination other than the territorial waters or contiguous zone or escorting the vessel or steaming nearby until the ship is heading on such course;

(f) conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country

(g) conducting the ship or persons on board to the host Member State or to another Member State participating in the operation.⁹⁴⁵

⁹⁴³ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJ L 111/20* of 4 May 2010, Annex Part I: “Rules for sea border operations coordinated by the Agency”, para. 2.4.

⁹⁴⁴ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJ L 111/20* of 4 May 2010, Annex Part I: “Rules for sea border operations coordinated by the Agency”, paras. 2.1-2.4.

⁹⁴⁵ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJ L 111/20* of 4 May 2010, Annex Part I: “Rules for sea border operations coordinated by the Agency”, para. 2.4.

Frontex' actions on the high seas can vary from exercising a right of approach, the customary right of every warship or other duly authorized vessels of any State to approach a vessel on the high seas in order to ascertain its identity and nationality, usually by requesting it to show its flag, to interdiction. As already noted, approaching a vessel and requesting information does not constitute an interference with the exercise of rights of navigation, as inclusive interests are not impinged or threatened. The stopping, boarding and searching of a ship and seizing the ship and apprehending persons on board have to fulfil the conditions set out in the third part of this chapter. However, the question remains whether ordering a ship to modify its course or steaming nearby until the ship is heading on such course constitutes an interference with the right of navigation and, if this is indeed the case, whether the interference is justified. According to PAPANASTAVRIDIS, a diversion of boats to a certain destination is not only the exercise of the right of approach, but it is indisputably a form of actual physical interference to the vessel. Therefore it must fulfil the conditions of the right of visit to be regarded as lawful.⁹⁴⁶

Are the Frontex measures in conformity with international law? The 2009 Frontex General Report recognized that the contrasting interpretations of the law of the sea rules by Member States, especially in the definition of the operational area, was a big problem.⁹⁴⁷ As a result, at the end of 2009, the European Commission proposed Guidelines, supplementing the Schengen Borders Code, for Frontex operations at sea.⁹⁴⁸ The aim of the proposal was to ensure that the international rules relevant to the maritime border surveillance operations carried out under the operational cooperation coordinated by Frontex are uniformly applied by all the Member States taking part in the operations.⁹⁴⁹ The Commission proposal was

⁹⁴⁶ PAPANASTAVRIDIS, Efthymios, "Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law", 36 *Syracuse Journal of International Law and Commerce* 145 (2009), 155.

⁹⁴⁷ Frontex, "General Report (2009)", 43-44, available online:

<http://www.frontex.europa.eu/gfx/frontex/files/general_report/2009/gen_rep_2009_en.pdf>.

⁹⁴⁸ European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final.

⁹⁴⁹ European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final, Explanatory Memorandum, para. 2.

accepted by the Council of the European Union in Council Decision 2010/252 of 26 April 2010.⁹⁵⁰

The Guidelines specify the conditions under which measures can be taken in the different maritime areas, including the high seas. These conditions include the relevant rules of international law, thereby contributing to their effective and uniform implementation in Frontex operations. The purpose of the measures are to prevent and discourage persons from circumventing the checks at border crossing points and to detect unauthorized crossing of the external borders.⁹⁵¹ However, the Preamble to the Guidelines mentions that all measures taken have to be proportionate to the objectives at any time.⁹⁵²

On the high seas, the Guidelines make it clear that the authorization of the flag State is always necessary when taking any measures, whether exercising the right of visit or seizure, against a migrant vessel.⁹⁵³ Pending or in the absence of authorization of the flag State, the ship can be surveyed at a prudent distance. This means that no other measures are to be taken, unless a bilateral or multilateral agreement allows for it.⁹⁵⁴ However, pursuant to Guidelines, when there are reasonable grounds for suspecting that the ship is without nationality, or may be assimilated to a ship without nationality, the participating unit may

⁹⁵⁰ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010. Although the European Court of Justice (ECJ) annulled Council Decision 2010/252, and thus also the guidelines therein, the effects of the Council Decision have to be maintained until a new act can be adopted in accordance with ordinary legislative procedures. See: ECJ, *European Parliament v. Council of the European Union*, 17 April 2012, Opinion of Advocate General MENGOZZI, Case C-355/10 (2012) and ECJ, *European Parliament v. Council of the European Union*, 5 September 2012, Case C-355/10 (2012).

⁹⁵¹ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010, Preamble, para. 1.

⁹⁵² Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010, Preamble, para. 3.

⁹⁵³ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010, Annex Part I: “Rules for sea border operations coordinated by the Agency”, paras. 2.5.2.1.-2.5.2.4.

⁹⁵⁴ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010, Annex Part I: “Rules for sea border operations coordinated by the Agency”, para. 2.5.2.6.

proceed to verify the ship's right to fly its flag. If suspicion remains after the documents have been checked, a further examination on board the ship may be carried out. Other measures, such as seizure or apprehending persons on board, is only to be carried out when: (1) the ship proves to be without nationality; and (2) there are reasonable grounds for suspecting that the ship is engaged in the smuggling of migrants by sea in accordance with the Smuggling Protocol.⁹⁵⁵ The legal basis for this provision can be found in Article 8(7) of the Smuggling Protocol which says: "*A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.*"

It has to be noted that the word 'engaged' should be understood broadly as including vessels involved both directly and indirectly in the smuggling of migrants.⁹⁵⁶ As it can hardly be contested that the smuggling of migrants is an internationally condemned crime, seizure and apprehending persons on board will constitute appropriate measures. MALLIA argues that in the context of drug smuggling, a similar provision – namely Article 17(2) of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Drugs Convention)⁹⁵⁷ – has been interpreted as placing a ship without nationality in the same category as a ship in respect of which a state exercises jurisdiction by virtue of the fact that it sails under its flag. As a result, a State can take the same enforcement measures with respect to ships without nationality as it can with respect to ships flying its flag.⁹⁵⁸

⁹⁵⁵ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, OJ L 111/20 of 4 May 2010, Annex Part I: "Rules for sea border operations coordinated by the Agency", para. 2.5.2.5.

⁹⁵⁶ UNGA, "Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime", *UN Doc. A/55/383.Add.1* (3 November 2000), 18.

⁹⁵⁷ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990), 95 *UNTS* 1582 [Drugs Convention].

⁹⁵⁸ MALLIA, Patricia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (The Hague: Martinus Nijhoff Publishers, 2009), 70.

According to the Guidelines, interception measures may also include: “conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country.”⁹⁵⁹ Of course, the third country has to consent. For example, with regard to the Frontex *Operation Hera*, during which thousands of migrants were diverted to their points of departure at ports at the West African coast, Spain concluded agreements with Mauretania and Senegal that allowed the diversions.⁹⁶⁰ Senegal and Mauretania were involved with assets and staff.⁹⁶¹ Also, a Mauritanian or Senegalese law enforcement officer is always present on board of deployed Member States’ assets and is always responsible for the diversion.⁹⁶²

International law does not on its own govern the extraterritorial application of national law. A State clearly needs to express its intention to apply a given law extraterritorially or the nature of the law itself has to manifest such an intent. Does the Schengen Borders Code apply extraterritorially? There are circumstances in which European Community law may apply to activities pursued outside the territory of the Community. In the case *Boukhalfa v Germany* (1996), the European Court of Justice stated that: “The geographical application of the Treaty is defined in Article 227. That article does not, however, preclude Community rules from having effects outside the territory of the Community.”⁹⁶³ Moreover, according to legal doctrine, the extraterritorial application of the Schengen Borders is implied in the Schengen Borders Code due to the fact that Annex VI, para. 3 of the Code, deals with the specific rules for the procedures at sea borders.⁹⁶⁴ This paragraph stipulates that the Schengen Borders Code, to ensure that both crew and passengers fulfil the conditions laid down in Article 5 on the entry conditions for third-country nationals, allows for checks to be carried out on ships during

⁹⁵⁹ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010, Annex Part I: “Rules for sea border operations coordinated by the Agency”, para. 2.4(f).

⁹⁶⁰ Frontex, “HERA 2008 and NAUTILUS 2008 Statistics”, Press Release (17 February 2009), available online: <http://www.frontex.europa.eu/newsroom/news_releases/art40.html>.

⁹⁶¹ Frontex, “Longest FRONTEX coordinated operation – HERA, the Canary Islands” (19 December 2006), available online: <http://www.frontex.europa.eu/newsroom/news_releases/art8.html>.

⁹⁶² Frontex, “HERA 2008 and NAUTILUS 2008 Statistics”, Press Release (17 February 2009), available online: <http://www.frontex.europa.eu/newsroom/news_releases/art40.html>.

⁹⁶³ ECJ, *Boukhalfa v. Bundesrepublik Deutschland*, 30 April 1996, Case C-214/94 (1996), ECR I-02253 (1996), para. 14.

⁹⁶⁴ BALDACCINI, Anneliese, “Extraterritorial Border Controls in the EU”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control – Legal Challenges* (Leiden: Martinus Nijhoff Publishers, 2010), 245-246.

crossings or in the territory of third country, both “in accordance with the agreements reached on the matter”.⁹⁶⁵

It can be concluded that the measures that can be taken by Frontex are legal according to the international law of the sea. Nevertheless, some remarks must be made. First, contrary to what the term ‘guidelines’ suggests, the content of the Guidelines are based on obligations and constraints in international law. Second, due to a lack of transparency of the Frontex operations carried out at sea, it is difficult to know whether the Guidelines are being respected or not. Although Frontex identifies open communication as one of the values at the foundation of Frontex activities,⁹⁶⁶ it provides only selective information regarding the joint operations conducted at the sea borders. For example, the 2010 Frontex General Report states that 6,890 immigrants were apprehended during joint sea operations in 2010 – 73% fewer than in 2009 (25,536 migrants),⁹⁶⁷ but the Report does not mention the procedures that were followed to apprehend the persons.

6.1.3. *Interception by Frontex – Conformity with the non-refoulement principle*

Although the Schengen Borders Code should be applied in accordance with the *non-refoulement* principle,⁹⁶⁸ the principle is not explicitly mentioned in relation to surveillance operations on the high seas. Some European Member States are contesting the extraterritorial applicability of the principle in international waters.⁹⁶⁹ However, with respect to surveillance operations at sea, EU Council Decision 2010/252 of 26 April 2010 introduces a prohibition on *refoulement* of those in danger of persecution or other forms of inhuman or degrading

⁹⁶⁵ Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJL* 105/1 of 13 April 2006, Annex VI, Art. 3.1.1.

⁹⁶⁶ Frontex, “General Report (2010)”, 17, available online: <http://www.frontex.europa.eu/gfx/frontex/files/frontex_general_report_2010.pdf>.

⁹⁶⁷ Frontex, “General Report (2010)”, 41, available online: <http://www.frontex.europa.eu/gfx/frontex/files/frontex_general_report_2010.pdf>.

⁹⁶⁸ Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJL* 105/1 of 13 April 2006, Preamble, para. 20.

⁹⁶⁹ European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final, Explanatory Memorandum, para. 2.

treatment.⁹⁷⁰ This prohibition applies regardless of the status of the waters the people are in.⁹⁷¹ This means that, during Frontex operations, the *non-refoulement* principle is to be respected, even on the high seas. In addition, Article 19(2) of the European Charter of Fundamental Rights also contains the *non-refoulement* principle: “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”⁹⁷² The Charter applies to EU Member States when implementing EU law.⁹⁷³

According to the European Commission, an amendment of the Frontex Regulation was necessary in order to ensure a well-defined and correct functioning of Frontex in the coming years.⁹⁷⁴ Therefore, the Frontex Regulation was adapted in the light of the evaluations carried out and practical experiences. The mandate of Frontex was clarified in Regulation (EU) No. 1168/2011.⁹⁷⁵ As already noted, Frontex will appoint a human rights officer to monitor whether human rights are respected at border checks and a Consultative Forum on fundamental rights.⁹⁷⁶

⁹⁷⁰ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJ L* 111/20 of 4 May 2010, Preamble, para. 10.

⁹⁷¹ European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM (2009) 658 final, Explanatory Memorandum, para. 2.

⁹⁷² Charter of Fundamental Rights of the European Union (adopted 7 December 2000, as adapted at Strasbourg on 12 December 2007), *OJ C* 364/1 of 18 December 2000.

⁹⁷³ See also: European Parliament, “Study on Implementation of EU Charter of Fundamental Rights and Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office” (2011), available online:

<<http://www.europarl.europa.eu/committees/en/LIBE/studiesdownload.html?languageDocument=EN&file=48349>>.

⁹⁷⁴ European Commission Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, COM (2010) 61 final.

⁹⁷⁵ Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ L* 304/1 of 22 November 2011.

⁹⁷⁶ Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ L* 304/1 of 22 November 2011, Art. 26(a).

The NGO's ECRE⁹⁷⁷ and Amnesty International both welcomed the new Regulation which confirms that Frontex' activities are to be carried out in accordance with relevant EU law, international law and obligations related to access to international protection and fundamental rights.⁹⁷⁸ However, these groups are concerned that, while the competence of Frontex is being expanded, the framework for accountability remains weak. They recommend that Frontex be subjected to full accountability, through an enhanced oversight of the Agency by the European Parliament. Independent monitoring is also seen as necessary to ensure that fundamental rights are respected within the context of border control operations.⁹⁷⁹

Following the 2011 incidents with migrants at sea in the Mediterranean due to the situation in Tunisia and Libya, PACE adopted a Resolution on the interception and rescue at sea of asylum seekers, refugees and irregular migrants, stating that it was concerned about the lack of clarity regarding the respective responsibilities of European Union States as well as Frontex.⁹⁸⁰ The absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations coordinated by Frontex was considered to be problematic. PACE would like the European Parliament to be entrusted with the democratic supervision of the activities of Frontex.

6.1.4. Public and legal accountability of Frontex

The responsibility for the control and surveillance of external borders lies with the Member States.⁹⁸¹ The actions of European Member States are subject to review by the

⁹⁷⁷ See the website of the European Council on Refugees and Exiles (ECRE), <<http://www.ecre.org/>>.

⁹⁷⁸ ECRE and Amnesty International, "Joint Briefing on the Commission proposal to amend the Frontex Regulation" (21 September 2010), 5, available online: <http://www.ecre.org/files/ECRE_Amnesty_Briefing_Frontex_proposal_September_2010.pdf>.

⁹⁷⁹ ECRE and Amnesty International, "Joint Briefing on the Commission proposal to amend the Frontex Regulation" (21 September 2010), 4, available online: <http://www.ecre.org/files/ECRE_Amnesty_Briefing_Frontex_proposal_September_2010.pdf>.

⁹⁸⁰ PACE, Resolution 1821 (2011), "The interception and rescue at sea of asylum seekers, refugees and irregular migrants", para. 10, available online: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1821.htm#P16_137>.

⁹⁸¹ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJL* 349/1 of 25 November 2004, Preamble, para. 4.

European Court of Justice for actions at their borders in application of Community law⁹⁸² and they are answerable to the European Court of Human Rights for the actions of their authorities which engage fundamental rights protected by the European Human Rights Convention, as for example happened in the *Hirsi Case*.⁹⁸³ The Director is accountable to the Management Board, which is composed of Member State officials. Public accountability is limited to the adoption by the Management Board of an annual report which has to be submitted to the Council, the Commission and the European Parliament.⁹⁸⁴ Although the latter has control over the budget, the Parliament can do little in terms of ensuring that Frontex is held accountable for the manner in which it fulfils its mandate. Nevertheless, the Parliament has informal ways of supervising the work of Frontex, in particular by summoning the Executive Director to report and answer questions. Nevertheless, this is no formal legal obligation.⁹⁸⁵ For example, in 2007, the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) organized a public hearing on ‘Tragedies of Migrants at Sea’. The Chairman of the LIBE Committee requested the participation of a representative of Frontex. However, the inability of any of the three senior officials of Frontex to attend that hearing caused a degree of friction.⁹⁸⁶

PACE launched an inquiry into who was responsible for the more than 1,000 migrants thought to have perished in the Mediterranean Sea since January 2011 while trying to reach European soil from North Africa. The PACE rapporteur, Tineke STRIK, stated that: *“There have been allegations that migrants and refugees are dying after their appeals for rescue have been ignored. Such a grave allegation must be urgently investigated. I intend to look into the manner in which these boats are intercepted – or not – by the different national coastguards, the EU’s border agency FRONTEX, or even military vessels. I also intend to speak to witnesses directly involved in*

⁹⁸² Treaty establishing the European Community as amended by the Treaty of Amsterdam (adopted 25 March 1957, entered into force 1 January 1958), *OJ C* 325/33 of 24 December 2002, Art. 68.

⁹⁸³ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012).

⁹⁸⁴ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJ L* 349/1 of 25 November 2004, Art. 20, para. 2(b).

⁹⁸⁵ BALDACCINI, Anneliese, “Extraterritorial Border Controls in the EU”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control – Legal Challenges* (Leiden: Martinus Nijhoff Publishers, 2010), 236-237.

⁹⁸⁶ European Union Committee of the House of Lords, “FRONTEX: the EU external borders agency”, 9th Report of Session 2007-08 (5 March 2008), para. 85, available online: <<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/60/60.pdf>>.

reported incidents, and put questions to national authorities, the UNHCR, FRONTEX and NATO, among others.”⁹⁸⁷ However, in her report of 29 March 2012, the rapporteur admitted that – although she had requested written information from *inter alia* NATO, Frontex, the European Union and the International Maritime Organization, not all of her requests had been responded to. This created a lack of information from certain quarters.⁹⁸⁸

Regarding legal accountability, the Frontex regulations do not establish a process before the European Courts for the legal protection against unlawful actions by border control guards where they participate in Frontex operations. The responsibility lies with the national court of the host Member State.⁹⁸⁹ The lack of specific jurisdiction concerning Frontex is being addressed to some extent by the Lisbon Treaty, where it is provided that the European Court of Justice will be empowered to review the legality of acts of EU bodies, offices or agencies intended to produce legal effects *vis-à-vis* third parties.⁹⁹⁰ As a result, Frontex will not be exculpated from claims against its acts for or in the name of the European Union.⁹⁹¹ Furthermore, due to the accession of the European Union to the European Human Rights Convention, Frontex will be directly legally accountable before the European Court of Human Rights for violations of fundamental rights protected under the Convention.⁹⁹²

6.1.5. Conclusion

After analyzing the relevant rules regarding Frontex operations at sea, it can be concluded that at-sea operations undertaken by Frontex are not *per se* violating the

⁹⁸⁷ PACE, “PACE launches inquiry into responsibility for lives lost in the Mediterranean” (23 June 2011), available online: <http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6789&L=2>.

⁹⁸⁸ PACE, “Lives Lost in the Mediterranean Sea: Who is Responsible?”, Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), paras. 10-11, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

⁹⁸⁹ See: FISCHER-LESCANO, Andreas, LÖHR, Tillmann & TOHIDIPUR, Timo, “Border Control at Sea: Requirements under International Human Rights and Refugee Law”, *International Journal of Refugee Law* 21 (2009), 294.

⁹⁹⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (adopted 13 December 2007, entered into force 1 December 2009), *OJ C* 306 of 17 December 2007.

⁹⁹¹ FISCHER-LESCANO, Andreas, LÖHR, Tillmann & TOHIDIPUR, Timo, “Border Control at Sea: Requirements under International Human Rights and Refugee Law”, *International Journal of Refugee Law* 21 (2009), 295.

⁹⁹² BALDACCINI, Anneliese, “Extraterritorial Border Controls in the EU”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control – Legal Challenges* (Leiden: Martinus Nijhoff Publishers, 2010), 238.

applicable law of the sea, nor the *non-refoulement* principle. However, the lack of transparency in combination with a weak framework of accountability, often leads to the view that Frontex is not respecting international obligations in practice. As illegal migration will remain a problem for Mediterranean European Member States, Europe must focus on the creation of efficient, legal migration channels, burden-sharing between States and cooperation with the countries of origin and transit. Meanwhile, Frontex provides an effective and workable solution for the maritime migration problem. Nevertheless, the mandate of Frontex should be clarified. Frontex should raise its public profile by ensuring that information which is or should be in the public domain is easily accessible to the public. Moreover, Frontex should be more formally accountable to the European Parliament. The Chairman of the Management Board and the Executive Director should, if so requested, appear before the Parliament or its Committees to discuss the activities of Frontex.⁹⁹³

6.2. Migration by sea in the Asia-Pacific

6.2.1. The Asia-Pacific and the Smuggling Protocol

The UNODC created a toolkit to combat the smuggling of migrants. The toolkit – intended to provide guidance, to showcase promising practices and to recommend resources in thematic areas addressed in the separate tools – assists States to effectively implement the Smuggling Protocol.⁹⁹⁴ Next to this, UNODC has also developed a ‘Model Law against the Smuggling of Migrants’ in response to a request by the General Assembly to the Secretary-General.⁹⁹⁵ The Model Law is designed to be adaptable to the needs of each State, irrespective of the legal tradition or the social, economic, cultural or geographical conditions of that State.⁹⁹⁶ Despite these initiatives of UNODC to help States with the implementation of the

⁹⁹³ European Union Committee of the House of Lords, “FRONTEX: the EU external borders agency”, 9th Report of Session 2007-08 (5 March 2008), paras. 90-91, available online: <<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/60/60.pdf>>.

⁹⁹⁴ UNODC, “Toolkit to Combat Smuggling of Migrants”, available online: <<http://www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/toolkit-to-combat-smuggling-of-migrants.html#Aims%20and%20purpose%20of%20the%20Toolkit>>.

⁹⁹⁵ UNODC, “Model Law against Smuggling of Migrants” (2010), available online: <http://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf>.

⁹⁹⁶ Fifth session of the Conference of the Parties to the United Nations Convention against Transnational organized Crime, “Activities of the United Nations Office on Drugs and Crime to promote and support the

Smuggling Protocol, there still remain significant challenges, for example for many States in the Asia-Pacific. The Asia-Pacific region includes East and Southeast Asia, Australia and the other countries in Oceania. Several of these countries are simultaneously sending and transit or transit and receiving States.⁹⁹⁷

To be able to implement the Smuggling Protocol, most of the countries in the Asia-Pacific have to amend their laws and the law enforcement systems require adjustments. In addition, many of the measures require substantial financial, material and human resources, creating particular difficulties to smaller and economically less developed nations. Many developing States still lack the technical expertise and resources to effectively prevent and suppress smuggling.⁹⁹⁸ Furthermore, given the cultural diversity in the Asia-Pacific, some States are reluctant to support the internationalization of criminal law. For these reasons, not all States in the Asia-Pacific have signed the Smuggling Protocol.⁹⁹⁹ Nonetheless, with growing levels of transnational crime, the countries of the region are increasingly showing genuine interest and willingness to participate in international law enforcement activities.¹⁰⁰⁰ Furthermore, several regional initiatives were taken in the region. These will be described in the following part.

6.2.2. Initiatives within the framework of ASEAN

The Association of South East Asian Nations (ASEAN) is an inter-governmental organization which aims to accelerate the economic growth, social progress and cultural

implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime”, *UN Doc. CTOC/COP/2010/8* (9 August 2010), para. 3.

⁹⁹⁷ SCHLOENHARDT, Andreas, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Leiden: Martinus Nijhoff Publishers, 2003), 139.

⁹⁹⁸ Second session of the Conference of the Parties to the United Nations Convention against Transnational organized Crime, “Implementation of the Protocol against Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime: Updated Information Based on Additional Responses received from States for the First Reporting Cycle”, *UN Doc. CTOC/COP/2005/4/Rev. 1* (8 August 2006), para. 47.

⁹⁹⁹ However, the Bangkok Declaration on Irregular Migration (adopted 23 April 1999, available online: <<http://www.baliprocess.net/files/ConferenceDocumentation/Bangkok%20Declaration%20on%20Irregular%20Migration%20sgd%20230499.pdf>>) serves as a common basis for law enforcement cooperation in the Asia-Pacific region. Moreover, there is discussion that the provisions under the Declaration may one day become enforceable.

¹⁰⁰⁰ SCHLOENHARDT, Andreas, “Trafficking in Migrants in the Asia-Pacific: National, Regional and International Responses”, 5 *Singapore Journal of International & Comparative Law* 696 (2001), 742-743.

development in the region, and to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations. To achieve these goals, ASEAN activities include political cooperation and economic and functional cooperation.¹⁰⁰¹ The ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing a legal status and an institutional framework for ASEAN. It also codifies ASEAN norms, rules and values, sets clear targets for ASEAN and presents accountability and compliance.¹⁰⁰² The ASEAN Charter has become a legally binding agreement among the 10 ASEAN Member States.¹⁰⁰³

Transnational crime – including migrant smuggling – has the potential of eroding the central belief of strengthening the foundation for a prosperous and peaceful community of Southeast Asian Nations, thereby affecting the political, economic and social well-being of ASEAN. Therefore ASEAN countries have taken concerted efforts to combat such crime since early 1970s.¹⁰⁰⁴ However, as transnational crime was expanding and becoming more organized, ASEAN called for a comprehensive and coordinated approach in combating crime at the regional level. During the First Informal Summit in November 1996, ASEAN asked the relevant ASEAN bodies to study the possibility of regional cooperation on transnational criminal matters.¹⁰⁰⁵ At the Second Informal Summit in December 1997, they resolved to take firm and stern measures to combat transnational crimes.¹⁰⁰⁶ ASEAN also adopted the ‘Vision 2020’ which envisioned the evolution of agreed rules of behaviour and cooperative measures to deal with problems that can be met only on a regional scale, such as transnational crimes.¹⁰⁰⁷

¹⁰⁰¹ Declaration Constituting an Agreement Establishing the Association of South East Asian Nations (adopted 8 August 1967), 1331 *UNTS* 3.

¹⁰⁰² Charter of the Association of South East Asian Nations (adopted 20 November 2007, entered into force 15 December 2008), available online: <<http://www.aseansec.org/publications/ASEAN-Charter.pdf>>.

¹⁰⁰³ The 10 Members are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam (plus 1 observer, namely Papua New Guinea). The ASEAN Regional Forum (ARF) counts 27 Members: Australia, Bangladesh, Brunei Darussalam, Cambodia, Canada, China, European Union, India, Indonesia, Japan, Democratic Peoples’ Republic of Korea, Republic of Korea, Laos, Malaysia, Myanmar, Mongolia, New Zealand, Pakistan, Papua New Guinea, Philippines, Russian Federation, Singapore, Sri Lanka, Thailand, Timor Leste, United States, and Vietnam.

¹⁰⁰⁴ ASEAN, “The Mandate for ASEAN Cooperation In Combating Transnational Crime”, available online: <<http://www.aseansec.org/16133.htm>>.

¹⁰⁰⁵ ASEAN, “Press Statement on The First Informal ASEAN Heads of Government Meeting” (30 November 1996), available online: <<http://www.aseansec.org/20158.htm>>, para. 15.

¹⁰⁰⁶ ASEAN, “Press Statement on The Second Informal ASEAN Heads of Government Meeting” (15 December 1997), available online: <<http://www.aseansec.org/1816.htm>>, Other Topics, para. 3.

¹⁰⁰⁷ ASEAN, “ASEAN Vision 2020”, available online: <<http://www.aseansec.org/1814.htm>>.

In 1996 the ASEAN Plan of Action in Combating Transnational Crime¹⁰⁰⁸ was adopted, which led to the ASEAN Declaration on Transnational Crime, concluded in Manila in December 1997.¹⁰⁰⁹ The declaration aims to strengthen cooperation at the regional level to fight transnational organized crime¹⁰¹⁰ and calls for the establishment of an ASEAN Centre on Transnational Crime.¹⁰¹¹ In order to achieve the general and specific objectives, ASEAN Member Countries are *inter alia* encouraged to share information, to ratify and support existing international treaties or agreements designed to combat transnational crime and to enhance cooperation and coordination in law enforcement.¹⁰¹² At the ASEAN Ministerial Meeting on Transnational Crime in November 2009, the Ministers stated that they noted with satisfaction the progress and achievements attained under the purview of responsible bodies and they recommended the synergy in executing their respective action plans.¹⁰¹³

Although the aforementioned ASEAN initiatives are only fragmentary declarations, cooperation under the umbrella of ASEAN has already proved to be important. Member States show much stronger support for the ASEAN activities than for initiatives by humanitarian organizations as ASEAN is primarily driven by economic incentives and all countries of the region – including non-members – show a keen interest in participating in ASEAN forums. Consequently, it is desirable to foster legislative and law enforcement cooperation at the ASEAN level.¹⁰¹⁴

¹⁰⁰⁸ ASEAN, “ASEAN Plan of Action in Combating Transnational Crime”, available online: <<http://www.aseansec.org/16133.htm>>. In 2002 the Plan of Action was followed by the Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime, available online: <<http://www.aseansec.org/5616.htm>>. There must be noted that after 9/11 the focus was moved to terrorism as a transnational crime.

¹⁰⁰⁹ ASEAN Declaration on Transnational Crime (adopted 20 December 1997), available online: <<http://www.aseansec.org/5640.htm>>.

¹⁰¹⁰ ASEAN Declaration on Transnational Crime, para. 1.

¹⁰¹¹ ASEAN Declaration on Transnational Crime, para. 4.

¹⁰¹² ASEAN, “ASEAN Plan of Action in Combating Transnational Crime”, available online: <<http://www.aseansec.org/16133.htm>>.

¹⁰¹³ ASEAN, “Joint Statement of the 7th ASEAN Ministerial Meeting on Transnational Crime (AMMTC)” (17 November 2009), available online: <<http://www.aseansec.org/24036.htm>>, para. 2.

¹⁰¹⁴ SCHLOENHARDT, Andreas, “Trafficking in Migrants in the Asia-Pacific: National, Regional and International Responses”, 5 *Singapore Journal of International and Comparative Law* 696 (2001), 729.

6.2.3. *The Bali Process – A regional consultative mechanism*

Due to the large numbers of illegal boat arrivals run by smuggling operations in the Asia-Pacific region, a regional consultative mechanism – known as the Bali Process and co-chaired by the Governments of Indonesia and Australia – was established in 2002.¹⁰¹⁵ It is primarily a process and framework for information-sharing and training of officials, in law enforcement and drafting legislation, in connection with the smuggling and trafficking of people and other crimes. More than 50 countries are involved and as the migrant flows consist of both victims of forced displacement and economic migrants, a primary challenge is to ensure that the rights of refugees and asylum-seekers are respected. Therefore the IOM and the UNHCR are part of the secretariat and they help to facilitate the meetings.¹⁰¹⁶

At the Bali Ministerial Conferences, Ministers agreed to specific objectives for the Bali Process, *inter alia* information sharing, harmonization of legislation and enhanced law enforcement.¹⁰¹⁷ To achieve these goals, several workshops are organized. Australia and China for example developed model legislation to criminalize people smuggling which has subsequently been used by many regional countries in the development of their own legislation.¹⁰¹⁸ Participants expressed strong appreciation for the way the Bali Process has delivered direct practical benefits to regional operational agencies. They agreed that some of the objectives set by the Ministers had been achieved at least in so far as they could be taken forward in a multilateral process of this kind.¹⁰¹⁹ At the fourth meeting in 2011, the Ministerial Conference agreed that an inclusive but non-binding Regional Cooperation Framework (RCF) would provide a more effective way for interested parties to reduce irregular movement through the region. One of the core principles of this RCF is that

¹⁰¹⁵ <<http://www.baliprocess.net/>>

¹⁰¹⁶ <<http://www.baliprocess.net/>>

¹⁰¹⁷ Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26-28 February 2002; Second Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 29-30 April 2003; Third Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 14-15 April 2009; Fourth Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 29-30 March 2011.

¹⁰¹⁸ ASEAN, “Model Law to Criminalise People Smuggling”, available online:

<<http://www.baliprocess.net/files/Legislation/Model%20law%20-%20people%20smuggling%20-%20final.pdf>>.

¹⁰¹⁹ Bali Process, “About the Bali Process”, available online:

<<http://www.baliprocess.net/index.asp?pageID=2145831401>>.

irregular movement facilitated by people smuggling syndicates should be eliminated and States should promote and support opportunity for orderly migrations.¹⁰²⁰

In recent years there has been a proliferation of regional consultative processes.¹⁰²¹ One of their advantages is that they are regionally-based and thus bring together governments which tend to be affected. The second advantage is that they are informal. States tend to be more open to dialogue and to the exchange of information. However, the main disadvantage is that the conclusions and recommendations still remain non-binding.¹⁰²² Although ASEAN sometimes makes use of the Bali Process, there is still a lack of an actual institutional framework.

6.2.4. *The protection of refugees within the Bali Process*

It is also important that the rights of migrants are respected in regional initiatives such as the Bali Process. One example is the case of the Rohingya. The Rohingya is a Muslim ethnic minority living in northern Rakhine State – western Myanmar – and suffers from multiple restrictions and human rights violations in this country. According to Amnesty International, the Rohingyas' freedom of movement is severely limited. Next to this, they are also subjected to forced eviction and house destruction, land confiscation and various forms of extortion and arbitrary taxation including financial restrictions on marriage. Rohingyas continue to be used as forced labourers on roads and at military camps. Furthermore, the vast majority of Rohingyas are effectively denied Myanmar citizenship.¹⁰²³

¹⁰²⁰ SUWANIKKHA, Surat, "The Regional Cooperation Framework and the Bali Process – An Overview", Presentation by the Ministry of Foreign Affairs of Thailand, Humanitarian Migration Section at the Expert Meeting on Refugee and Asylum Seekers in Distress at Sea (8-10 November 2011), available online: <<http://www.unhcr.org/4ef3381e0.html>>.

¹⁰²¹ In the Asia-Pacific there is next to the Bali process also for example the Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants or APC Process. More information available online: <<http://www.apcprocess.net/>>.

¹⁰²² See for example IOM, "The Role of Regional Consultative Processes in Managing International Migration", IOM Migration Research Series No. 3 (2001); VON KOPPENFELS, Amanda K., "Informal but Effective: Regional Consultative Processes as a Tool in Managing Migration", 39 *International Migration* 61 (2001); THOUÉZ, Colleen & CHANNAC, Frederique, "Shaping International Migration Policy: The Role of Regional Consultative Processes", 29 *West European Politics* 370 (2006).

¹⁰²³ Amnesty International, "Myanmar: The Rohingya Minority: Fundamental rights denied" (18 May 2004), available online: <<http://www.amnesty.org/en/library/info/ASA16/005/2004>>.

In 2008 the number of people leaving Myanmar by boat for Southeast Asia started growing. They fled in search of protection, safety and/or work. By the end of that year, over a thousand Rohingyas had forcibly been expelled and abandoned on the high seas by the Thai security forces.¹⁰²⁴ In February 2009 a Joint NGO Statement on the Requirements of a Regional Solution for the Rohingya was drafted in which ASEAN was asked to put this problem on its agenda.¹⁰²⁵ ASEAN agreed to use the Bali Process to try to solve the problem of the minority Muslim Rohingyas fleeing Myanmar.¹⁰²⁶ However, several NGO's were concerned that the Bali Process, the suggested forum for the negotiation of a regional solution, could not adequately focus on the rights of the Rohingyas. Therefore the NGO's reminded all States that any regional solution must be based upon the following principles:

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1. Refuge must be provided to those in need of international protection
2. No refugee or migrant should be forcibly returned (*refouled*) to Burma
3. The rights of refugees and migrants must be respected
4. The UNHCR must be granted full, unconditional access to the Rohingya in states of the region
5. The international community must be included in and provide support to any regional solution.

At the Bali conference in April 2009, there was agreement on setting up an *ad-hoc* working group on the issue.¹⁰²⁸ Little has been made public about these Bali Process discussions and to date no concrete actions have been taken. Chris LEWA, an expert on the Rohingya issue and director of the Bangkok-based Arakan project (a research-based

¹⁰²⁴ Joint NGO's, "Statement on the Treatment of Rohingya and Bangladeshi 'Boat People' in Asia" (6 February 2009), available online: <<http://www.refugeesinternational.org/policy/letter/statement-treatment-rohingya-and-bangladeshi-boat-people-asia>>.

¹⁰²⁵ Joint NGO's, "Statement on the Treatment of Rohingya and Bangladeshi 'Boat People' in Asia" (6 February 2009), available online: <<http://www.refugeesinternational.org/policy/letter/statement-treatment-rohingya-and-bangladeshi-boat-people-asia>>.

¹⁰²⁶ ASEAN, "14th Annual Summit" (26 February-1 March 2009), available online: <<http://www.aseansec.org/22210.htm>>.

¹⁰²⁷ Joint NGO's, "Statement on the Requirements of a Regional Solution for the Rohingya" (6 March 2009), available online: <<http://refugeerightsasiapacific.org/2009/03/06/joint-statement-2/>>.

¹⁰²⁸ Bali Process, "Third Regional Ministerial Conference" (14-15 April 2009), available online: <<http://www.baliprocess.net/index.asp?PageID=2145831461>>.

advocacy group monitoring the Rohingya situation), said that it was very likely that the regional leaders involved in the Bali Process would try to find a way for Myanmar to accept the Rohingya people back into the country instead of helping refugees.¹⁰²⁹

6.2.5. Conclusion

By relying on the Bali Process to sort out the problem of the Rohingya, there is a danger that the issue is being treated as people smuggling rather than as a result of persecution. Nonetheless, it is clear that this is not simply a case of migrant smuggling since its root causes are far beyond the issues of the Bali Process. Myanmar must improve its treatment of the Rohingya because as long as these people continue to be discriminated, they will continue to leave the country. Next to this, the term 'smuggling' could be misused to board and search a migrant vessel or to send it back, in some cases violating the international law of the sea rules as well as the *non-refoulement* principle. In the case of the Rohingyas it would have been a better solution if ASEAN – which includes Myanmar – had dealt with the problem. ASEAN is for example able to put (economic) pressure on Myanmar to improve its human rights situation, one of the root causes why people leave the country in the first place. The Bali Process is too informal and maybe too slow when effective actions are needed as soon as possible. Furthermore, States should not forget – both in ASEAN as well as in the Bali Process – that the problem of migrant smuggling is not only a transnational issue, but also an interdisciplinary one.

¹⁰²⁹ Mizzima, “Bali process failed to solve Rohingya boatpeople issue” (17 April 2009), available online: <<http://www.mizzima.com/news/regional/1979-bali-process-failed-to-solve-rohingya-boatpeople-issue-ai.html>>.

7. State responsibility and compensation

7.1. State responsibility for a breach of freedom of navigation

Since the freedom of navigation exclusively belongs to the flag State and not to individuals or private entities,¹⁰³⁰ the flag State is the only entity able to claim a breach of the freedom of navigation by another State. The latter will be liable when the principles of general law on State responsibility are violated. Arising out of the nature of the international legal system and the doctrines of State sovereignty and equality of States, State responsibility is a fundamental principle of international law. Article 20 ILC Draft Articles says that valid consent by a State to particular conduct by another State, precludes the wrongfulness of that act in relation to the consenting State. However, the conduct has to remain within the limits of the consent given. Consent can be given by a State in advance, at the time the act is occurring or even *ex post facto*. The latter is a form of waiver or acquiescence, leading to loss of the right to invoke responsibility.¹⁰³¹ There are for example several drug smuggling cases – such as *United States v. Barrio Hernandez* – where the US Courts upheld State consent given after the boarding but prior to the ensuing trial.¹⁰³² Thus, as long as the boarding remains within the boundaries of the consent given, the boarding State will be exculpated or excused for its wrongful act, namely the infringement of the freedom of navigation enjoyed by the foreign-flagged vessel.

¹⁰³⁰ ITLOS, The M/V Saiga Case (No. 2), *St. Vincent and the Grenadines v. Guinea*, 1 July 1999, *ITLOS Reports* (1999), para. 97. But see: ITLOS, The M/V Saiga Case (No. 2), *St. Vincent and the Grenadines v. Guinea*, 1 July 1999, Separate Opinion WOLFRUM, *ITLOS Reports* (1999), 92 *et seq.* WOLFRUM states: “[D]isputes concerning the exercise of freedom of navigation, in general, involve rights of natural or juridical persons which may prevail over the rights of States. Accordingly, the concept of freedom of navigation has as its addressees States as well as individual or private entities.”

¹⁰³¹ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, 73, available online: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. See also ILC Draft Articles, Art. 45.

¹⁰³² *United States v. Barrio Hernandez*, 655 F. Supp. 1069 (D. P.R. 1987).

7.2. State responsibility and compensation under Article 110(3) LOSC

7.2.1. Content and meaning of Article 110(3) LOSC

Although Article 110(1) LOSC permits an interference with the freedom of navigation on the high seas in certain conditions, Article 110(3) LOSC provides: “*If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.*” Article 22(3) CHS embodies almost the same wordings. Already in 1826, the US Supreme Court stated in the *Marianna Flora Case*: “[T]he party seizes at his peril, and is liable to costs and damages if he fails to establish the forfeiture.”¹⁰³³ Similar provisions can be found in Article 106 LOSC with regard to the seizure of a pirate ship without adequate grounds as well as in Article 11(8) in the case of a ship which has been unjustifiably stopped or arrested in the exercise by a State of the right of hot pursuit. The object and purpose of 110(3) LOSC is to prevent abusive interferences by increasing the degree of diligence exercised by naval officers considering a boarding.¹⁰³⁴ In addition, Article 300 LOSC contains more generally a prohibition against the abuse of the rights recognized in the LOSC.

The wording of Article 110(3) LOSC unequivocally indicates that the entity entitled to claim compensation is the ship. In its commentary on draft Article 46, the ILC wrote: “*The State to which the warship belongs must compensate the merchant ship.*”¹⁰³⁵ But what exactly is meant by ‘the ship’? Does there exist an individual right to compensation in cases of some interferences? Invocation of State responsibility by a private entity is not unknown to the law of the sea. Next to this, unlike the ICJ, ITLOS is potentially open to private entities. Article 20(2) of the ITLOS Statute states: “*The Tribunal shall be open to entities other than States Parties [...] in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal*

¹⁰³³ *The Marianna Flora*, 24 U.S. 11 Wheaton 1 (1826).

¹⁰³⁴ RANDELZHOFFER, Albrecht, “Probleme der Völkerrechtlichen Gefährdungshaftung”, 24 *Berichte der Deutschen Gesellschaft für Völkerrecht* 35 (1984), 49.

¹⁰³⁵ ILC, “Report of the International Law Commission covering the work of its eight session”, *UN Doc. A/3159* (1956), 2 *Yearbook of the International Law Commission* 253 (1956), 284, available online: <http://untreaty.un.org/ilc/documentation/english/a_cn4_104.pdf>.

which is accepted by all the parties to that case."¹⁰³⁶ Thus, the ITLOS Statute has expanded the Tribunal's jurisdiction to entities other than States Parties, a significant innovation which has not yet been fully explored. The provision has to be read together with Article 21 ITLOS Statute, according to which the Tribunal has jurisdiction with respect to "*all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*". Therefore, entities other than States Parties, can have access to ITLOS with respect to any dispute submitted under an agreement, if the agreement specifically confers jurisdiction on the Tribunal.

However, several questions may be raised. First, the term 'entities' is quite broad. Nevertheless, it may include private bodies, such as private commercial corporations or non-governmental organizations. For example, Article 292(2) LOSC also allows private entities – on behalf of the flag State – to claim the release of a vessel. Although the provision does not allow a direct access of an individual to ITLOS, it permits the flag State to authorize an individual or association (e.g. the ship owner, a shipping association, a labour union) to make an application for release.¹⁰³⁷ Secondly, the reference in Article 20(2) ITLOS Statute to 'any other agreement' conferring jurisdiction on the Tribunal differs from Article 288(2) LOSC. The latter states that jurisdiction may be conferred on the Tribunal by "*an international agreement related to the purposes of the Convention*". As there is no precedent here, it will be left to ITLOS to decide on these open questions.¹⁰³⁸ Nevertheless, this issue could be of relevance to interferences on the high seas. For example, shipping companies could conclude agreements with States interested in the fight against terrorism. On the one hand, these agreements could oblige the shipping companies to screen their cargoes. On the other hand, they could refer to the limited possibilities of interferences on the high seas by the State Party to the agreement whether or not such conduct would be in conformity with flag State

¹⁰³⁶ Statute of the International Tribunal for the Law of the Sea, Annex VI LOSC, available online: <http://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_e.pdf>.

¹⁰³⁷ OXMAN, Bernard H., "Human Rights and the United Nations Convention on the Law of the Sea", 36 *Columbia Journal of Transnational Law* 399 (1998), 423.

¹⁰³⁸ ITLOS, "Statement by Rüdiger Wolfrum – President of the International Tribunal for the Law of the Sea to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs" (24 October 2005), 10-11, available online: <http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_241005_eng.pdf>.

jurisdiction. If the agreement would confer jurisdiction to ITLOS, the shipping company might directly rely on Article 110(3) LOSC to claim compensation.¹⁰³⁹

Nonetheless, the possibility of ITLOS jurisdiction remains hypothetical. The LOSC does not provide for the possibility that either the ship or another private entity may settle its dispute with the interfering State before an international forum. As a result, a claimant will have to pursue his claim before a domestic court. WENDEL submits that, if the domestic legal system does not recognize the legal personality of the ship itself, only the ship owner or the bareboat charterer may rely on the provision as private individuals. It might not extend to the owners of cargo.¹⁰⁴⁰ We can conclude that, even though the LOSC does not attribute a right to a private entity to be exempt from interferences on the high seas by other States than the flag State, it provides an entitlement for a private entity to claim compensation.

The basic principle in the general law on State responsibility is that a State will be responsible for an internationally wrongful act when conduct consisting of an action or omission (1) is attributable to the State under international law and (2) constitutes a breach of an international obligation of the State.¹⁰⁴¹ However, a successful claim for compensation under Article 110(3) LOSC does not *per se* require an unlawful interference by the interdicting State. Thus, while boarding might have been justified under Article 110(1)(d) LOSC, the interfering State might still have to pay compensation under certain conditions: its liability is strict. In its commentary on draft Article 46, the ILC stated that this strict liability is justified in order to prevent the right of visit being abused.¹⁰⁴² Nevertheless, except for compensation for an intrusion into the human rights of individuals concerned, the consent of the flag State to a boarding limits the individual right to claim compensation from the boarding State.¹⁰⁴³

¹⁰³⁹ WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007), 83.

¹⁰⁴⁰ WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007), 68 and 92-93. See also GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 325.

¹⁰⁴¹ ILC Draft Articles, Art. 2.

¹⁰⁴² ILC, "Report of the International Law Commission covering the work of its eight session", *UN Doc. A/3159* (1956), 2 *Yearbook of the International Law Commission* 253 (1956), 284, available online: <http://untreaty.un.org/ilc/documentation/english/a_cn4_104.pdf>.

¹⁰⁴³ WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007), 166.

The ship has to be compensated for any loss or damage that may have been sustained. But what exactly is 'any loss or damage'? First of all, Article 110(3) LOSC makes a distinction between 'loss' and 'damage'. This distinction is unknown to the general law of State responsibility which provides that the responsible State has to compensate for the damage caused by its internationally wrongful act.¹⁰⁴⁴ This damage can be either moral or material. Moral damage includes individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Material damage is damage to property or other interests – as well as lost profits – which is financially assessable.¹⁰⁴⁵ Although the distinction between 'loss' and 'damage' seems rather strange, it can be explained because the original provision – namely Article 22(3) CHS – was drafted when there was still some confusion in the general law of State responsibility, particularly regarding the obligation to compensate for lost profits. Therefore, the drafters might have found it necessary to clarify the exact content of the obligation.¹⁰⁴⁶ Secondly, the Article mentions the word 'any'. This was added in order to include even losses suffered as a consequence of rather short delays.¹⁰⁴⁷ Examples of types of damages to a ship are the delay of the vessel and the value of the vessel and cargo where these are destroyed or confiscated. However, in case of stateless migrant vessels, damages could result out of the detention and mistreatment of the persons on board. Also moral damages which are financially assessable – such as mental suffering, humiliation, degradation – can be subject of a claim of compensation under Article 110(3) LOSC.¹⁰⁴⁸

However, in case the ship boarded has committed an act justifying the suspicions, it does not have a right to be compensated. In the *Marianna Flora Case*, the United States' cruiser *Alligator* had approached the *Marianna Flora* on suspicion of piracy and then been

¹⁰⁴⁴ ILC Draft Articles, Art. 36(1).

¹⁰⁴⁵ ILC Draft Articles, Art. 36(2); ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries", 92 and 98-99, available online: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

¹⁰⁴⁶ WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007), 175.

¹⁰⁴⁷ ILC, "Note verbale by the United Kingdom", *UN Doc. A/CN.4/99/Add.1* (15 March 1956), 2 *Yearbook of the International Law Commission* 37 (1956), 81, available online: <http://untreaty.un.org/ilc/documentation/english/a_cn4_99_add1-9.pdf>.

¹⁰⁴⁸ WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007), 186.

fired upon by that vessel as the shipmaster feared that the *Alligator* was a pirate craft itself. As a result, the *Marianna Flora* was seized by the US cruiser. Although the *Marianna Flora* was not a pirate craft, liability did not follow as the ship had fired first and without provocation, an act justifying the suspicion.¹⁰⁴⁹ Another example is the incident with the *M/V So San*, a North Korean ship that was suspected of being stateless. The boarding and searching could be justified as the vessel did not display a flag or identifying markings.¹⁰⁵⁰ WENDEL submits that the searching of the cargo was not justified, as the purpose of the search was to verify the statelessness of the ship. Therefore, only the inspection of the vessel's papers would have been allowed.¹⁰⁵¹ However, GUILFOYLE points out that Article 110(2) LOSC says: "*If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.*" This right of further examination appears to be general and wide-ranging. Inspection of the cargo was thus justified as this may disclose information capable of revealing the vessel's identification.¹⁰⁵²

Interferences on the high seas basically involve two States, namely the flag State and the boarding State. Normally, under Article 110(3) LOSC it will be the boarding State that will have to compensate the ship. However, in some cases also the flag State could be held liable. General law on State responsibility provides that the participating State may be held internationally responsible for the act of another State if it aids or assists these acts, directs and controls them or coerces the State into committing them. However, this requires that the State has knowledge of the act in question and that the act is considered as internationally wrongful.¹⁰⁵³ As a result, flag State consent does not *ipso facto* imply that the flag State will be held liable. For example, when the wrongful act is the excessive use of force when arresting a suspect, the flag State would not necessarily have knowledge of those specific circumstances

¹⁰⁴⁹ *The Marianna Flora*, 24 U.S. 11 Wheaton 1 (1826).

¹⁰⁵⁰ BYERS, Michael, "Policing the High Seas: The Proliferation Security Initiative", 98 *American Journal of International Law* 526 (2004), 526-527; BROWN, Neil, "Jurisdictional Problems relating to Non-Flag State Boarding of Suspect Ships in International Waters: A Practitioner's Observations", in SYMMONS, Clive R. (Ed.), *Selected Contemporary Issues in the Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2011), 69-82 and 78.

¹⁰⁵¹ WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007), 51.

¹⁰⁵² GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 327-328.

¹⁰⁵³ ILC Draft Articles, Artt. 16-18.

or have permitted interdiction with a view to facilitating that abuse.¹⁰⁵⁴ However, the compensation provision under Article 110(3) LOSC also provides for liability if the interference was lawful. Nevertheless, one can make an analogous application of the general principles of State responsibility to conclude that also in this case the flag State could be held liable.¹⁰⁵⁵

Consistent with Article 110(3) LOSC, Article 9(2) Smuggling Protocol provides that – if the grounds for measures taken pursuant to article 8 Smuggling Protocol prove to be unfounded following the boarding of the vessel – a vessel is to be compensated for any loss or damage that may have been sustained if the vessel did not commit any act justifying the measures taken.

7.2.2. *Agreements between States and Article 110(3) LOSC*

Will Article 110(3) LOSC be applicable when States have for example concluded a shipboarding or a shiprider agreement? As these agreements constitute treaty exceptions to Article 110(1) LOSC, one could argue that also the compensation provision in Article 110(3) LOSC is likewise not applicable. However, when wrongful conduct occurs, States may still be liable under general law of State responsibility. Which States will be liable – and to what extent – will depend on a case by case basis. Article 47 ILC Draft Articles deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. The general principle in such cases is that each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.¹⁰⁵⁶ As the ILC noted, terms such as ‘joint’, ‘joint and several’ and ‘solidary’ responsibility derive from different legal traditions.¹⁰⁵⁷ Analogies must therefore be applied with care. In the absence of agreement to

¹⁰⁵⁴ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 332.

¹⁰⁵⁵ WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007), 135.

¹⁰⁵⁶ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, 124, available online: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

¹⁰⁵⁷ For a comparative survey of internal laws on solidary or joint liability, see: WEIR, Tony, “Complex Liabilities”, in TUNC, André (Ed.), *International Encyclopaedia of Comparative Law* (The Hague: Martinus Nijhoff Publishers, 1983), Vol. XI.

the contrary between the States concerned, the general principle in the case of a plurality of responsible States is thus that each State is separately responsible for conduct attributable to it.¹⁰⁵⁸ During joint operations, a State thus remains independently international responsible for its own conduct. This implies that – where a single course of conduct is attributable to several States – State responsibility is not diminished or reduced by the fact that other States are also responsible for the same act.¹⁰⁵⁹

There is limited case law on joint and several liability in case of an agreement between States. In the *Certain Phosphate Lands in Nauru Case*, Australia – the sole respondent – had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned, namely Australia, New Zealand and the United Kingdom. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned as these were necessary parties to the case. Therefore, Australia concluded that – in accordance with the principle formulated in *Monetary Gold Case*¹⁰⁶⁰ – the claim against Australia alone was inadmissible and that the responsibility of the three States making up the Administering Authority was ‘solidary’. However, the ICJ rejected these arguments.¹⁰⁶¹ The Court clarified: “Australia has raised the question whether the liability of the three States would be “joint and several” (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This [...] is independent of the question whether Australia can be sued alone.”¹⁰⁶² It is submitted that the formal source of rights and obligations involved will often be the starting point for determining if joint and several responsibility exists. If the agreement establishes joint and several responsibility, previous or subsequent

¹⁰⁵⁸ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, 124, available online: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

¹⁰⁵⁹ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, 124, available online: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

¹⁰⁶⁰ ICJ, *Monetary Gold Removed from Rome in 1943, Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*, 15 June 1954, *ICJ Reports* 19 (1954).

¹⁰⁶¹ ICJ, *Certain Phosphate Lands in Nauru Case, Nauru v. Australia*, 26 June 1992, *ICJ Reports* 240 (1992).

¹⁰⁶² ICJ, *Certain Phosphate Lands in Nauru Case, Nauru v. Australia*, 26 June 1992, *ICJ Reports* 240 (1992), para. 48.

facts could not make it other than joint.¹⁰⁶³ However, there is also a possibility of joint and several responsibility from a common course of conduct.¹⁰⁶⁴

Although shiprider agreements are often described as establishing a ‘joint’ interdiction program, it is more likely to be the case of the shiprider or boarding party assisting in other’s wrongful conduct than their acting as a joint organ. Although the shiprider and the boarding State officials are aboard one single vessel, they are not under any unified command or obligation to assist each other unconditionally in particular operations.¹⁰⁶⁵ Therefore, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. In some cases, one could argue that the conduct of the shiprider aboard another State’s vessel is fully attributable to the latter. Article 6 ILC Draft Articles does recognize the possibility of attributing conduct of a State organ to another State in limited and precise situations. The State organ has to be placed at the disposal of another State and the organ has to act exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone. The notion ‘placed at the disposal of’ implies that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Next to the fact that the organ has to be appointed to perform functions appertaining to the State at whose disposal it is placed, it must also – in performing the functions entrusted to it by the beneficiary State – act in conjunction with the machinery of that State and under its exclusive direction and control.¹⁰⁶⁶ Given the fact that the shiprider will act within its own command structure, Article 6 ILC Draft Articles will not be applicable.

¹⁰⁶³ ICJ, *Certain Phosphate Lands in Nauru Case, Nauru v. Australia*, 26 June 1992, Separate Opinion of Judge Shahabuddeen, *ICJ Reports* 270 (1992), 274.

¹⁰⁶⁴ For an extensive discussion on joint and several responsibility, see: NOYES, John E. & SMITH, Brian D., “State Responsibility and the Principle of Joint and Several Liability”, 13 *Yale Journal of International Law* 225 (1988), 225-267.

¹⁰⁶⁵ GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 336-337.

¹⁰⁶⁶ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, 44, available online: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

7.3. State responsibility for a breach of refugee law and human rights

As mentioned, States sometimes cooperate with each other to control their borders. As part of the Frontex *Operation Hera*,¹⁰⁶⁷ Spain signed a shiprider agreement with Senegal and Mauretania to bring on board Senegalese and Mauritanian immigration officers for interceptions carried out in their respective territorial waters.¹⁰⁶⁸ In 1997, Italy and Albania signed an agreement to intercept migrants in international waters as well as Albanian territorial waters. Albanian officials were brought onto Italian naval vessels.¹⁰⁶⁹ In 2003, the United States signed an agreement with the Dominican Republic to bring officials of one country on board vessels of the other country while carrying out patrols in their respective territorial waters.¹⁰⁷⁰ Which State could be held responsible for conduct which violates refugee and other human rights? As mentioned, cooperation can have various forms. Three possible avenues for establishing State responsibility in joint efforts of controlling sea borders can be identified: (1) responsibility for the own conduct of States in situations of joint operations, (2) responsibility for conduct of a State organ placed at the disposal of another State (shiprider agreements) and (3) the concept of indirect responsibility for assisting another State in internationally wrongful conduct.¹⁰⁷¹ With regard to interception measures, ExCom stated: “*The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons.*”¹⁰⁷² However, it is suggested that this should be read as dealing with responsibility for

¹⁰⁶⁷ Frontex does not have a mandate to operate beyond the external borders of the EU, as for example in the territorial waters of Senegal and Mauretania. Therefore, the existence of an agreement is requisite for this kind of operation.

¹⁰⁶⁸ Frontex, “Longest Frontex Coordinated Operation – Hera, The Canary Islands”, available online: <<http://www.frontex.europa.eu/news/longest-frontex-coordinated-operation-hera-the-canary-islands-ZubSEM>>. Frontex denies public access to the text of the co-operation agreements signed between Spain and Senegal/Mauratania.

¹⁰⁶⁹ Agreement between Italy and Albania to Prevent Certain Illegal Acts and Render Humanitarian Assistance to Those Leaving Albania (2 April 1997), *Gazetta Ufficiale della Repubblica Italiana* No. 163 (15 July 1997).

¹⁰⁷⁰ Agreement between the United States of America and the Government of the Dominican Republic Concerning Cooperation in Maritime Migration Law Enforcement (20 May 2003), *TIAS UST LEXIS* 32 (2003).

¹⁰⁷¹ DEN HEIJER, Maarten, “Europe beyond its Borders”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 191.

¹⁰⁷² ExCom, “Protection Safeguards in Interception Measures Problems Related to the Rescue of Asylum-Seekers in Distress at Sea”, Conclusion No. 97 (LIV) (2003), para a(i), available online: <<http://www.unhcr.org/refworld/docid/3f93b2894.html>>.

implementation instead of responsibility for outcome. Also, prime responsibility is not the same as sole responsibility.¹⁰⁷³

Shiprider agreements are being used to legally place the authority to intercept with the State of the officials onboard the ships. But could they also be used as a pretext to shift obligations under refugee and human rights law? In the *Xhavara Case* (2001), the ECtHR attributed exclusive responsibility to Italy for the acts it perpetrated in international waters as a result of the aforementioned agreement concluded with Albania authorizing it to patrol both international and Albanian waters for the purpose of migration control. The Albanian authorities could not be held liable for the measures taken by Italy in performance of the agreement. The ECtHR held that the agreement cannot – in itself – engage responsibility of the State under the ECHR for any action taken by Italian authorities in the implementation of the agreement.¹⁰⁷⁴

Also in the case of *Al-Saadoon and Mufdhi v. United Kingdom* (2010) the ECtHR considered the impact of bilateral agreements.¹⁰⁷⁵ In this case the United Kingdom argued that – as UK forces were operating in Iraq subject to a memorandum of understanding establishing Iraqi overall jurisdiction – it was under a legal obligation to transfer the applicants to the Iraqi authorities. The ECtHR recalled that the principles underlying the ECHR cannot be interpreted and applied in a vacuum. Therefore, the Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part. Moreover, the ECtHR has also long recognized the importance of international cooperation.¹⁰⁷⁶ However, it concludes that the fact that a subsequent treaty or agreement has been signed shifting jurisdiction or requiring that persons are handed over to the territorial State, does not affect liability under the ECHR.¹⁰⁷⁷ As GAMMELTOFT-HANSEN points out:

¹⁰⁷³ TAYLOR, Savitri, “Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?”, in MCADAM, Jane, *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008), 125.

¹⁰⁷⁴ ECtHR, *Xhavara and Others v. Italy and Albania*, 11 January 2001, Appl. No. 39473/98 (2001).

¹⁰⁷⁵ ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, 2 March 2010, Appl. No. 61498/08 (2010).

¹⁰⁷⁶ ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, 2 March 2010, Appl. No. 61498/08 (2010), para. 126. The ECtHR referred to: ECtHR, *Al-Adsani v. The United Kingdom*, 21 November 2001, Appl. No. 35763/97 (2001), paras. 54-55; ECtHR, *Bankovic and Others v. Belgium and Others*, 12 December 2001, Appl. No. 52207/99 (2001), paras. 55-57; ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 30 June 2005, Appl. No. 45036/98 (2005), para. 150.

¹⁰⁷⁷ ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, 2 March 2010, Appl. No. 61498/08 (2010), para. 128.

“While shiprider or other bilateral agreements may be taken into account in the assessment of the degree of control exercised by the extraterritorially acting State, they cannot serve to trade away human rights obligations at will.”¹⁰⁷⁸ This is consistent with the ILC Draft Articles on State Responsibility.¹⁰⁷⁹ According to these Articles, a State may be held internationally responsible for the act of another State if it aids or assists these acts, directs and controls them or coerces the State into committing them. However, this requires that the State has knowledge of the act in question and that the act is considered as internationally wrongful.¹⁰⁸⁰

The last question that is being raised is exactly how far does the responsibility of the country in which the asylum application is lodged extend in case of removal to a STC? The country to which an asylum application has been submitted will be primarily responsible for considering it. Accordingly, if that country wants to transfer that responsibility to a third country, it must establish that such third country is ‘safe’ with respect to that particular asylum-seeker. The burden of proof – to establish that the third country is unsafe – does not lie with the asylum-seeker, but with the country which wishes to remove the asylum-seeker from its territory.¹⁰⁸¹ GIL-BAZO argues that the transfer of responsibility from one State to another – even when assuring that such State is a ‘safe third country’ – raises issues of State responsibility to fulfil all the obligations towards refugees under international refugee and human rights law that have been engaged by its exercise of jurisdiction.¹⁰⁸²

¹⁰⁷⁸ GAMMELTOFT-HANSEN, Thomas, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011), 139.

¹⁰⁷⁹ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts” (adopted 9 August 2001), *UN Doc. A/56/10* (24 October 2001), Supp. No. 10, available online: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> [ILC Draft Articles].

¹⁰⁸⁰ ILC Draft Articles, Artt. 16-18.

¹⁰⁸¹ UNHCR, “UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status” (July 2001), para. 36, available online: <<http://www.unhcr.org/refworld/category,LEGAL,,COMMENTARY,,3c0e3f374,0.html>>.

¹⁰⁸² GIL-BAZO, Maria-Teresa, “The Practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited”, 18 *International Journal of Refugee Law* 571 (2006), 599.

7.4. Conclusion

Since the freedom of navigation exclusively belongs to the flag State and not to individuals or private entities,¹⁰⁸³ the flag State is the only entity able to claim a breach of the freedom of navigation by another State. A valid consent of the flag State, however, precludes wrongfulness. Even though the LOSC does not attribute a right to a private entity to be exempt from interferences on the high seas by other States than the flag State, it provides an entitlement for a private entity to claim compensation. Article 110(3) LOSC provides: “*If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.*” Consistent with Article 110(3) LOSC, Article 9(2) Smuggling Protocol provides that – if the grounds for measures taken pursuant to article 8 Smuggling Protocol prove to be unfounded following the boarding of the vessel – a vessel is to be compensated for any loss or damage that may have been sustained if the vessel did not commit any act justifying the measures taken.

The wording of Article 110(3) LOSC unequivocally indicates that the entity entitled to claim compensation is the ship. If the domestic legal system does not recognize the legal personality of the ship itself, only the ship owner or the bareboat charterer may rely on the provision as private individuals. It might not extend to the owners of cargo.¹⁰⁸⁴ Examples of types of damages to a ship are the delay of the vessel and the value of the vessel and cargo where these are destroyed or confiscated. However, in case of stateless migrant vessels, damages could result out of the detention and mistreatment of the persons on board. Also moral damages which are financially assessable – such as mental suffering, humiliation, degradation – can be subject of a claim of compensation under Article 110(3) LOSC.¹⁰⁸⁵

¹⁰⁸³ ITLOS, The M/V Saiga Case (No. 2), *St. Vincent and the Grenadines v. Guinea*, 1 July 1999, *ITLOS Reports* (1999), para. 97. But see: ITLOS, The M/V Saiga Case (No. 2), *St. Vincent and the Grenadines v. Guinea*, 1 July 1999, Separate Opinion WOLFRUM, *ITLOS Reports* (1999), 92 *et seq.* WOLFRUM states: “[D]isputes concerning the exercise of freedom of navigation, in general, involve rights of natural or juridical persons which may prevail over the rights of States. Accordingly, the concept of freedom of navigation has as its addressees States as well as individual or private entities.”

¹⁰⁸⁴ WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007), 68 and 92-93. See also GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 325.

¹⁰⁸⁵ WENDEL, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin Heidelberg: Springer, 2007), 186.

However, in case the ship boarded has committed an act justifying the suspicions, it does not have a right to be compensated.

Interferences on the high seas basically involve two States, namely the flag State and the boarding State. Normally, under Article 110(3) LOSC it will be the boarding State that will have to compensate the ship. However, in some cases also the flag State could be held liable. However, this requires that the State has knowledge of the act in question and that the act is considered as internationally wrongful.¹⁰⁸⁶ As shipboarding or shiprider agreements constitute treaty exceptions to Article 110(1) LOSC, the provision in Article 110(3) LOSC is likewise not applicable. However, when wrongful conduct occurs, States may still be liable under general law of State responsibility. Which States will be liable – and to what extent – will depend on a case by case basis.

States can also be responsible for a breach of refugee law and human rights. While shiprider or other bilateral agreements may be taken into account in the assessment of the degree of control exercised by the extraterritorially acting State, they cannot serve to trade away human rights obligations.¹⁰⁸⁷ This is consistent with the ILC Draft Articles on State Responsibility.¹⁰⁸⁸

¹⁰⁸⁶ ILC Draft Articles, Artt. 16-18.

¹⁰⁸⁷ GAMMELTOFT-HANSEN, Thomas, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011), 139.

¹⁰⁸⁸ ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts” (adopted 9 August 2001), *UN Doc. A/56/10* (24 October 2001), Supp. No. 10, available online: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> [ILC Draft Articles].

Summary

It is true that the LOSC has put a certain halt to the process of territorial expansion of coastal States sovereignty, sovereign rights and jurisdiction over the seas. Nevertheless, some provisions lend themselves for an extensive interpretation, which has quite liberally been made use of. Next to this, coastal States have a tendency to expand the reach of their regulations beyond 200 nautical miles ('creeping jurisdiction'), as well as to functionally expand their jurisdiction by an ever more stringent regulation of a wider range of activities within their maritime zones ('thickening jurisdiction').¹⁰⁸⁹ These trends together have been subsumed under the notion 'territorial temptation' of coastal States.¹⁰⁹⁰

However, when considering the waning freedom of the high seas, it must be borne in mind that the legal system relating to the oceans and seas based on the LOSC needs to be further developed in order to cope with new challenges facing the international community. Necessary measures – taken in for example the area of maritime security – as a result of a multilateral negotiating process certainly justify further limitations of the traditional freedoms of the seas, as this is in the interest of humankind as a whole.¹⁰⁹¹ Already in 1955, MCDUGAL asserted: “[...] *the international law of the sea is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation States unilaterally put forward claims of the most diverse and conflicting character to the use of the world’s seas, and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interest of the world community and of the rival claimants, and ultimately*

¹⁰⁸⁹ BATEMAN, Sam, ROTHWELL, Donald R. & VANDERZWAAG, David, “Navigational Rights and Freedoms in the New Millennium: 20th Century Controversies and 21st Century Challenges”, in BATEMAN, Sam & ROTHWELL, Donald R. (Eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2000), 323; TUERK, Helmut, *Reflections on the Contemporary Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2012), 159.

¹⁰⁹⁰ OXMAN, Bernard H., “The Territorial Temptation: A Siren Song at Sea”, 100 *American Journal of International Law* 830 (2006), 833.

¹⁰⁹¹ TUERK, Helmut, *Reflections on the Contemporary Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2012), 185. See also: TUERK, Helmut, “The Waning Freedom of the Seas”, in CASADO RAIGÓN, Rafael & CATALDI, Giuseppe (Eds.), *L'évolution et l'état actuel du droit international de la mer: Mélanges de droit de la mer offerts à Daniel Vignes* (Brussel: Bruylant, 2009), 935-936.

accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interest and technology and by other continually evolving conditions in the world arena."¹⁰⁹²

This description of the law of the sea remains pertinent today, especially when considering maritime security issues. The 'package deal concept' of the LOSC should not stand in the way of progress. It should only mean that there is a need for caution and a preference of evolution over revolution.¹⁰⁹³ Balancing claims of jurisdiction to prescribe and enforce against the principle of navigational freedom is an uneasy exercise in lawmaking. BECKER is convinced that there is room for a more aggressive interdiction regime. However, its proponents have to keep in mind the needs and claims of the system as a whole. The non-interference principle only merits respect to the extent that it remains a valuable and effective tool for promoting the general welfare of the international system and all its participants.¹⁰⁹⁴ As GAVOUNELI states on the freedom of the high seas: "*[The] balance between freedom of action and responsibility for control, once considered sacrosanct, has been challenged recently as new exigencies come to force – or simply, old needs are perceived to have acquired increased importance.*"¹⁰⁹⁵ It is clear that States, in coping with the problem of illegal migration by sea, tend to interdict vessels on the high seas based on the fact that the migrant vessels are stateless. Even if a further jurisdictional nexus is necessary to seize these vessels, international law offers several possibilities to legally carry out seizures.

The hypothesis that there is a tension between the freedom of the high seas and the objective of suppressing illegal migration by sea ignores the fact that the principle of the freedom of the high seas reflect and protects important interests, notably including security and law enforcement interests themselves.¹⁰⁹⁶ Nevertheless, States also have to bear in mind

¹⁰⁹² MCDUGAL, Myres S., "The Hydrogyn Bomb Tests and the International Law of the Sea", 49 *Am. J. Int'l L.* 356 (1955), 356-357.

¹⁰⁹³ KLEIN, Natalie, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011), 301-302.

¹⁰⁹⁴ BECKER, Michael A., "The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea", 46 *Harvard International Law Journal* 131 (2005), 230.

¹⁰⁹⁵ GAVOUNELI, Maria, *Functional Jurisdiction in the Law of the Sea* (Leiden/Boston: Martinus Nijhoff Publishers, 2007), 159.

¹⁰⁹⁶ OXMAN, Bernard H., "Crimes at Sea and Trafficking of Weapons of Mass Destruction: General Report", in FRANCKX, Eric & GAUTIER, Philippe (Eds.), *The Exercise of Jurisdiction over Vessels: New Developments in the*

that they do not operate within a legal vacuum when operating on the high seas. The *Hirsi Case* confirms the trend towards an extraterritorial application of the *non-refoulement* principle in case of effective control. Although this is currently not yet customary international law, it is hoped that the jurisprudence of the ECtHR will influence jurisdictions in other world regions.¹⁰⁹⁷ Next to this, there is still a *lacuna*, namely in case of the diversion of vessels on the high seas. As there is probably no effective control – since the persons are for example not transferred onto a vessel of the diverting State – the *non-refoulement* principle will most likely not be applicable.

Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction (Brussels: Bruylant, 2010), 137-138.

¹⁰⁹⁷ GIUFFRÉ, Mariagiulia, “Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others v Italy*”, 61 *International and Comparative Law Quarterly* 728 (2012), 749.

CHAPTER III.
MARITIME SAFETY AND SECURITY:
COMMON CONCERNS AND ABUSES

Introduction

In the previous two chapters we discussed the maritime safety aspects of migrants at sea – namely search and rescue – and the maritime security aspects, being interception at sea. However, both areas deal with common concerns as well as abuses. First, a common concern is the interaction between the law of the sea and human rights. International law is often broken down into specialist sub-fields, generating ‘fragmentation’ and the possibility of conflicting norms and regimes. We will therefore take a look at this risk in the field of migrants at sea. Human rights considerations in the law of the sea as well as law of the sea aspects within the caselaw of the ECtHR will be discussed. In this regard, especially the *Hirsi* case is interesting. Second, maritime safety and security are sometimes (deliberately) being confused. For example, the search and rescue framework is being (ab)used to intercept. States sometimes rely on the principles associated with search and rescue at sea as a means of interdicting vessels that could not otherwise lawfully be visited on the high seas.¹⁰⁹⁸ Furthermore, the search and rescue framework is being used by smugglers, creating a risk of criminalization of seafarers. In the last part, we will try to introduce a proposal to meet these common concerns and abuses. The proposal will focus on both an increased international interagency cooperation and an improved regional cooperation between States.

¹⁰⁹⁸ KLEIN, Natalie, “International Migration by Sea and Air”, in OPESKIN, Brian, PERRUCHOUD, Richard & REDPATH-CROSS, Jillyanne (Eds.), *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012), 270.

1. The law of the sea and human rights concerns: a risk of fragmentation?

1.1. Introduction

Nowadays, it seems that the age of the generalist is passing in international law. The teaching as well as the practice of international law is often broken down into specialist sub-fields such as the law of the sea and international human rights law. The fact that they have their own sources, their own mechanisms to apply in cases of non-compliance and their own courts and tribunals, creates the idea that that these 'self-contained' regimes are separate from general international law.¹⁰⁹⁹ As indicated by a study of the ILC, this 'fragmentation' of international law generates the possibility of conflicting norms and regimes.¹¹⁰⁰ For example, it is sometimes suggested that the issue of how best to regulate migration by sea bears scars of a fragmentary approach to law-making. It has been submitted that the substantive content of the law of the sea has been isolated from potentially important humanitarian considerations. The law of the sea would therefore not be very susceptible to developments in international human rights.¹¹⁰¹

Human rights law has played a major role in the discussion on fragmentation of international law. Many of the most prominent conflicts over international law have pitted human rights law against other areas of international law.¹¹⁰² For example, human rights law has been pitted against the international trade regime in conflicts over the availability of affordable medicines,¹¹⁰³ against international investment law in conflicts over development

¹⁰⁹⁹ See for example: KOSKENNIEMI, Martti & LEINO, Päivi, "Fragmentation of International Law: Postmodern Anxieties?", 15 *Leiden Journal of International Law* 553 (2002), 553-579; TREVES, Tullio, "Fragmentation of International Law: the Judicial Perspective", 23 *Comunicazione e Studi* 821 (2007), 821-876.

¹¹⁰⁰ ILC, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi", *UN Doc. A/CN.4/L.682* (13 April 2006), available online: <http://untreaty.un.org/ilc/guide/1_9.htm>.

¹¹⁰¹ BARNES, Richard A., "The International Law of the Sea and Migration Control", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 104-106.

¹¹⁰² COHEN, Harlan G., "From Fragmentation to Constitutionalism", 25 *Pacific McGeorge Global Business & Development Law Journal* 381 (2012), 383.

¹¹⁰³ OTERO GARCÍA-CASTRILLÓN, Carmen, "An Approach to the WTO Ministerial Declaration on the TRIPS Agreement and Public Health", 5 *Journal of International Economic Law* 212 (2002), 212-213.

and indigenous rights¹¹⁰⁴ and against the law of armed conflict in conflicts over the legality of targeted killings and proper treatment of detained suspected terrorists.¹¹⁰⁵ Moreover, human rights law itself seems in constant danger of fragmenting, with multiple broad regional regimes interpreting similar treaties, State courts interpreting their obligations under both international law and State constitutions¹¹⁰⁶ and a variety of treaty bodies and rapporteurs with overlapping mandates.¹¹⁰⁷

It is true that the law of the sea encounters many of the problems that arise when specialized sets of rules overlap, especially within the framework of the LOSC)¹¹⁰⁸ Concerning migrants at sea, the confrontation between the law of the sea and the *non-refoulement* principle proved to be problematic in both maritime safety and maritime security issues. Although it is unlikely that the LOSC – or the law of the sea more generally – will be accorded a central role in the history of the international law of human rights, it may be deserving of more than just a footnote.¹¹⁰⁹ The law of the sea, its instruments and institutions have not only a direct contribution to make to human rights law, but in some instances even prove to be sufficient to protect individual human rights.¹¹¹⁰

First, we will deal with the law of the sea and the human rights considerations that it contains, both in the LOSC and in the ITLOS judgments. Special attention will be given to the duty to render assistance to persons lost or in distress at sea. The second part will deal with how the ECtHR has applied the law of the sea in several cases. It will especially focus on the

¹¹⁰⁴ Amazon Defence Coalition, Ecuador Plaintiffs Appeal U.S. Court Decision on Arbitration, Bus. Wire, 18 March 2010, available online: <<http://www.businesswire.com/news/home/20100318006007/en/Amazon-Defense-Coalition-Ecuador-Plaintiffs-Appeal-U.S>>.

¹¹⁰⁵ MILANOVIC, Marko, “Norm Conflict in International Law: Whither Human Rights?”, 20 *Duke Journal of Comparative & International Law* 69 (2009).

¹¹⁰⁶ See for example: *United States v. Burns*, S.C.R. 283 (2001); *Government of the Republic of South Africa and Others v. Grootboom and Others*, 11 BCLR 1169 (2000).

¹¹⁰⁷ OHCHR, “Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body – Report by the Secretariat”, *UN Doc. HRI/MC/2006/2* (22 March 2006), para. 8, available online: <<http://www2.ohchr.org/english/bodies/icm-mc/documents.htm>>.

¹¹⁰⁸ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 *UNTS* 3 [LOSC].

¹¹⁰⁹ OXMAN, Bernard H., “Human Rights and the Law of the Sea”, in CHARNEY, Jonathan I., ANTON, Donald K. & O’CONNELL, Mary Ellen (Eds.), *Politics, Values and Functions: International Law in the 21st Century – Essays in Honor of Professor Louis Henkin* (The Hague: Kluwer Law International, 1997), 404; OXMAN, Bernard H., “Human Rights and the United Nations Convention on the Law of the Sea”, 36 *Columbia Journal of Transnational Law* 399 (1998), 429.

¹¹¹⁰ CACCIAGUIDI-FAHY, Sophie, “The Law of the Sea and Human Rights”, 9 *Panoptica* 1 (2007), 1.

judgment of the *Hirsi Case*. After describing how the ECtHR reached its decision, it is interesting to take a look at this case from a law of the sea perspective. How would a lawyer specializing in the law of the sea interpret the facts and how would he or she apply the relevant law of the sea provisions? Lastly, we will highlight some remaining questions concerning the *Hirsi* judgment.

1.2. Human rights considerations in the law of the sea

1.2.1. The Law of the Sea Convention

The law of the sea is one of the oldest branches of international law, maintaining a doctrinal framework from Hugo Grotius. His essay ‘Mare Liberum’ was the first of its kind for international law as a whole. In 1982, after 10 years of negotiations, the LOSC was adopted. It must be viewed as forming part of the codification process of the law of the sea in the twentieth century that started with the The Hague Codification Conference of 1930 on territorial waters, continued with the 1958 and 1960 Geneva Conferences on the Law of the Sea, and reached its apogee in the monumental UNCLOS III.¹¹¹¹ The LOSC provides a framework for the regulation of ocean spaces, primarily through the allocation of competences to coastal States and flag States. It has been described as ‘the constitution for the oceans’.¹¹¹²

Until now, little attention has been given to the humanitarian principles within the law of the sea. Although the LOSC is not a human rights instrument *per se*, several provisions of the Convention articulate human rights principles which are to date still not used effectively and to their full potential by the human rights community.¹¹¹³ Moreover, the LOSC is a global

¹¹¹¹ For a detailed history on the drafting of the LOSC see: NELSON, Dolliver M., “Reflections on the 1982 Convention on the Law of the Sea”, in FREESTONE, David, BARNES, Richard A. and ONG, David M. (Eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), 28-39.

¹¹¹² See for example: SCOTT, Shirley V., “The LOS Convention as a Constitutional Regime for the Oceans”, in OUDE ELFERINK, Alex G. (Ed.), *Stability and Change in the Law of the Sea: the Role of the LOS Convention* (Leiden: Martinus Nijhoff Publishers, 2005), 9-38.

¹¹¹³ OXMAN, Bernard H., “Human Rights and the Law of the Sea”, in CHARNEY, Jonathan I., ANTON, Donald K. & O’CONNELL, Mary Ellen (Eds.), *Politics, Values and Functions: International Law in the 21st Century – Essays in Honor of Professor Louis Henkin* (The Hague: Kluwer Law International, 1997), 377-404; BASTID-BURDEAU, Geneviève, “Migrations clandestines et droit de la mer”, in COUSSIRAT COUSTÈRE, Vincent (Ed.), *La mer et son droit: Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Paris: Editions A. Pedone,

convention of which the scope *ratione loci* and *ratione materiae* rivals that of all but the most comprehensive of global human rights conventions.¹¹¹⁴ Also, from the perspective of ratification, it equals the most successful global human rights conventions as 164 States and the EU are party to the Convention.¹¹¹⁵

As early as the Preamble, the LOSC seeks to advance the interests of humanity by establishing “a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment” and by contributing “to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole”.¹¹¹⁶ Thus, several community rights are being promoted in the LOSC. The best known example is the declaration that the international seabed area and its resources are the ‘common heritage of mankind’.¹¹¹⁷ Therefore, the development of the resources must be carried out for the benefit of mankind as a whole.¹¹¹⁸ But also the protection of archaeological and historical objects found at sea,¹¹¹⁹ the protection and preservation of the marine environment¹¹²⁰ and the obligation of transparency¹¹²¹ are reflected in the Convention.

Concerning the protection of individuals, the LOSC requires States to prevent and to punish the transport of slaves in ships flying their flag and also declares with respect to the

2003), 57-66; TAVERNIER, Paul, “La Cour européenne des droits de l’Homme et la mer”, in COUSSIRAT COUSTÈRE, Vincent (Ed.), *La mer et son droit: Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Paris: Editions A. Pedone, 2003), 575-589; VUKAS, Budislav, *The Law of the Sea: Selected Writings* (Leiden: Martinus Nijhoff Publishers, 2004), 71-79; CACCIAGUIDI-FAHY, Sophie, “The Law of the Sea and Human Rights”, 9 *Panoptica* 1 (2007), 1-21; TREVES, Tullio, “Human Rights and the Law of the Sea”, 28 *Berkeley Journal of International Law* 1 (2010), 1-14.

¹¹¹⁴ OXMAN, Bernard H., “Human Rights and the Law of the Sea”, in CHARNEY, Jonathan I., ANTON, Donald K. & O’CONNELL, Mary Ellen (Eds.), *Politics, Values and Functions: International Law in the 21st Century – Essays in Honor of Professor Louis Henkin* (The Hague: Kluwer Law International, 1997), 379.

¹¹¹⁵ UN, “Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks”, Table recapitulating the status of the Convention and of the related Agreements (23 May 2012), available online: <http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm>.

¹¹¹⁶ LOSC, Preamble paras. 4-5.

¹¹¹⁷ LOSC, Art. 136.

¹¹¹⁸ LOSC, Art. 140 (1).

¹¹¹⁹ LOSC, Art. 303.

¹¹²⁰ LOSC, Art. 192.

¹¹²¹ See for example: LOSC, Artt. 16, 94(7), 205, etc.

high seas and the EEZ that a slave taking refuge on board a ship – whatever its flag – shall *ipso facto* be free.¹¹²² Another example is the prohibition on imprisonment or other forms of corporal punishment for fisheries violations and the requirement that parties who take action and impose penalties after arresting and detaining foreign vessels promptly notify the flag State of these ships.¹¹²³ However, the most important provision in the Convention is the duty to render assistance, also a legal obligation for States under customary international law.¹¹²⁴ Nevertheless, there is no actual right to be rescued for individuals.

1.2.2. *The International Tribunal for the Law of the Sea*

ITLOS is the specialized international judicial tribunal that was created to deal with disputes concerning the interpretation and the application of the LOSC. The LOSC provides in Article 287 that a State may choose – by a written declaration – any one or more of the following means for the settlement of disputes: ITLOS, the ICJ, an arbitral tribunal or a special arbitral tribunal for disputes relating to fisheries, protection and preservation of the marine environment, marine scientific research or navigation, including pollution from vessels and from dumping. In case the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration. ITLOS has a residual compulsory jurisdiction with respect to the prompt release of vessels (Article 292 LOSC) and the prescription of provisional measures under Article 290(5). The majority of disputes that have been submitted to ITLOS fall under these two categories.

In its prompt release judgments, ITLOS has underlined the importance of the LOSC for the protection of individuals. In the *Camouco Case*¹¹²⁵ as well as the *Monte Confurco Case*¹¹²⁶ – both judgments from 2000 – ITLOS gave a broad interpretation of the notion ‘detention’, as

¹¹²² LOSC, Art. 99.

¹¹²³ LOSC, Art. 73(3) and 73(4).

¹¹²⁴ MSC, “Review of safety measures and procedures for the treatment of persons rescued at sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, para. 6.

¹¹²⁵ ITLOS, *The Camouco Case, Panama v. France*, 7 February 2000, *ITLOS Reports* (2000).

¹¹²⁶ ITLOS, *The Monte Confurco Case, Seychelles v. France*, 18 December 2000, *ITLOS Reports* (2000).

applied to the shipmaster and its crew. It ruled that the practice of court supervision during a pending case in Réunion – whereby the master had to surrender his passport and the authorities were obliged to verify its presence on a daily basis – amounted to ‘detention’ for the purpose of the prompt release proceedings under Article 292 LOSC as the master was not in a position to leave Réunion. Two other judgments – the *Juno Trader Case* (2004)¹¹²⁷ and the *Hoshinmaru Case* (2007)¹¹²⁸ – also paid special attention to the freedom of the master and crew. Although in both cases the restrictions to the freedom of movement had been lifted, the master and crew were still present in the territory of the prosecuting State. Therefore, ITLOS stressed that the master and the crew were free to leave without any condition. Even though the persons were not in a state of detention under Article 292 LOSC, ITLOS wanted to eliminate all possible obstacles, bureaucratic or otherwise, to the departure of the ship. This shows how keen ITLOS is to protect the rights of the individuals involved in the cases submitted to it.¹¹²⁹ In the *Juno Trader* judgment, it was stated “[t]he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial guarantee must be reasonable indicates that a concern for fairness is one of the purposes of this provision.”¹¹³⁰ ‘International standards of due process of law’ were also invoked in the 2007 *Tomimaru Case*¹¹³¹ in order to assess whether the confiscation of a vessel had been made in such a way as to permit ITLOS to consider that the prompt release proceedings concerning the confiscated vessel were without object.

The aforementioned human rights principles or considerations are directly stated in the LOSC or can be inferred from its provisions. However, such principles may become applicable in a case concerning the application and interpretation of the LOSC even when they do not appear in the latter’s provisions. ITLOS first considered the protection of human rights in the *M/V Saiga* case (1999). Although ITLOS regarded persons to be – to a certain

¹¹²⁷ ITLOS, *The Juno Trader Case, Saint Vincent and the Grenadines v. Guinea Bissau*, 18 December 2004, *ITLOS Reports* (2004).

¹¹²⁸ ITLOS, *The Hoshinmaru Case, Japan v. Russian Federation*, 6 August 2007, *ITLOS Reports* (2007).

¹¹²⁹ TREVES, Tullio, “Human Rights and the Law of the Sea”, 28 *Berkeley Journal of International Law* 1 (2010), 4.

¹¹³⁰ ITLOS, *The Juno Trader Case, Saint Vincent and the Grenadines v. Guinea Bissau*, 18 December 2004, *ITLOS Reports* (2004), para. 77.

¹¹³¹ ITLOS, *The Tomimaru Case, Japan v. Russian Federation*, 6 August 2007, *ITLOS Reports* (2007).

extent – ‘accessory’ to ships,¹¹³² it ruled that considerations of humanity must apply in the law of the sea as they do in other areas of international law.¹¹³³ ITLOS justified integrating international law beyond the scope of the LOSC by making reference to Article 293 LOSC, which permits the application of other rules of international law not incompatible with the Convention. We can conclude that, although ITLOS cannot hear claims brought by individuals, it has been keen to introduce certain considerations of humanity into its jurisprudence.¹¹³⁴

1.2.3. The SAR and SOLAS Conventions

The primary objective of the SOLAS Convention is the prevention of the loss of life at sea. Consequently, it also deals with situations of distress at sea. The SAR Convention on the other hand, imputes multi-State coordination of search and rescue systems. Both treaties are monitored by the IMO. Following a number of incidents that highlighted concerns about the treatment of persons rescued at sea¹¹³⁵ – in particular undocumented migrants, asylum seekers and refugees – amendments to the SOLAS and SAR Conventions were adopted in May 2004. They entered into force in 2006. The purpose of these amendments is to help ensure that persons in distress are assisted, while minimizing the inconvenience to assisting ships and ensuring the continued integrity of SAR services.¹¹³⁶ Concerning the rescued persons, the amendments stipulate that the obligation of assistance applies regardless of

¹¹³² ITLOS, *The M/V Saiga Case (No. 2), St. Vincent and the Grenadines v. Guinea*, 1 July 1999, *ITLOS Reports* (1999), para. 106.

¹¹³³ ITLOS, *The M/V Saiga Case (No. 2), St. Vincent and the Grenadines v. Guinea*, 1 July 1999, *ITLOS Reports* (1999), para. 155. In the *Corfu Channel Case* (1949), the ICJ had already reflected the relevance of elementary conditions and considerations of humanity as a general principle of international law. See ICJ, *Corfu Channel Case, United Kingdom of Great Britain and Northern Ireland v. People’s Republic of Albania*, 9 April 1949, *ICJ Reports* 4 (1949).

¹¹³⁴ For an extensive discussion see: PAPANICOLOPULU, Irini, “The Law of the Sea Convention: No Place for Persons?”, *27 International Journal of Marine & Coastal Law* 867 (2012).

¹¹³⁵ For example the case of the Norwegian container ship *M/V Tampa* (2001). The captain rescued as many as 438 asylum seekers from drowning in international waters between Christmas Island (Australia) and Indonesia. It lasted for weeks until all the countries involved came to a solution for the disembarkation problem, painfully demonstrating the insufficiency of the international legal framework. See: DERRINGTON, Sarah & WHITE, Michael, “Australian Maritime Law Update 2001”, *Journal of Maritime Law & Commerce* 33 (2002), 275-291; MATHEW, Penelope, “Australian Refugee Protection in the Wake of Tampa”, *American Journal of International Law* 96 (2002), 661-676; BAILLIET, Cecilia, “The *Tampa* Case and its Impact on Burden Sharing at Sea”, *3 Human Rights Quarterly* 741 (2003), 741-774.

¹¹³⁶ MSC, “Guidelines on the Treatment of Persons Rescued at Sea”, MSC Resolution 167(78) (20 May 2004), para. 2.3.

their nationality or status or the circumstances in which they are found.¹¹³⁷ Furthermore, within the capabilities and limitations of the ship, all embarked persons shall be treated with humanity.¹¹³⁸ The owner, the charterer, the company operating the ship or any other person shall not influence (because of financial motives for example) the shipmaster's decision concerning what – in his professional judgement – is necessary for the safety of life at sea.¹¹³⁹ Governments have an obligation to co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage.¹¹⁴⁰ Lastly, although there is no actual duty for States to allow disembarkation onto its own territory – a State can refuse disembarkation or make this dependant on certain conditions¹¹⁴¹ – disembarkation of the persons has to be arranged as soon as reasonably practicable.¹¹⁴² The new amendments – drafted with the help of *inter alia* the UNHCR¹¹⁴³ – were definitely an improvement.

The SAR and SOLAS Conventions can be used as an interpretative tool pursuant to Article 31(3) VCLT. Concerning the interpretation of treaties, the VCLT provides in Article 31(3) that (a) subsequent agreements, (b) practice and (c) relevant rules of international law between the Parties to a treaty are relevant to its interpretation.¹¹⁴⁴ Nevertheless, the use of such interpretative methods has to remain faithful to the ordinary meaning and context of the treaty in light of its object and purpose.¹¹⁴⁵ Although the ICJ has acknowledged that treaties have to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation, it also accepted that there is a primary necessity

¹¹³⁷ SOLAS Convention, Chapter V Regulation 33 para 1.

¹¹³⁸ SOLAS Convention, Chapter V Regulation 33 para 6.

¹¹³⁹ SOLAS Convention, Chapter V Regulation 34-1.

¹¹⁴⁰ SOLAS Convention, Chapter V Regulation 33 para 1-1; SAR Convention, Chapter 3 para 3.1.9.

¹¹⁴¹ GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed. 1996), 157.

¹¹⁴² SOLAS Convention, Chapter V Regulation 33 para 1-1; SAR Convention, Chapter 3 para 3.1.9.

¹¹⁴³ In 2002, a High-Level Inter-agency Group was set up to deal with the problem of migrants at sea. The IMO, the UNHCR, the United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS), the United Nations Office on Drugs and Crime (UNODC), the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the International Organization for Migration (IOM) were all participating in this Inter-agency Group. The conclusions of the Interagency Group meetings were the basis for the 2004 SOLAS and SAR Amendments. See for example: MSC, "Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea", *IMO Doc. MSC 76/22/8* (31 July 2002).

¹¹⁴⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 *UNTS* 331. [VCLT]

¹¹⁴⁵ VCLT, Art. 31(2).

of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion.¹¹⁴⁶ In combining both the evolutionary and the inter-temporal element, the ICJ reflects the opinion of the International Law Commission when commenting on the draft text of Article 31(3)(c) VCLT.¹¹⁴⁷ Although the 1979 SAR and 1974 SOLAS Conventions have respectively 101 and 161 State parties,¹¹⁴⁸ the implementation of the 2004 Amendments – containing several humanitarian considerations – proved to be more difficult than expected. States like Finland and Malta have not even signed the amendments yet. As there is no general acceptance of the provisions contained in the 2004 Amendments, the latter cannot be used to re-interpret Article 98 LOSC. States that did not sign the amendments will thus not be bound by them. Italy however is a party to the LOSC, the 1979 SAR and 1974 SOLAS Conventions and the 2004 SAR and SOLAS Amendments.

To meet the practical obstacles of implementation and in order to assist States in meeting their existing commitments, there has been developed a wide range of soft law instruments concerning migrants at sea. They contain certain elements which are unlikely to find their way into a treaty because of the opposition of some States to binding agreements, but also because of their aim. For example, the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea were especially developed to provide guidance to Governments and to shipmasters with regard to humanitarian obligations and obligations under the relevant international law relating to treatment of persons rescued at sea. These guidelines are considered to be associated with the 2004 SAR and SOLAS Amendments, as they were adopted at the same time. The term Government that is used in these Guidelines, should be read to mean Contracting Government to the SOLAS or SAR Convention.¹¹⁴⁹

¹¹⁴⁶ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Namibia Advisory Opinion)*, 21 June 1971, *ICJ Reports* 16 (1971), para. 53; ICJ, *Aegean Sea Continental Shelf Case, Greece v. Turkey*, 19 December 1978, *ICJ Reports* 3 (1978); ICJ, *Oil Platforms Case, Islamic Republic of Iran v. United States of America*, 6 November 2003, *ICJ Reports* 161 (2003), paras. 40-41.

¹¹⁴⁷ ILC, “The Law of Treaties”, Commentary to draft Article 27, para. 16, in WATTS, Arthur D., *The International Law Commission 1949-1998* (Oxford: Oxford University Press, 1999), Vol. II, 690.

¹¹⁴⁸ IMO, “Status of Conventions summary” (31 August 2012), available online: <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>>.

¹¹⁴⁹ MSC, “Guidelines on the Treatment of Persons Rescued at Sea”, MSC Resolution 167(78) (20 May 2004), para. 1.1.

The 2004 IMO Guidelines state that a place of safety can be defined as a location where rescue operations are considered to terminate, where the survivors' safety or life is no longer threatened, basic human needs (such as food, shelter and medical needs) can be met and transportation arrangements can be made for the survivors' next or final destination.¹¹⁵⁰ Disembarkation of asylum-seekers recovered at sea, in territories where their lives and freedom would be threatened, must be avoided.¹¹⁵¹ This requirement is applicable regardless where the persons were found, thus also on the high seas.

Although these provisions are not binding, a soft law instrument can also contain an agreed interpretation of a treaty provision (Article 31(3)(a) VCLT). Subtle evolutionary changes in existing treaties may thus come about through the process of interpretation under the influence of soft law. Therefore, sometimes there is not even the need for attempting to turn a soft law provision into a 'rule' of international customary law or to enshrine it in a binding treaty.¹¹⁵² It is submitted that States that have adopted the 2004 SAR and SOLAS Amendments have also agreed upon the associated 2004 IMO Guidelines as a tool of interpretation. Malta for example did not sign the 2004 Amendments, because they do not agree with the provisions in the 2004 Guidelines. On 22 December 2005, the IMO received a communication from the Ministry of Foreign Affairs of Malta declaring that Malta "*is not yet in a position to accept these amendments*".¹¹⁵³ According to Malta there is a safe place in terms of search and rescue and there is a safe place in terms of humanitarian law.¹¹⁵⁴ The 2004 Guidelines, however, do state that a place of safety has to fulfil certain humanitarian requirements too.

¹¹⁵⁰ MSC, "Guidelines on the Treatment of Persons Rescued at Sea", MSC Resolution 167(78) (20 May 2004), para. 6.12.

¹¹⁵¹ MSC, "Guidelines on the Treatment of Persons Rescued at Sea", MSC Resolution 167(78) (20 May 2004), para. 6.17.

¹¹⁵² BOYLE, Alan, "Further Development of the 1982 Convention on the Law of the Sea", in FREESTONE, David, BARNES, Richard A. and ONG, David M. (Eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), 51-52.

¹¹⁵³ IMO, "Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions" (31 October 2011), available at: <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202011.pdf>.

¹¹⁵⁴ KLEPP, Silja, "A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea", 23 *International Journal of Refugee Law* 538 (2011), 549.

1.2.4. *The Smuggling Protocol*

Mixed migration movements make it difficult to make an assessment of the situation at hand, especially in case of people without proper identification documents. Nevertheless, all of these movements include at least some refugees or other people of concern to the UNHCR. As a result, it is not always easy to know which person is a smuggler and which person needs protection, although the saving clause in Article 19 of the Smuggling Protocol states that the 1951 Refugee Convention has to be respected. Migration itself is not considered to be a crime in the Smuggling Protocol. Thus, a migrant who possesses a fraudulent document to enable his or her own smuggling would not be included.¹¹⁵⁵ Governments are even encouraged to adopt measures to protect smuggled migrants in dangerous and inhuman situations.¹¹⁵⁶ Moreover, when taking measures against migrant smuggling by sea, States must ensure the safety and humane treatment of the persons on board.¹¹⁵⁷ Furthermore, the Smuggling Protocol contains a ‘saving clause’ in Article 19(1), which makes explicit mention that nations must not use the Protocol to infringe on pre-existing rights frameworks, including the Refugee Convention.¹¹⁵⁸ This document binds all State signatories of the Smuggling Protocol to follow the 1951 Refugee Convention and its 1967 Protocol.¹¹⁵⁹ It has to be noted, however, that the *travaux préparatoires* indicate that a State – which becomes a Party to the Smuggling Protocol but is not a Party to the 1951 Refugee Convention and the 1967 Protocol – will not become subject to any right, obligation or responsibility under these instruments.¹¹⁶⁰

¹¹⁵⁵ UNGA, “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime”, *UN Doc. A/55/383.Add.1* (3 November 2000), para. 93.

¹¹⁵⁶ Smuggling Protocol, Art. 6(3)(b).

¹¹⁵⁷ Smuggling Protocol, Art. 9(1)(a).

¹¹⁵⁸ Smuggling Protocol, Art. 19(1).

¹¹⁵⁹ The IMO circular already mentioned: “*Measures taken, adopted or implemented pursuant to this circular to combat unsafe practices associated with the trafficking or transport of migrants by sea should be in conformity with the international law of the sea and all generally accepted relevant international instruments, such as the United Nations 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.*” MSC, “Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea”, *IMO Doc. MSC.1/Circ. 896/Rev. I* (12 June 2001), para. 5.

¹¹⁶⁰ UNGA, “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Interpretative notes for the official records (*travaux préparatoires*) of the Negotiation of the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime”, *UN Doc. A/55/383.Add.1* (3 November 2000), para. 118.

In certain circumstances a refugee or a person in need of protection and a smuggler can be one and the same person. BROLAN argues that this creates confusion in the public mind and results in politicians exploiting public fear, stereotyping refugees as a social threat.¹¹⁶¹ MORENO-LAX argues that if States want to implement the Smuggling Protocol in good faith, they have to introduce appropriate measures to properly distinguish ‘victims’ from smugglers, in accordance with international standards.¹¹⁶² Nevertheless, during the drafting stage of the Smuggling Protocol it was decided that the word ‘victim’ – a term that was incorporated in the Trafficking Protocol – was inappropriate for smuggled migrants¹¹⁶³ and thus *a fortiori* also for smugglers.

Moreover, the fact that States should not initiate criminal proceedings against migrants for the fact of being smuggled does not mean that States are not entitled to bring criminal prosecution against them for breaching various immigration and criminal laws during the course of their journey. Article 6(4) Smuggling Protocol provides: “*Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.*” Measures can include both criminal and administrative sanctions.¹¹⁶⁴ For example, some of the smuggled migrants on the ship *M/V Sun Sea* – travelling from Sri Lanka to Canada – were believed to be a member of the Liberation Tigers of Tamil Eelam (LTTE), an organization which is often being regarded as a terrorist organization.¹¹⁶⁵ Nevertheless, HAMMARBERG stresses that immigration offences (not criminal offences) should remain administrative in nature, stating: “*Criminalization is a disproportionate measure which exceeds a state’s legitimate interest in controlling its borders. To criminalize irregular*

¹¹⁶¹ BROLAN, Claire, “An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective”, 14 *International Journal of Refugee Law* 561 (2002), 594.

¹¹⁶² MORENO-LAX, Violeta, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, 23 *International Journal of Refugee Law* 174 (2011), 188.

¹¹⁶³ UNODC, “Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Organized Crimes and the Protocols thereto” (2006), 461, available online: <http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf>.

¹¹⁶⁴ UNGA, “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Interpretative notes for the official records (*travaux préparatoires*) of the Negotiation of the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime”, *UN Doc. A/55/383.Add.1* (3 November 2000), para. 97.

¹¹⁶⁵ NEVE, Alex & RUSSELL, Tiisetso, “Hysteria and Discrimination: Canada’s Harsh Response to Refugees and Migrants Who Arrive by Sea”, 62 *University of New Brunswick Law Journal* 37 (2011).

migrants would, in effect, equate them with the smugglers or employers who, in many cases, have exploited them. Such a policy would cause further stigmatization and marginalization, even though the majority of migrants contribute to the development of European states and their societies.”¹¹⁶⁶ The NGO ‘Freedom from Torture’ has published several reports on the issue of returns of members of the Tamil community to Sri Lanka, detailing several cases of torture. Even in instances where returns were of a voluntary nature, torture has been perpetrated on Tamils. Reports confirm that Sri Lankan authorities often suspect complicity with LTTE activities. As a result, membership of the Tamil Tigers, real or perceived, thus puts people at serious risk of ill-treatment, abuse, detention and torture.¹¹⁶⁷

Before drafting the Smuggling Protocol, the United Nations General Assembly stressed that – notwithstanding the need for an international convention combating migrant smuggling – it is also generally recognized that international efforts to prevent migrant smuggling should not inhibit legal migration or freedom of travel or undercut the protection provided by international law to refugees.¹¹⁶⁸ The saving clause in Article 19(1) Smuggling Protocol states that the 1951 Refugee Convention and the 1967 Protocol have to be respected at all times. BROLAN suggests that the inclusion of the saving clause would further imply – although she admits that this is somewhat controversial – that the smuggling of persons found to be refugees may not be so ‘illegal’. Could it not go to the smuggler’s mitigation that he knew those being smuggled likely qualified as refugees, and/or were fleeing inhuman and degrading treatment?¹¹⁶⁹ Nevertheless, there are certainly other ways to help refugees than by smuggling and thus obtaining a financial or other material benefit.

¹¹⁶⁶ HAMMARBERG, Thomas, “It is Wrong to Criminalize Migration”, 11 *European Journal of Migration & Law*, 383 (2009), 384.

¹¹⁶⁷ Freedom from Torture, “New Research Highlights Risk for Tamils returning from Sri Lanka to UK”, News and Commentary (14 September 2012), available online: < <http://www.freedomfromtorture.org/news-blogs/6659?>>.

¹¹⁶⁸ UNGA, “Prevention of alien smuggling”, *UN Doc. A/RES/48/102* (20 December 1993), para. 9.

¹¹⁶⁹ BROLAN, Claire, “An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective”, 14 *International Journal of Refugee Law* 561 (2002), 592.

1.3. The European Convention of Human Rights and the law of the sea

1.3.1. Decisions of the ECtHR

Although the ECHR¹¹⁷⁰ makes no direct reference to the law of the sea or maritime law, the ECtHR has already considered several cases concerning both. On the one hand, it involves cases related to state jurisdiction in maritime zones: how can the ECHR be applied in a maritime context? Thus, these cases deal with the application of Article 1 ECHR that says: “*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*”

Jurisdiction in international law is generally framed territorially.¹¹⁷¹ Nevertheless, extraterritoriality does not prevent human rights obligations from being engaged in particular circumstances.¹¹⁷² The ECtHR considers the exercise of ‘effective control’ over the territory (for example the *Loizidou Case*¹¹⁷³) or over the persons concerned (for example *Issa Case*¹¹⁷⁴) to be the crucial element giving rise to state responsibility. For example, in the *Medvedyev Case*¹¹⁷⁵, the ECtHR noted that from the date on which the *Winner* was arrested and until it arrived in Brest, the *Winner* and its crew were under the control of French military forces. Although they were outside French territory, they were within the jurisdiction of France for the purposes of Article 1 ECtHR. What remained unclear – until the *Hirsi Case* that will be discussed in 2.2. – is whether situations other than those amounting to detention or arrest constitute an exercise of control over persons on board vessels sufficient to trigger human rights responsibility.

¹¹⁷⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 *UNTS* 222 [ECHR].

¹¹⁷¹ ECtHR, *Bankovic and Others v. Belgium and Others*, 12 December 2001, Appl. No. 52207/99 (2001), para. 73.

¹¹⁷² For a detailed discussion see: MORENO-LAX, Violeta, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, 23 *International Journal of Refugee Law* 174 (2011), 174-220.

¹¹⁷³ ECtHR, *Loizidou v. Turkey*, 23 March 1995, Appl. No. 15318/89 (1995).

¹¹⁷⁴ ECtHR, *Issa and Others v. Turkey*, 16 November 2004, Appl. No. 31821/96 (2004).

¹¹⁷⁵ ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Appl. No. 3394/03 (2008), para. 50.

On the other hand, the ECtHR decisions concern cases on the protection of the applicant's human rights within the context of the law of the sea. In the *Medvedyev Case*¹¹⁷⁶ (2008) and the *Rigopoulos Case*¹¹⁷⁷ (1999) ships flying the Cambodian and the Panamanian flags, respectively, were apprehended on the high seas by Navy ships of France and Spain. Each seizure was conducted in the framework of the fight against drug trafficking and with the authorization of the flag State. As a result, the crew members were taken into custody on the Navy ship, brought to a port of the arresting State, and were later submitted to criminal proceedings. However, the crew members claimed that the State detaining them had violated Article 5(3) ECHR according to which arrested or detained persons "*shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.*" The time elapsed between the moment the crew members were taken into custody and the point at which they were presented to a judge (16 days in the *Rigopoulos Case* and 13 in the *Medvedyev Case*) was claimed to be incompatible with the requirement of "promptitude". However, the Court held that there was no violation of Article 5(3) ECHR as the 'exceptional circumstances' prevailed in both cases. The arrest was carried out on the high seas at a distance of thousands of kilometres from the French and Spanish territory. Both cases demonstrate the relevance of maritime situations in interpreting a human rights law provision.

Nevertheless, in order to reach a decision, the ECtHR has sometimes taken certain steps in its reasoning that raise doubts from the point of view of an international lawyer specializing in the law of the sea. In the *Medvedyev Case*, the crew members pleaded a violation of Article 5(1) ECHR, according to which: "*No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.*" The applicants claimed that the actors making the arrest did not satisfy the requirement of a procedure described by law. The ECtHR decided that the legality of the arrest of the vessel depended on the flag State's consent. However, the ECtHR did not seem to adopt as a starting point the idea that the flag State is free to authorize other States to exercise some or all of its powers on its ships, and that all States are free to request such authorization to the flag State.

¹¹⁷⁶ ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Appl. No. 3394/03 (2008).

¹¹⁷⁷ ECtHR, *Rigopoulos v. Spain*, 12 January 1999, Appl. No. 37388/97 (1999).

On the contrary, the approach seemed to be that a request for and the granting of an authorization needs a legal basis, *in casu* Article 108 LOSC that says that “[a]ny State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic” and Article 17 of the 1988 Drugs Convention stating that a Party – which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic – may request authorization from the flag State to board and search the vessel. The flag State may subject its authorization to conditions to be mutually agreed between it and the requesting Party. An international lawyer specializing in the law of the sea would have looked directly at the flag State authorization and would have decided on the basis whether this authorization covered the action taken by France. The provision in Article 108 LOSC is indeed aimed at encouraging cooperation between States and also Article 17 Drugs Convention merely wants to facilitate the cooperation based on the request and grant of an authorization. The obligations ensuing from Article 17 Drugs Convention are even conditional on the fact that a State can freely request an authorization and a State can freely grant or withhold an authorization.¹¹⁷⁸

In the *Women on Waves Case*¹¹⁷⁹ the ECHR considered another aspect of the law of the sea. In this case, the *Borndiep* – a ship flying the Dutch flag – carried out a trip aimed at conducting activities in favour of legalizing abortion. However, as abortion was prohibited in Portugal at that time, the Portuguese government sent a warship to deny it access to its waters. The NGOs that had chartered the *Borndiep*, claimed that Portugal had violated their right of expression and freedom of peaceful meeting and of association under Articles 10 and 11 of the ECHR. The Portuguese government argued that its interference with the right of innocent passage of the *Borndiep* was legal under Articles 19 and 25 of the LOSC as the passage entailed violations of Portuguese law. Furthermore, the measures corresponded to restrictions on passage “prescribed by law as are necessary in a democratic society. . . for the protection of health or morals” in conformity with Articles 10(2) and 11(2) of the ECHR.

¹¹⁷⁸ TREVES, Tullio, “Human Rights and the Law of the Sea”, 28 *Berkeley Journal of International Law* 1 (2010), 10.

¹¹⁷⁹ ECtHR, *Women on Waves and Others v. Portugal*, 3 February 2009, Appl. No. 31276/05 (2009).

Although the ECtHR accepted the view that the interference of the Portuguese Government was prescribed by law in Articles 19(2)(g) and 25 LOSC, it held that the acts of interference with the navigation of the *Borndiep* were not necessary in a democratic society. The ECHR noted: “the State certainly had at its disposal other means to attain the legitimate objectives of defending order and protecting health than to resort to a total interdiction of entry of the *Borndiep* in its territorial waters, especially by sending a warship against a merchant vessel.” TREVES doubts whether this argument would be valid in a case regarding interference with innocent passage that was submitted to a court or tribunal that had jurisdiction over cases concerning the interpretation and application of the LOSC.¹¹⁸⁰

The right of innocent passage is one of the cornerstones of the law of the sea. Passage through the territorial sea is required to be continuous and expeditious¹¹⁸¹ and is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.¹¹⁸² Articles 19(2)(g) LOSC states that the loading or unloading of any commodity, currency or person contrary to the sanitary laws and regulations of the coastal State shall be considered to be prejudicial to the peace, good order or security of the coastal State. *In casu*, passage could thus be considered as non-innocent. The coastal State can take the necessary steps to prevent passage which is not innocent.¹¹⁸³ When passage becomes non-innocent, there is no longer a right for the vessel to be present in the territorial sea. This right of removal is also being regarded as being part of customary international law.¹¹⁸⁴ However, the powers exercised in the territorial sea should be exercised proportionally with the need to prevent or punish such infringements.¹¹⁸⁵ In 1992, the Indonesian government turned away the *Lusitania Expresso*, a Portuguese registered ferry, from its territorial waters. The ferry – carrying human rights activists – was headed to East Timor to protest against human rights violations in the region. The human rights activists had not yet demonstrated when the Indonesian authorities turned the ship away. But according to Indonesia those acts would have violated Article 19(2)(d)

¹¹⁸⁰ TREVES, Tullio, “Human Rights and the Law of the Sea”, 28 *Berkeley Journal of International Law* 1 (2010), 11.

¹¹⁸¹ LOSC, Art; 18(2).

¹¹⁸² LOSC, Art. 19(1).

¹¹⁸³ LOSC, Art. 25.

¹¹⁸⁴ See for example: Hoge Raad, Attican Unity Case, *Staat der Nederlanden v. BV Bergings- en Transportbedrijf van den Akker, Union de Remorquage et de Sauvetage and Dissotis Shipping Corporation*, 7 February 1986, 61 *Schip & Schade* (1986).

¹¹⁸⁵ GOODWIN-GILL, Guy S., *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed.1996), 162.

and thus rendered the passage non-innocent.¹¹⁸⁶ This incident illustrates a State's willingness to take pre-emptive measures to prevent the occurrence of non-innocent passage.

A last case that will be discussed is the *Mangouras Case*¹¹⁸⁷, in which the ECtHR had to determine whether a guarantee of three million Euros – fixed by the Spanish judicial authorities for release of Captain MANGOURAS of the vessel *Prestige* from detention – constituted a violation of Article 5(3) ECHR. Article 5(3) guarantees release of detainees prior to trial with allowance for reasonable bail. The ECtHR Court affirmed that, although the amount fixed for release of the captain was admittedly high, it did not contravene the ECHR. One of the reasons was the growing and legitimate concern for marine pollution, *inter alia* as expressed in the law of the sea. Thus, values emerging in the law of the sea are assessed by the ECtHR to determine whether they should be balanced against values set out in the ECHR.

1.3.2. *The Hirsi Case*

1.3.2.1. The content of the ECtHR judgment

The extraterritorial applicability of the *non-refoulement* principle – which is implicitly present in Article 3 ECHR¹¹⁸⁸ – was decided by the ECtHR on 23 February 2012 in the case *Hirsi Jamaa and Others v. Italy*.¹¹⁸⁹ The applicants – 11 Somali and 13 Eritrean nationals – were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast. However, after they were noticed by ships of the Italian Revenue Police (*Guardia di finanza*) and the Coastguard, the persons on board were

¹¹⁸⁶ See: ROTHWELL, Donald R., “Coastal State Sovereignty and Innocent Passage: The Voyage of the Lusitania Expresso”, 16 *Marine Policy* 427 (1992).

¹¹⁸⁷ ECtHR, *Mangouras v. Spain*, 8 January 2009, Appl. No. 12050/04 (2009).

¹¹⁸⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), 213 *UNTS* 222 [ECHR].

¹¹⁸⁹ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012). See also: UNHCR, “UNHCR’s oral intervention at the European Court of Human Rights Hearing of the case *Hirsi and Others v. Italy* (Application No. 27765/09), Strasbourg, June 22, 2011”, available online: <<http://www.unhcr.org/refworld/pdfid/4e0356d42.pdf>>.

transferred onto Italian military ships and returned to Tripoli. This return was carried out based on a bilateral agreement between Italy and Libya.¹¹⁹⁰

The applicants relied on Article 3 ECHR to argue that the decision of the Italian authorities to intercept the vessels on the high seas – and send the applicants straight back to Libya – exposed them to the risk of ill-treatment there, as well as to the serious threat of being sent back to their countries of origin (Somalia and Eritrea), where they might also face ill-treatment. Although the ECtHR affirmed that only in exceptional cases could acts of the Member States performed, or producing effects, outside their territories constitute an exercise of jurisdiction by them, it held that in this case there had been a violation of Article 3 ECHR because the applicants had been exposed to (1) the risk of ill-treatment in Libya and (2) of repatriation to Somalia or Eritrea. The ECtHR found that the applicants had fallen within the jurisdiction of Italy since in the period between boarding the Italian warships on the high seas and being handed over to the Libyan authorities, the applicants had been under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. The fact that none of the applicants were actually returned to these countries was irrelevant since it was the existence of the risk which mattered.¹¹⁹¹

Additionally, the ECtHR stated that the transfer of the applicants to Libya had been carried out without any examination of each individual situation and thus constituted a form of collective expulsion, in breach of Article 4 of Protocol No. 4 ECHR. Italy argued that none of the migrants had actually requested international protection on board the military ships. Nevertheless, the ECtHR considered the national authorities – faced with a situation in which human rights were being systematically violated – to have an obligation to find out about the treatment to which the applicants would be exposed after their return.¹¹⁹² Thus, it seems that there will now be a violation of the Convention in case of enforced return to treatment contrary to Article 3 as long as the risk of such a treatment is ‘sufficiently real and

¹¹⁹⁰ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), paras. 9-13.

¹¹⁹¹ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), para. 70 *et seq.* Already before this ECtHR-decision, GUILFOYLE concluded that – based on Australian and Spanish state practice – the *non-refoulement* principle will be applicable on the high seas when persons are removed onto a government vessel. See: GUILFOYLE, Douglas, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 231.

¹¹⁹² ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), para. 133.

probable',¹¹⁹³ whether or not the applicant has notified the deporting authorities of this risk, as long as these authorities should have been aware of the risk.¹¹⁹⁴

1.3.2.2. A law of the sea perspective

As a preliminary matter, it has to be kept in mind that the 'rights' in the law of the sea are generally not enforceable by or against individuals under the LOSC. In many circumstances they are articulated as duties owed by a State to other State parties. Thus, they may be enforced by those States pursuant to the compulsory dispute settlement provisions in the LOSC. As a treaty has to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,¹¹⁹⁵ there is no room to interpret that the individuals aboard a vessel in distress have a positive 'right' to be rescued under Article 98 LOSC. Nor do seafarers have a 'right' to expect that adequate and effective search and rescue services will be made available to them by coastal States in case of a distress situation.¹¹⁹⁶ Furthermore, many of the LOSC provisions are not self-executing. As such, these provisions must be implemented through domestic legislation before they give rise to legally enforceable rights and duties, at least as far as private persons are concerned.¹¹⁹⁷ Other States, from their side, may have little interest in ensuring third State compliance with international law concerning search and rescue at sea.¹¹⁹⁸

The ECtHR decided: "*Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion.*" However, from a law of the sea perspective, this would be a very important question to start with. In the Parties'

¹¹⁹³ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), para. 136.

¹¹⁹⁴ DEMBOUR, Marie-Bénédicte, "Interception-at-Sea: Illegal as currently practiced – Hirsi and Others v. Italy", Strasbourg Observers Blog (1 March 2012), available online: <http://strasbourgobservers.com/2012/03/01/interception-at-sea-illegal-as-currently-practiced-hirsi-and-others-v-italy/>.

¹¹⁹⁵ VCLT, Art. 31(1).

¹¹⁹⁶ For an extensive discussion see: MOEN, Amy E., "For Those in Peril on the Sea: Search and Rescue under the Law of the Sea Convention", 24 *Ocean Yearbook* 377 (2010), 377-410.

¹¹⁹⁷ BARNES, Richard A., "Refugee Law at Sea", 53 *International and Comparative Law Quarterly* 47 (2004), 50.

¹¹⁹⁸ BARNES, Richard A., "The International Law of the Sea and Migration Control", in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 107.

submissions, the Italian Government stressed that they intercepted the vessels in the context of a rescue on the high seas under Article 98 LOSC. According to them, in no circumstances could it be described as a maritime police operation. As Italy itself submits that it was a rescue, it should also fulfil its obligations under international law concerning search and rescue.

Italy signed and ratified the LOSC, as well as the 2004 SAR and SOLAS Amendments. Therefore, when carrying out a rescue operation, a place of safety has to be provided to the persons. According to the guidelines – which are associated with the 2004 SAR and SOLAS Amendments and thus can be used to interpret the amendments – there is a need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened, also when the persons are found on the high seas.¹¹⁹⁹ We can conclude that also under the law of the sea it is forbidden to disembark the applicants in Libya as Libya could not be regarded as a place of safety.

1.3.2.3. Remaining questions

The *Hirsi Case* was unanimously adopted by the ECtHR Grand Chamber. The latter accepts cases that raise a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.¹²⁰⁰ As the principle of *non-refoulement* as well as the prohibition of collective expulsion have attained the status of customary international law, the decision can be expected to have a jurisprudential impact beyond the reach of the European Convention.¹²⁰¹ Nevertheless, there are still some problems that remain unsolved.

A first issue is whether there will be effective control in a case involving the diversion of a ship on the high seas. When diverting a migrant vessel, a State exercises the right of visit (Article 110 LOSC). The right of visit is an exception to the general principle of the exclusive

¹¹⁹⁹ MSC, “Guidelines on the Treatment of Persons Rescued at Sea”, MSC Resolution 167(78) (20 May 2004), para. 6.17.

¹²⁰⁰ ECHR, Art. 43.

¹²⁰¹ HESSBRUEGG, Jan Arno, “European Court of Human Rights Protects Migrants Against “Push Back” Operations on the High Seas”, ASIL Insights (17 April 2012), available online: <<http://www.asil.org/pdfs/insights/insight120417.pdf>>.

jurisdiction of the flag State over ships flying its flag, set out in Article 92 LOSC. It entails the right of every warship or other duly authorized vessel to board the vessel and, more importantly, the right to search the vessel in circumstances of extreme suspicion.¹²⁰² As a diversion of boats to a certain destination is indisputably a form of actual physical interference with the vessel, it must fulfil the conditions of the right of visit to be regarded as lawful.¹²⁰³ Article 110 LOSC stipulates that the right of visit is only justified – next to the situation where the flag State has given its consent – when there is reasonable ground for suspecting that the ship is engaged in piracy, in slave trade, in unauthorized broadcasting and when the ship is without nationality or though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. The absence of nationality in Article 110(1)(d) LOSC seems to be the most relevant ground for the interdiction of vessels with migrants on board.¹²⁰⁴ The right of visit is based upon the fact that the migrant boats are considered to be stateless vessels. As the result of a diversion by an Italian warship for example, it could happen that the migrant vessel is actually forced to return to Libya. However, the persons were never brought onto an Italian vessel. Is there effective control in this case? The law of the sea remains silent on whether the *non-refoulement* principle is applicable when exercising the right of visit.

Positively establishing extraterritorial jurisdiction has been motivated by a desire to avoid double standards or, as was stated by the ECtHR in the *Cyprus v. Turkey Case*, a regrettable vacuum in human rights protection.¹²⁰⁵ According to MILANOVIC, the ECtHR judgments are not based on the intricacy of the concept of jurisdiction in Article 1 ECHR. The tensions in the *policy* considerations underpinning the law are the decisive factors.¹²⁰⁶ On the

¹²⁰² LOSC, Art. 110.

¹²⁰³ PAPANASTAVRIDIS, Efthymios, “Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law”, 36 *Syracuse Journal of International Law and Commerce* 145 (2009), 155.

¹²⁰⁴ BARNES, Richard A., “The International Law of the Sea and Migration Control”, in RYAN, Bernard & MITSILEGAS, Valsamis (Eds.), *Extraterritorial Immigration Control* (Leiden: Martinus Nijhoff Publishers, 2010), 130; GOODWIN-GILL, Guy & MCADAM, Jane, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed. 2007), 272; PALLIS, Mark, “Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes”, 18 *International Journal of Refugee Law*, 487, 350-353; PAPANASTAVRIDIS, Efthymios, “Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law”, 36 *Syracuse Journal of International Law and Commerce* 145 (2009), 159. The latter also discusses the ‘slave trade’ argument as a possible legal basis for interception of human beings on the high seas.

¹²⁰⁵ ECtHR, *Cyprus v. Turkey*, 10 May 2001, Appl. No. 25781/94 (2001), paras. 78 and 91.

¹²⁰⁶ MILANOVIC, Marko, “Al-Skeini and Al-Jedda in Strasbourg”, 23 *European Journal of International Law* 121 (2012), 127.

one hand, the ECtHR does not want to open the floodgates of litigation by considering every individual against whom force was used as falling under the protection of the ECHR. The *Bankovic* case made clear that not any State act capable of violating a person's human rights will amount to an exercise of authority and control over that individual.¹²⁰⁷ Up until now, the *Bankovic* case has still not been overruled. On the other hand, in some cases it is manifestly arbitrary for persons to be unprotected by the ECHR. For example, in the case *Mansur PAD and Others v. Turkey*, the application concerned the alleged killing of seven Iranian men in North-West Iran by Turkish soldiers in May 1999. Turkey admitted it had bombed the area from a helicopter as it suspected that terrorists were there. In order to maintain good relations with Iran, Turkey had agreed to pay the amount of compensation claimed by the Iranian authorities for the killings. However, the victims' families refused to take the money. The ECtHR reiterated that a State may be held accountable for ECHR violations of people who were in the territory of another State which was not part of the legal space of the Contracting States, but who were found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.¹²⁰⁸ Nothing could have justified the killings and the persons simply *had* to be protected.

Following this reasoning, any diversion with a probable risk of *non-refoulement*, will not be allowed. As the Mediterranean Sea is almost an enclosed sea, one could indeed sometimes foresee where the migrants would go to. However, in the *Hirsi Case*, there was an extra condition. In the period between boarding the ships and being handed over to the Libyan authorities, the applicants had been under the **continuous** and exclusive de jure and de facto control of the Italian authorities. In case of diversions, there will **only** be effective control at the time of diverting. Moreover, we must bear in mind that the diverting States will only be under an obligation to secure to individuals under its effective control, the rights and freedoms in the ECHR that are relevant to the specific situation of those individuals. This means that the rights in the ECHR can be 'divided and tailored'.¹²⁰⁹

¹²⁰⁷ ECtHR, *Bankovic and Others v. Belgium and Others*, 12 December 2001, Appl. No. 52207/99 (2001).

¹²⁰⁸ ECtHR, *Mansur PAD and Others v. Turkey*, 28 June 2007, Appl. No. 60167/00 (2007).

¹²⁰⁹ ECtHR, *Al-Skeini and Others v. United Kingdom*, 7 July 2011, Appl. No. 55721/07 (2011), para. 137.

Secondly, what if interception operations on the high seas are being coordinated by Frontex? Frontex is the European External Border Agency that organizes joint surveillance operations at sea to interdict such migrant boats, helping States to cope with the problem.¹²¹⁰ Although Frontex is a specialized and independent body, the responsibility for the control and surveillance of external borders lies with the Member States.¹²¹¹ When human rights violations result from joint maritime operations, the independent responsibility of each participating EU Member State may be invoked.¹²¹² This is how the ECtHR proceeded in the *Xhavara Case*¹²¹³, attributing exclusive responsibility to Italy for the acts it perpetrated in international waters as a result of the convention concluded with Albania authorizing it to patrol both international and Albanian waters for the purpose of migration control. However, as there is a lack of transparency concerning the Frontex operations, it will not always be easy to know which Member State had effective control.

During Frontex joint operations at sea, equipment and personnel from several EU Member States are involved. For example, during the 2011 *Operation Hermes* in the central Mediterranean, Italy (host), Austria, Belgium, France, Germany, Greece, Hungary, Netherlands, Poland, Portugal, Romania, Spain and Switzerland were all participating.¹²¹⁴ Therefore, it is not always clear which State will be in control. Nevertheless, Regulation 1168/2011 states that each operation has to be based on a well-defined operational plan, including an evaluation and an obligation to report incidents, agreed prior to the start of joint operations or pilot projects amongst Frontex and the host Member State and in consultation with the participating Member States.

¹²¹⁰ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJL* 349/1 of 25 November 2004; Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJL* 304/1 of 22 November 2011.

¹²¹¹ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, *OJL* 349/1 of 25 November 2004, Preamble, para. 4.

¹²¹² See for example: MORENO-LAX, Violeta, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, 23 *International Journal of Refugee Law* 174 (2011), 174-220.

¹²¹³ ECtHR, *Xhavara and Others v. Italy and Albania*, 11 January 2001, Appl. No. 39473/98 (2001).

¹²¹⁴ Frontex, “General Report (2011)”, 41, available online:

<http://www.frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2011/General_Report_2011.pdf>.

The operational plan details the organizational aspects before the envisaged beginning of the joint operation.¹²¹⁵ It covers all aspects considered necessary for carrying out the joint operation, including a description of the tasks and special instructions for the guest officers, the composition of the teams of guest officers and the deployment of other relevant staff, command and control provisions (with the names and ranks of the host Member State's border guards responsible for cooperating with the guest officers and Frontex, in particular those of the border guards who are in command during the period of deployment and the place of the guest officers in the chain of command) and the modalities of cooperation with third countries, other Union agencies and bodies or international organizations. Regarding sea operations, the operational plan has to contain specific information on the application of the relevant jurisdiction and legislation in the geographical area where the joint operation or pilot project takes place, including references to international and EU law regarding interception, rescue at sea and disembarkation.¹²¹⁶ The operational plan could thus help identifying the State that had the actual effective control.

1.4. Conclusion

Human rights concerns are intertwined with concerns of the law of the sea. These two fields are not separate planets rotating in different orbits, but rather meet in many situations. On the one hand, ITLOS takes into account certain human rights considerations. Especially in the field of search and rescue at sea, the SAR and SOLAS Conventions and the accompanying soft law provisions, are taking into account the *non-refoulement* principle. Next to this, the Smuggling Protocol contains a saving clause, referring to the 1951 Refugee Convention. On the other hand, the ECtHR considers the law of the sea when appropriate, especially in cases of interception. It is important to note that the factual and legal context can make the mechanical application of national or regional human rights standards

¹²¹⁵ Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ L* 304/1 of 22 November 2011, Art. 3(a).

¹²¹⁶ Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ L* 304/1 of 22 November 2011, Art. 3(a).

inappropriate. As a result, it may be undesirable to interpret a treaty or diplomatic note with the same strictness one would apply to a domestic statute.¹²¹⁷

GUILFOYLE states: “While the Strasbourg Court is right to insist on the principle of legality (*nullum crimen sine lege*) in national implementation of law enforcement treaties, to apply a principle of strict legality (*nullum crimen sine lege stricta et scripta*) to the treaties themselves is to needlessly undermine the enforcement provisions of other treaty regimes. It is erroneous to presume that the *nullum crimen* or *nullum poena* principle applies in the same manner at the international level as at the national level.”¹²¹⁸ As some human rights are simply very difficult to provide for at sea – such as access to an independent lawyer – courts should be realistic in case of such exceptional circumstances.¹²¹⁹ Although a contextual interpretation of the relevant human rights is certainly pragmatic, we have to bear in mind that some of the problems encountered are reasonably foreseeable. Therefore, Governments are able to consider in advance the measures that could be taken to ensure compliance with ordinary and established human rights principles.¹²²⁰ For example, the request for proposals (contract solicitation) information on the design process for the US Coast Guard’s newest ship – the *Fast Response Cutter* – mentions certain requirements in order to be able to deal with large groups of intercepted migrants being brought aboard. It says: “The main deck shall be capable of holding 150 Alien Migrants for 24 hours, with a minimum clear deck area of 0.5m² (5 ft²) per person. The arrangement shall allow for the processing and movement of alien migrants [...] [F]acilities shall include an awning, portable head(s), and potable water delivery [...]. Deck arrangements shall be such that guarding personnel are provided with maximum separation from Alien Migrants while providing optimal opportunity for control. The main deck shall have the prescribed minimum clear deck area to

¹²¹⁷ ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Appl. No. 3394/03 (2008), Partly dissenting opinion of Judges COSTA, CASADEVALL, BİRSAN, GARLICKI, HAJIYEV, ŠIKUTA and NICOLAOU PARAS, paras. 6 and 9-10.

¹²¹⁸ GUILFOYLE, Douglas, “Human Rights Issues and Non-Flag State Boarding of Suspect Ships”, in SYMMONS, Clive R. (Ed.), *Selected Contemporary Issues in the Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2011), 103; GUILFOYLE, Douglas, “Counter-Piracy Law Enforcement and Human Rights”, 59 *International & Comparative Law Quarterly* 141 (2010), 160.

¹²¹⁹ ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Appl. No. 3394/03 (2008), Partly dissenting opinion of Judges COSTA, CASADEVALL, BİRSAN, GARLICKI, HAJIYEV, ŠIKUTA and NICOLAOU PARAS, para. 10.

¹²²⁰ ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Appl. No. 3394/03 (2008), Partly dissenting opinion of Judges TULKENS, BONELLO, ZUPANČIČ, FURA, SPIELMANN, TSOTSORIA, POWER and POALELUNGI, paras. 6-7.

*hold alien migrants after deducting the area required for any portable heads (footprint and tiedown interferences included)."*¹²²¹

Finally, it was interesting to see – be it theoretically – how the law of the sea would have dealt with the *Hirsi Case*. Although individuals cannot directly benefit from the law of the sea provisions, it is surprising that these rules already provide protection, be it outside the ECHR and the ‘effective control’ theory. When a State – such as Italy – is party to the 2004 SAR and SOLAS amendments, it cannot disembark rescued persons in territories where their lives and freedoms would be threatened, even though they were found on the high seas. In Italy, recent declarations at the highest political level stated that the ‘push-back’ policy will no longer be applied, in the light of the ECtHR *Hirsi Case*. Throughout the country, there were certainly several efforts to accommodate persons arriving from North Africa. After a four-day visit to Rome between 3 and 6 July 2012, Nils MUIŽNIEKS – Council of Europe Commissioner for Human Rights – concluded that the Italian government gave signs of a shift in policy.¹²²² However, mid-august, two large migrant boats reached Lampedusa. One of the boats was carrying about 250 persons – mainly Sub-Saharan Africans – and was thought to have departed from Libya. A second boat was carrying about 125 Tunisians. As a result, the detention centre on Lampedusa was getting over its 350 person capacity. In response to the apparent increase in the numbers of persons reaching the island, former Italian Interior Minister Roberto MARONI called for a resumption of Italy’s push-back practice in order to halt new boats.¹²²³

¹²²¹ Department of Homeland Security, *US Coast Guard Fast Response Cutter B Class* (22 June 2007) para. 070-9.11, available online: <<http://www.uscg.mil/Acquisition/sentinel/pdf/frcbrfp.pdf>>.

¹²²² Council of Europe – Commissioner for Human Rights, “For human rights protection, Italy needs a clear break with past practices” (9 July 2012), available online: <http://www.coe.int/t/commissioner/News/2012/120709Italy_en.asp>.

¹²²³ Migrants at Sea, “400 Migrants Reach Lampedusa Over Past Weekend; Detention Centre Over Capacity; Former Interior Minister Maroni Calls for Resumption of Italy’s Push-Back Practice” (21 August 2012), available online: <<http://migrantsatsea.wordpress.com/2012/08/21/400-migrants-reach-lampedusa-over-past-weekend-detention-centre-over-capacity-former-interior-minister-maroni-calls-for-resumption-of-italys-push-back-practice/>>.

2. When safety and security are being confused

2.1. When the search and rescue framework is being used to intercept

States sometimes rely on the principles associated with search and rescue at sea as a means of interdicting vessels that could not otherwise lawfully be visited on the high seas.¹²²⁴ Next to this, it is better for a State's reputation to claim that they have 'rescued' migrants at sea instead of admitting that they actually interdicted a vessel.¹²²⁵ In the aforementioned case *Hirsi Jamaa and Others v. Italy*¹²²⁶ (2012), Italy submitted that it intercepted the migrant vessel in the context of a rescue on the high seas.¹²²⁷ The UNCHR already stressed that States should avoid the categorization of interception operations as search and rescue operations, because this can lead to confusion with respect to disembarkation responsibilities.¹²²⁸ Although States have indeed the duty to render assistance to persons in distress, their actual intent here is interdicting a vessel. As interdiction on the high seas is only possible in a limited number of cases, states have thus tried to 'disguise' these interdictions as rescues. This part will focus on the question whether this practice can be considered to be an abuse of right under international law.

¹²²⁴ KLEIN, Natalie, "International Migration by Sea and Air", in OPESKIN, Brian, PERRUCHOUD, Richard & REDPATH-CROSS, Jillyanne (Eds.), *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012), 270.

¹²²⁵ E.g. In the *Hirsi Case*, Italy stated to have rescued asylum seekers that were in distress at sea and not to have interdicted them. See: ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), para. 65.

¹²²⁶ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012). See also: UNHCR, "UNHCR's oral intervention at the European Court of Human Rights Hearing of the case *Hirsi and Others v. Italy* (Application No. 27765/09), Strasbourg, June 22, 2011", available online: <<http://www.unhcr.org/refworld/pdfid/4e0356d42.pdf>>.

¹²²⁷ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09 (2012), para. 65.

¹²²⁸ UNHCR, "The Treatment of Persons Rescued at Sea: Conclusions and Recommendations from Recent Meetings and Expert Round Tables Convened by the Office of the United Nations High Commissioner for Refugees – Report of the Office of the United Nations High Commissioner for Refugees," *UN Doc. A/AC.259/17* (11 April 2008), para. 20, available online: <http://www.un.org/Depts/los/consultative_process/consultative_process.htm>.

2.1.1. *The principle of good faith in international law*¹²²⁹

Abuse of right is often being linked to the principle of good faith. Bin CHENG – author of the timely publication *General Principles of Law* – believed that good faith eludes *a priori* definition. According to him, the notion can be illustrated by means of international judicial decisions. However, the concept cannot be defined.¹²³⁰ The *legal* concept of good faith entails the *moral* elements of honesty, fairness and reasonableness and therefore it is not easily reducible to precise rules. However, as a legal principle, it must be applied only where there is a legal obligation in question.¹²³¹ In the *Nuclear Tests Case*, the ICJ said: “*One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation. ... The very rule of pacta sunt servanda in the law of the treaties is based on good faith.*”¹²³²

The VCLT codified and progressively developed the customary rules on the law of treaties.¹²³³ Article 26 VCLT says: “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*”. In this respect, the principle of good faith has three functions. First of all, the principle is particularly relevant in relation to the performance of treaties. For example, Article 2(2) United Nations Charter mentions: “*All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.*”¹²³⁴ Parties must observe what they have actually agreed to observe. Secondly, the principle has got a function when it comes to the interpretation of a treaty. Article 31(1) VCLT stipulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of

¹²²⁹ On good faith, see: CHENG, Bin, *General Principles of Law as Applied by International Courts and Tribunals* (London: Steven & Sons Limited, 1953), 105-160; D'AMATO, Anthony, “Good Faith”, in BERNHARDT, Rudolf (Ed.), *Encyclopaedia of Public International Law*, Vol. II (Amsterdam: North-Holland, 1995); KOLB, Robert, *La bonne foi en droit international public* (Paris: Presses Universitaires de France, 2000); O'CONNOR, John F., *Good faith in International Law* (Hants: Dartmouth Publishing Company 1991), 148 p.

¹²³⁰ CHENG, Bin, *General Principles of Law as Applied by International Courts and Tribunals* (London: Steven & Sons Limited, 1953), 105.

¹²³¹ O'CONNOR, John F., *Good faith in International Law* (Hants: Dartmouth Publishing Company, 1991), 123.

¹²³² ICJ, *Nuclear Tests Case, New Zealand v. France*, 20 December 1974, *ICJ Reports* 457 (1974), para. 49. The association of *pacta sunt servanda* with ‘faith’ was already well marked in the history of ancient Rome. The keeping of treaties and pacts was associated by the Romans with the Goddess Fides, the personification of trust. See: O'CONNOR, John F., *Good faith in International Law* (Hants: Dartmouth Publishing Company, 1991), 17.

¹²³³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 *UNTS* 331 [VCLT].

¹²³⁴ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 *UNTS* XVI.

the treaty in their context and in the light of its object and purpose. This means that the interpretation of a treaty is first of all based on the actual text or 'plain meaning'. Both in the jurisprudence of the Permanent Court of International Justice (PCIJ) and the ICJ, the principle of *ut res magis valeat quam pereat* has been invoked.¹²³⁵ This principle entails that if a piece of law seems unclear, one should try to understand it in a way that makes sense of it. However, there are certain limits to this principle. As the Court said in the Interpretation of Peace Treaties Advisory Opinion, the principle cannot be applied in a way that would be contrary to the spirit of the treaty.¹²³⁶ Therefore a Court may take into account – in interpreting a treaty – honesty, fairness and reasonableness. Thirdly, good faith has a function in the process of negotiations for a treaty. International law may invoke specific rules derived from good faith, such as estoppel, which may be applied as appropriate to negotiations.¹²³⁷

2.1.2. The principle of abuse of right in international law

In the *Dictionnaire de la terminologie du droit international* of 1960 abuse of right is defined as: “*Exercice par un Etat d’un droit d’une manière ou dans des circonstances qui font apparaître que cet exercice a été pour cet Etat un moyen indirect de manquer à une obligation internationale lui incombant ou a été effectué dans un but ne correspondant pas à celui en vue duquel ledit droit est reconnu à cet Etat.*”¹²³⁸ The abuse of right thus refers to a State exercising a right in such a manner or in such circumstances either in a way that avoids an international obligation or for a purpose not corresponding to the purpose for which that right was recognized in favor of that State. This definition of the concept was footed on two judgments of the PCIJ, namely in the *Case concerning Certain German Interests in Polish Upper Silesia*¹²³⁹ and the *Free Zones*

¹²³⁵ See for example: PCIJ, Free Zones of Upper Savoy and the District of Gex Case, *France v. Switzerland*, 19 August 1929, *PCIJ Ser. A No. 22* (1929), 13; ICJ, Corfu Channel Case, *United Kingdom of Great Britain and Northern Ireland v. Albania*, 9 April 1949, *ICJ Reports* 4 (1949), 24.

¹²³⁶ ICJ, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania Advisory Opinion, 30 March 1950, *ICJ Reports* 65 (1950), 229.

¹²³⁷ O’CONNOR, John F., *Good faith in International Law* (Hants: Dartmouth Publishing Company, 1991), 111.

¹²³⁸ BASDEVANT, Jules, “Abus de droit”, in X., *Dictionnaire de la terminologie du droit international* (Paris : Sirey 1960).

¹²³⁹ PCIJ, Case concerning Certain German Interests in Polish Upper Silesia, *Germany v. Poland*, 25 August 1925, *PCIJ Ser. A No. 7* (1926), 30. The Court held: “*Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.*”

Case¹²⁴⁰. KISS, however, limits the definition to the relations between States. According to him, abuse of rights refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State.¹²⁴¹

Some authors challenge the actual existence of the principle. SCHWARZENBERGER stipulated that the arbitrary or unreasonable exercise of a right is not illegal, but merely an unfriendly act. He therefore rejects the notion that there is a general rule of international customary law prohibiting the abuse of right.¹²⁴² The best known proponent of abuse of rights has been Hersch LAUTERPACHT. He stated that the determination of when the exercise of a right becomes abusive must depend on the specific facts of each case, rather than the application of an abstract legislative standard. Abuse of right would occur “*when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage.*”¹²⁴³ Nevertheless, he acknowledged that this was a relatively ambiguous definition. Before international courts and tribunals, the application of the principle would therefore result in a great deal of discretionary power being granted to judges and arbitrators. He thus promoted some caution when studying this principle.¹²⁴⁴

It is difficult to establish what is supposed to amount to an abuse, as distinct from a harsh but justified use, of a right under international law.¹²⁴⁵ However, largely due to its widespread existence in national legal systems, many authors have considered abuse of rights to be part of international law, whether as a general principle of law or as part of

¹²⁴⁰ PCIJ, Free Zones of Upper Savoy and the District of Gex Case, *France v. Switzerland*, 19 August 1929, PCIJ Ser. A/B No. 46 (1932), 167. The Court suggested that if a State attempted to avoid its contractual obligations by resorting to measures having the same effect as the specifically prohibited acts, an abuse of rights would result.

¹²⁴¹ KISS, Alexandre, “Abuse of Rights”, in BERNHARDT, Rudolf (Ed.), *Encyclopaedia of Public International Law* (Amsterdam: North-Holland, 1992-2003), Vol. I.

¹²⁴² SCHWARZENBERGER, Georg & BROWN, Edward D., *A Manual of International Law* (Abingdon: Professional Books, 6th ed. 1976), 119.

¹²⁴³ OPPENHEIM, Lassa, *International Law: A Treatise* (London: Longmans, Green & Co., 8th ed. 1955 by LAUTERPACHT, Hersch), 345.

¹²⁴⁴ LAUTERPACHT, Hersch, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958), 164; see also LAUTERPACHT, Hersch, “Droit de la paix”, 62 *Recueil des Cours* 95 (1937), 342.

¹²⁴⁵ SCHWARZENBERGER, Georg & BROWN, Edward D., *A Manual of International Law* (Abingdon: Professional Books, 6th ed. 1976), 84.

customary international law.¹²⁴⁶ Abuse of rights first found support in international law when the Advisory Committee of Jurists was drafting Article 38 of the Statute of the PCIJ¹²⁴⁷, which identifies sources of international law and which later became Article 38 of the Statute of the ICJ.¹²⁴⁸ One of the members of the Committee, referred to the principle “*which forbids the abuse of rights*” as one of the “*general principles of law*”.¹²⁴⁹ According to him, disputes concerning the right of a coastal state to fix the breadth of its territorial sea are an example of this principle. At that time, there was no international rule defining the outer limit of the territorial sea. Therefore he suggested that the Court be permitted to admit the rules of each State in this respect as “*equally legitimate in so far as they do not encroach on other principles, such for instance, as that of the freedom of the seas.*”¹²⁵⁰

The principle also appears in case law of the PCIJ and the ICJ. When dealing with the right to draw straight baselines in a territorial sea delimitation in the *Fisheries Case*, the ICJ said: “*The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the general direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone.*”¹²⁵¹ Some additional support for the principle may be found in separate and dissenting opinions as well as in international arbitral decisions. Also,

¹²⁴⁶ See generally BYERS, Michael, “Abuse of Rights: An Old Principle, A New Age”, 47 *McGill Law Journal* 389 (2002) 389-431; WHITEMAN, Marjorie M., *Digest of International Law* (Washington D.C.: Government Printing Office, 1965), Vol. V, 224-30; KISS, Alexandre, “Abuse of Rights”, in BERNHARDT, Rudolf (Ed.), *Encyclopaedia of Public International Law* (Amsterdam: North-Holland, 1992-2003), Vol. I.

¹²⁴⁷ Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 5 September 1921) 6 *LNTS* 279.

¹²⁴⁸ Statute of the International Court of Justice (adopted 16 June 1945, entered into force 24 October 1945) 33 *UNTS* 993 [ICJ Statute], Art. 38(1)(c) which reads: “*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... (c) the general principles of law recognized by civilized nations*”; See generally: CHENG, Bin, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), 490 p.

¹²⁴⁹ X., *Procès-verbaux des séances du comité* (The Hague : Van Langenhuisen Brothers, 1920), 314-315 and 335.

¹²⁵⁰ X., *Procès-verbaux des séances du comité* (The Hague, Van Langenhuisen Brothers 1920), 315.

¹²⁵¹ ICJ, *Fisheries Case, United Kingdom v. Norway*, 18 December 1951, *ICJ Reports* 116 (1951), 141-142.

a number of States have argued for the applicability of abuse of rights in State-to-State litigation and arbitration.¹²⁵²

2.1.3. *The link between good faith and abuse of right*

It is possible to argue that abuse of right is redundant because it is itself only a more specific expression of a broader principle, namely that of good faith. For example, BIRNIE & BOYLE argue that abuse of right is merely a method of interpreting rules concerning matters such as the duty to negotiate and consult in good faith, or another way of formulating a doctrine of reasonableness or a balancing of interests. Therefore they conclude that the principle does not add anything useful.¹²⁵³ CHENG similarly writes that the theory of abuse of right is merely an application of good faith to the exercise of rights.¹²⁵⁴ Nonetheless, the principle of abuse of right is not redundant since it is – in a small yet important respect – supplemental to the principle of good faith since it provides the threshold at which a lack of good faith gives rise to a violation of international law, with all the attendant consequences.¹²⁵⁵

2.1.4. *Good faith and abuse of right in the law of the sea*

Article 300 LOSC stipulates: “States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right”. The inclusion of this provision provides circumstantial evidence of the acceptability of the doctrine in international law.¹²⁵⁶ In the Southern Bluefin Tuna Case, Australia and New Zealand alleged before ITLOS that Japan was “in breach of its obligations under international law, specifically Articles 64 and 116-119 LOSC, and in relation thereto Article 300 and the precautionary principle

¹²⁵² For an extensive overview of the case law see: BYERS, Michael, “Abuse of Rights: An Old Principle, A New Age”, 47 *McGill Law Journal* 389 (2002), 389-431.

¹²⁵³ BIRNIE, Patricia & BOYLE, Alan E., *International Law and the Environment* (Oxford: Clarendon Press, 1992), 126.

¹²⁵⁴ CHENG, Bin, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), 21.

¹²⁵⁵ BYERS, Michael, “Abuse of Rights: An Old Principle, A New Age”, 47 *McGill Law Journal* 389 (2002), 411.

¹²⁵⁶ ILUYOMADE, Babatunde O., “The Scope and Content of a Complaint of Abuse of Right in International Law”, 16 *Harvard International Law Journal* 47 (1975), 71.

which, under international law, must direct any party in the application of those articles.”¹²⁵⁷ Although they cited the provision as a useful guide in interpreting Japan’s duties, they did not invoke the principle as the basis of an independent cause of action.¹²⁵⁸ When ITLOS issued its decision, the order did not refer to Article 300 LOSC or relied on allegations of abuse of right.¹²⁵⁹

When the controversy moved to the Arbitral Tribunal, Australia and New Zealand again cited Article 300 LOSC.¹²⁶⁰ These allegations – based on a treaty that specifically refers to the abuse of right – would seem to provide an ideal situation for the parties to invoke that principle as a separate legal basis for their claims.¹²⁶¹ However, in reality both Australia and New Zealand specifically stated that they were not accusing Japan of an independent breach of an obligation to act in good faith.¹²⁶² This reluctance of States to allege an independent breach of the article reflects an awareness of the diplomatic cost a State may pay in making such allegations against another State. It will be difficult to prove that a State is guilty of a substantive breach of the abuse of right principle.¹²⁶³ The Arbitral Tribunal put forward that the burden of proof on a State making such allegations is very high. It does not exclude, however, that a court or a tribunal might find that the obligations of Article 300 LOSC provide a basis for jurisdiction.¹²⁶⁴ We can conclude that, although it is very rare for a provision of this kind to be included in an international treaty¹²⁶⁵ and despite the explicit language of the provision, the experience to date suggests that Article 300 LOSC is unlikely

¹²⁵⁷ ITLOS, Southern Bluefin Tuna Cases, *Australia and New Zealand v. Japan*, 30 July 1999, Australia’s Request for Provisional Measures, *ITLOS Reports* (1999), 25.

¹²⁵⁸ HOFF, Paul S. & GOULDING, Michael I., “Japan’s Whale Research Program and International Law”, 32 *California Western International Law Journal* 151 (2002), 197.

¹²⁵⁹ ITLOS, Southern Bluefin Tuna Cases, *Australia and New Zealand v. Japan*, 27 August 1999, *ITLOS Reports* (1999).

¹²⁶⁰ Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, Southern Bluefin Tuna Cases, *Australia and New Zealand v. Japan*, 15 July 1999, Australia’s Statement of Claim and Grounds on Which It Is Based in the Dispute Concerning Bluefin Tuna, paras. 37 and 45.

¹²⁶¹ HOFF, Paul S. & GOULDING, Michael I., “Japan’s Whale Research Program and International Law”, 32 *California Western International Law Journal* 151 (2002), 198.

¹²⁶² Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, Southern Bluefin Tuna Cases, *Australia and New Zealand v. Japan*, 31 March 2000, Reply on Jurisdiction of Australia and New Zealand, para. 182.

¹²⁶³ HOFF, Paul S. & GOULDING, Michael I., “Japan’s Whale Research Program and International Law”, 32 *California Western International Law Journal* 151 (2002), 198.

¹²⁶⁴ Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, Southern Bluefin Tuna Cases, *Australia and New Zealand v. Japan*, 4 August 2000, Award on Jurisdiction and Admissibility, para. 64.

¹²⁶⁵ NORDQUIST, Myron H. (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff, 1985-2003), Vol. V, para. 300.6.

to have much practical meaning or effect. In fact, no international tribunal has yet expressly founded liability on such an abuse of right doctrine. However, this cannot be completely excluded in the future.

2.1.5. Abuse of right and interdictions in disguise

As already stated, interception on the high seas is subject to a number of conditions which – if not met – can lead to illegal actions. Therefore, States tend to categorize interdictions on the high seas as rescues. Could these actions constitute an abuse of right under international law, and more specifically Article 300 LOSC? In its commentary on the LOSC, NORDQUIST stipulates that it would appear that the parameters of the notion of abuse of rights as enunciated in Article 300 LOSC are limited to relations between States Parties as defined in Article 1(2) LOSC. He therefore refers to the definition put forward by KISS.¹²⁶⁶ Thus, to amount to an abuse of right, these rescues on the high seas have to be carried out in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State.¹²⁶⁷ The purpose of these rescues is definitely not consistent with the purpose of the duty to render assistance.

Therefore, we can conclude that this constitutes an end different from that for which the duty was created. The most difficult element is however that this must lead to the injury of another State. As *in casu* we deal with migrant vessels with potential asylum-seekers on board, it is highly unlikely that any State considers the interdictions in disguise as injurious. Nevertheless, we can conclude that the duty to render assistance was not created for the end it is being used sometimes.

¹²⁶⁶ NORDQUIST, Myron H. (Ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Nijhoff 1985-2003), Vol. V, para. 300.5.

¹²⁶⁷ KISS, Alexandre, “Abuse of Rights”, in BERNHARDT, Rudolf (Ed.), *Encyclopaedia of Public International Law* (Amsterdam: North-Holland, 1992-2003), Vol. I. See also: GOODWIN-GILL, Guy S., “State Responsibility and the ‘Good Faith’ Obligation in International Law”, in FITZMAURICE, Malgosia & SAROOSHI, Dan (Eds.), *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart Publishing, 2004), 75-104.

2.2. When the search and rescue framework is being used to smuggle

Due to increased interception measures at sea, smugglers are often sending migrants to navigate the sea on their own, rather than risk being caught with the passengers. Also, because of the likelihood that the vessels will not return, smugglers are utilizing less expensive materials to build the boats. With no need to transport fuel for a return trip, migrants are making use of this extra space by loading their boats with more people, resulting in more drownings.¹²⁶⁸ MSC points out that illegal migrants are often transported on ships that are not properly manned, equipped or licensed for carrying passengers on international voyages and that States should take steps to eliminate these unsafe practices.¹²⁶⁹ For example, every year tens of thousands of Somalis and Ethiopians – often fleeing violence, human rights abuses and poverty in the Horn of Africa – pay smugglers to ferry them across the Gulf of Aden to Yemen. Many never make it, as the boats capsize or smugglers beat some of the passengers to death, force them overboard, or disembark people too far from shores.¹²⁷⁰

Smugglers are generally well informed about States' protection obligations in case of distress situations and thus they act to exploit them. They are able to instruct migrants what to do upon interception to increase their chances of gaining entry into and remaining in countries of destination. For instance, States have been faced with situations of people sabotaging their own vessels to force authorities to carry out rescues.¹²⁷¹ As the concept of distress is not qualified, it also includes 'self-induced' distress as a type of distress in need of rescue.¹²⁷² PUGH argues that a group of determined people who have set out on a risky

¹²⁶⁸ CARLING, Jorgen, "Migration Control and Migrant Fatalities at the Spanish-African Borders", 41 *International Migration Review* 316 (2007), 327. See also: NESSEL, Lori A., "Externalized Borders and the Invisible Refugee", 40 *Columbia Human Rights Law Review* 625 (2009).

¹²⁶⁹ MSC, "Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Illegal Migrants by Sea", *IMO Doc. MSC.1/Circ. 896/Rev. I* (12 June 2001), para. 4.

¹²⁷⁰ Early 2012, a migrant vessel – crewed by three smugglers and carrying 58 passengers – set sail for Yemen. However, the boat's engine broke down and smugglers forced 22 passengers overboard. After five days, the boat capsized in rough seas and bad weather. At least 11 people drowned following this boat incident. See: UNHCR, "Somalis Perish in New Boat Disaster in Gulf of Aden", Briefing Note (10 February 2012), available online: <<http://www.unhcr.org/4f35146d9.html>>.

¹²⁷¹ UNODC, "Smuggling of Migrants by Sea", Issue Paper (2011), 7, available online: <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf>.

¹²⁷² MALLIA, Patricia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (The Hague: Martinus Nijhoff Publishers, 2009), 98.

voyage in a substandard vessel may not be easily recognized as being in a condition of distress. Therefore, this argument cannot be supported.

Moreover, so-called 'rescuers' are in fact smugglers. On 9 September 2012, Italian authorities questioned survivor reports that the boat on which they were sailing from Tunisia actually sank or capsized near Lampedusa on 7 September. Italian authorities raised the possibility that the survivors were intentionally landed on the small island of Lampione – approximately 20 km west of Lampedusa – by a smuggler's 'mother ship' and that the smugglers then returned to Tunisia. Some of the 56 survivors who were rescued from Lampione reported that their boat sank and they were forced to swim to the island. However, Italian authorities did not find sufficient debris, bodies, or other evidence that would indicate that their boat sank. Although two bodies were recovered, the locations of the recovered bodies are not consistent with the location where the migrant boat is reported to have sunk.¹²⁷³ These kind of practices can result in criminalization of seafarers, as almost happened in the aforementioned case of the *Cap Anamur*. The fear of criminalization by those who go to the rescue of boats carrying migrants is one of the reasons why commercial vessels fail to go to the rescue of persons in distress at sea.¹²⁷⁴

2.3. Conclusion

Concerning migrants at sea, maritime safety and security are sometimes deliberately being abused. First, the search and rescue framework is being abused to intercept persons. States sometimes rely on the principles associated with search and rescue at sea as a means of interdicting vessels that could not otherwise lawfully be visited on the high seas.¹²⁷⁵ This should be avoided, as it creates confusion on the rights and duties of all the parties involved.

¹²⁷³ Migrants at Sea, "Question Raised Whether Migrant Boat Sank Off Lampedusa Last Week" (9 September 2012), available online: <<http://migrantsatsea.wordpress.com/2012/09/09/question-raised-whether-migrant-boat-sank-off-lampedusa-last-week/>>.

¹²⁷⁴ PACE launched an inquiry in 2011 to investigate why over 1.000 migrants had died or perished in the Mediterranean Sea while trying to reach European soil from North Africa. See PACE, "Lives Lost in the Mediterranean Sea: Who is Responsible?", Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), para. 13.4, available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>.

¹²⁷⁵ KLEIN, Natalie, "International Migration by Sea and Air", in OPESKIN, Brian, PERRUCHOUD, Richard & REDPATH-CROSS, Jillyanne (Eds.), *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012), 270.

Second, the search and rescue framework is being used by smugglers. However, this might lead to criminalization of seafarers. As a result, shipmasters fail to go to the rescue of persons in distress at sea.

3. The future?

Adapting the LOSC in order to meet new challenges such as migration by sea is not an option. As the LOSC embodies a carefully negotiated balance of interests, it contains several provisions specifically designed to preserve its integrity.¹²⁷⁶ Not only are reservations or exceptions only allowed when expressly permitted by the Convention,¹²⁷⁷ *inter se* agreements between State Parties must be compatible and notice must be given to other State Parties.¹²⁷⁸ Moreover, amendment procedures are very strict and it is unlikely that they will ever be used.¹²⁷⁹ The approach that is suggested is two-folded: (1) high-level interagency cooperation to tackle both law of the sea and human rights/humanitarian matters with regard to safety as well as security issues; and (2) strengthened regional cooperation between States in order to share the burden.

Interdisciplinary problems therefore ask for interdisciplinary solutions. The abovementioned problems are indeed interdisciplinary in nature, including *inter alia* law of the sea, human rights and refugee law. Therefore, steps to improve the legal framework cannot be taken by only one agency, for example the IMO or UNHCR. Instead, it is submitted that a group of agencies should work together to tackle the interdisciplinary issues. To specifically combat trafficking in persons, there does already exist a high-level interagency group, namely the Interagency Coordination Group against Trafficking in Persons (ICAT). ICAT was established by General Assembly Resolution and aims to improve coordination and cooperation between UN agencies and other international organizations to facilitate a holistic approach to prevent and combat trafficking in persons, including protection of and support for victims of trafficking.¹²⁸⁰ The participating organizations include the IOM, the ILO, OHCHR, United Nations Children's Fund (UNICEF) and

¹²⁷⁶ BOYLE, Alan, "Further Development of the 1982 Convention on the Law of the Sea", in FREESTONE, David, BARNES, Richard & ONG, David M. (Eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), 43.

¹²⁷⁷ LOSC, Art. 309.

¹²⁷⁸ LOSC, Art. 311.

¹²⁷⁹ LOSC, Artt. 313-314.

¹²⁸⁰ UNGA, "Improving the Coordination of Efforts against Trafficking in Persons", *UN Doc. A/RES/61/180* (8 March 2007).

UNODC.¹²⁸¹ Concerning smuggling of persons however, there does not exist a similar initiative.

Also, as was mentioned in the first chapter of this dissertation, in the aftermath of the *M/V Tampa Case* in 2001, a high-level interagency group on the treatment of persons rescued at sea was set up. This group consists of UNDOALOS, UNHCR, UNODC, OHCHR, IOM and IMO.¹²⁸² IMO's area of competence is search and rescue at sea as well as the delivery of rescued persons to a place of safety, as regulated by the SOLAS and SAR Conventions. The area of competence of UNDOALOS – as far as the LOSC is concerned – is also restricted to sea operations and related aspects, including issues of sovereignty, territorial waters, etc., with issues of international co-ordination and co-operation in ocean affairs and the law of the sea within the ambit of the United Nations General Assembly. On the other hand, the areas of competence of UNHCR, UNODC, OHCHR and IOM are considered to be multi-disciplinary as they respectively relate to issues concerning asylum, transnational organized crime including the smuggling of migrants and trafficking in human beings, human rights and migrants in general, on a global scale.¹²⁸³ The responsibilities, that each should assume for follow-up action in emergency cases, naturally relates to the areas of competence and co-competence. Collaborative and co-operative efforts should strive to complement the work of the different organizations and agencies. The development of a common legal position in complex situations is very important.¹²⁸⁴

However, until now, this interagency cooperation has thus far only been focusing on rescue at sea and disembarkation problems. Although the conclusions of the interagency

¹²⁸¹ UNODC, “International Organizations United against Trafficking in Persons” (13 December 2010), available online: < <http://www.unodc.org/unodc/en/human-trafficking/2010/inter-agency-coordination-group-against-trafficking-in-persons-icat.html>>.

¹²⁸² MSC, “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex: “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, para. 3.

¹²⁸³ MSC, “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex: “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, para. 32.

¹²⁸⁴ MSC, “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex: “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, para. 33.

group meetings were the basis for the 2004 SOLAS and SAR Amendments,¹²⁸⁵ the IMO Guidelines on the Treatment of Persons Rescued at Sea,¹²⁸⁶ the IMO/UNHCR Practical guide on rescue at sea¹²⁸⁷ and the 2009 FAL guidelines on disembarkation,¹²⁸⁸ specific problems relating to security issues were not addressed. For example, IMO/UNHCR Practical guide on rescue at sea does not mention what to do in case of smuggling suspicion. Also, outside the interagency group, several international and regional initiatives for cooperation were introduced, such as the UNHCR Draft Model framework for cooperation following rescue at sea operations (burden and responsibility-sharing among States during and after rescue),¹²⁸⁹ the Regional MoU for the Mediterranean on concerted procedures relating to the disembarkation of persons rescued at sea (purely maritime matters)¹²⁹⁰ and the Regional cooperation framework within the Bali Process.¹²⁹¹ However, until now, these initiatives were not harmonized. Although the UNHCR Draft Model framework for cooperation mentions that it could be implemented into the Regional MoU for the Mediterranean, this is not yet the case. Furthermore, neither instruments mention the interception or the smuggling of migrants.

Therefore, the high-level interagency cooperation should in the future focus on elements not yet taken into account. Some issues raised by domestic law and international legal

¹²⁸⁵ MSC, “Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended”, MSC Resolution 153(78) (20 May 2004); MSC, “Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as Amended”, MSC Resolution 155(78) (20 May 2004). The amendments entered into force on 1 January 2006.

¹²⁸⁶ MSC, “Guidelines on the Treatment of Persons Rescued at Sea”, MSC Resolution 167(78) Annex 34 (20 May 2004).

¹²⁸⁷ IMO/UNHCR, “Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees” (2006), available online:

<http://www.imo.org/includes/blastDataOnly.asp/data_id=15282/UNHCRIMOleafletpersonsrescuedatsea.pdf>.

¹²⁸⁸ FAL, “Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea”, *IMO Doc. FAL 3/Circ.194* (22 January 2009).

¹²⁸⁹ UNHCR, “Refugees and Asylum-Seekers in Distress at Sea – How Best to Respond?”, Background paper (8-10 November 2011), available online:

<<http://www.unhcr.org/4ec1436c9.html>>. The Model Framework is based on and further develops the UNHCR’s 10 Point Plan of Action on Refugee Protection and International Migration. See: UNHCR, “Refugees and Asylum-Seekers in Distress at Sea – How Best to Respond?”, Summary Conclusions (8-10 November 2011), available online: <<http://www.unhcr.org/4ede2ae99.html>>, para. 13.

¹²⁹⁰ HESSE, Hartmut, “Persons rescued at Sea”, Presentation by the Senior Deputy Director, IMO Maritime safety Division at the Expert Meeting on Refugee and Asylum Seekers in Distress at Sea (8-10 November 2011), available online: <<http://www.unhcr.org/4ef3061c9.html>>.

¹²⁹¹ SUWANIKKHA, Surat, “The Regional Cooperation Framework and the Bali Process – An Overview”, Presentation by the Ministry of Foreign Affairs of Thailand, Humanitarian Migration Section at the Expert Meeting on Refugee and Asylum Seekers in Distress at Sea (8-10 November 2011), available online: <<http://www.unhcr.org/4ef3381e0.html>>.

instruments relating to transnational organized crime have not yet been taken into account and the law enforcement perspective to combat smuggling and trafficking had not yet been extensively discussed. For example, where crimes may have been committed, those involved – including seafarers and humanitarian workers – should bear in mind the possibility of investigative measures, their legal obligations not to obstruct investigations, and possible legal obligations imposed by the criminal law of flag or investigating States.¹²⁹² Next to this, the interagency group could play a role in harmonizing the new (regional) initiatives.

The most essential ingredient for an effective and a comprehensive response to the problem of migration by sea – together with the adoption and the implementation of the relevant international instruments – is strengthened cooperation between States.¹²⁹³ States are sometimes reluctant to cooperate on issues concerning migrants. The reason for this is that they fear to create a pull factor. For example, in 2012, Frontex reported that there was a significant increase in the number of Somalis reaching Malta. Frontex stated: *“Taking into account the professional planning of the trips, it is assumed that the modus operandi has changed and that Malta is now targeted on purpose, thereby replacing Italy as the preferred destination country for this nationality. The reason for this change has not yet been confirmed; however, in the past Malta resettled some Somali migrants in the United States and in some EU Member States, which might be acting as a pull factor.”*¹²⁹⁴ Nevertheless, regional arrangements should focus on burden-sharing, as some States are disproportionately affected.

¹²⁹² MSC, “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea”, *IMO Doc. MSC 76/22/8* (31 July 2002), Annex: “Report-Record of Decisions on the United Nations Inter-Agency Meeting on the Treatment of Persons Rescued at Sea”, para. 27.

¹²⁹³ UNODC, “Smuggling of Migrants by Sea”, Issue Paper (2011), 8, available online: <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf>.

¹²⁹⁴ Frontex, “Frontex Risk Assessment Network Quarterly – Issue 2” (April-June 2012), 6, available online: <http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Fran_Q2_2012_.pdf>.

Summary

First, we took a look at the interaction between the law of the sea and human rights. Human rights concerns are intertwined with concerns of the law of the sea. These two fields are not separate planets rotating in different orbits, but rather meet in many situations. Especially in the field of search and rescue at sea, the SAR and SOLAS Conventions and the accompanying soft law provisions, are taking into account the *non-refoulement* principle. On the other hand, the ECtHR considers the law of the sea when appropriate, especially in cases of interception. It is important to note that the factual and legal context can make the mechanical application of national or regional human rights standards inappropriate. As some human rights are simply very difficult to provide for at sea – such as access to an independent lawyer – courts should be realistic in case of such exceptional circumstances.¹²⁹⁵ Although a contextual interpretation of the relevant human rights is certainly pragmatic, we have to bear in mind that some of the problems encountered are reasonably foreseeable. Therefore, Governments are able to consider in advance the measures that could be taken to ensure compliance with ordinary and established human rights principles.¹²⁹⁶ Second, the confusion between maritime safety and security was discussed. The search and rescue framework is sometimes being (ab)used to intercept. Next to this, although the definition of migrant smuggling seems quite clear, it was pointed out that States sometimes confuse – willingly or unwillingly – rescuers with smugglers.

These problems have one common element: different areas of international law cross, creating confusion on how to deal with a certain situation. The high-level interagency group on the treatment of persons at sea is able to address these interdisciplinary issues as each agency can rely on the diverse competences they have. The high-level interagency cooperation has already proved that it is efficient in improving the legal framework concerning search and rescue at sea by tackling some of the main practical problems. Unfortunately, until now interagency cooperation has almost exclusively been focusing on

¹²⁹⁵ ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Appl. No. 3394/03 (2008), Partly dissenting opinion of Judges COSTA, CASADEVALL, BIRSAN, GARLICKI, HAJIYEV, ŠIKUTA and NICOLAOPARAS, para. 10.

¹²⁹⁶ ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Appl. No. 3394/03 (2008), Partly dissenting opinion of Judges TULKENS, BONELLO, ZUPANČIČ, FURA, SPIELMANN, TSOTSORIA, POWER and POALELUNGI, paras. 6-7.

safety issues, such as rescue. By creating a new dialogue on the security concerns, the problem of migrant smuggling could be handled more efficiently. Next to this, the most essential ingredient for an effective and a comprehensive response to the problem of migration by sea – together with the adoption and the implementation of the relevant international instruments – is strengthened cooperation between States.¹²⁹⁷

¹²⁹⁷ UNODC, “Smuggling of Migrants by Sea”, Issue Paper (2011), 8, available online: <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf>.

CONCLUSIONS

1. Concluding remarks

The central research question of this study is whether the law of the sea provides enough tools to deal with migrants at sea both as a safety and as a security problem and if not, how we can improve the law in order to meet the current needs.

First, concerning migrants at sea as a safety problem, we can state that practice does not meet legal obligations. The reason for this is the lack of a disembarkation duty. Although it is a legal obligation for shipmasters and States to render assistance to persons in danger of being lost and to proceed with all possible speed to the rescue of persons in distress, there is no comparable duty for States to disembark these persons. Therefore, shipmasters are reluctant to rescue migrants at sea because they know that States will often refuse disembarkation. Although recent international and European soft law initiatives do focus on such a duty, they also put too much burden on the coastal States. The 2009 IMO Guidelines on Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea mention that if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SRR should accept the disembarkation.¹²⁹⁸ Similarly, Council Decision 2010/252¹²⁹⁹ states in its Guidelines that regarding disembarkation, priority should be given to the third country from where the ship carrying the persons departed or through the territorial waters or SRR of which that ship transited. If this is not possible, priority should be given to disembarkation in the Member State hosting the surveillance operation at sea.¹³⁰⁰ Due to the increased loss of life in the Mediterranean in 2011, the negotiations on the Draft Regional Agreement on concerted procedures relating to the disembarkation of persons rescued at sea in the Mediterranean Basin were speeded up. Malta has an important role in this agreement due to its enormous SRR. One of the problems that should be tackled is the coordination between the several SRR in the Mediterranean.

¹²⁹⁸ FAL, “Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea”, *IMO Doc. FAL 35/Circ.194* (22 January 2009), para. 2.3.

¹²⁹⁹ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010.

¹³⁰⁰ Council Decision (EU) No. 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, *OJL* 111/20 of 4 May 2010, Annex Part II para. 2.1.

Also, a system of burden-sharing has to be part of the agreement. When the Regional Agreement could meet part of the concerns Malta has, it could even go further than purely maritime matters and thus include provisions on human rights and humanitarian law. The key solution is burden-sharing between States: without any prior agreements, the life of many migrants is being jeopardized. It is estimated that for every 100 people safely landing after a dangerous journey in the Mediterranean, 5 people drown without leaving any trace.¹³⁰¹

Secondly, concerning migrants at sea as a security problem, we can conclude that States have the tendency to expand the policing rights they have (especially on the high seas), but meanwhile try to avoid extraterritorial human rights obligations. As some provisions in the LOSC lend themselves for an extensive interpretation, States have quite liberally made use of this possibility. However, this is not necessarily illegitimate. It must be borne in mind that the legal system relating to the oceans and seas based on the LOSC needs to be further developed in order to cope with new challenges facing the international community. Necessary measures – taken in for example the area of maritime security – as a result of a multilateral negotiating process certainly justify further limitations of the traditional freedoms of the seas, as this is in the interest of humankind as a whole.¹³⁰² The ‘package deal concept’ of the LOSC should not stand in the way of progress. It should only mean that there is a need for caution and a preference of evolution over revolution.¹³⁰³ It is clear that States, in coping with the problem of irregular migration by sea, tend to interdict vessels on the high seas based on the fact that the migrant vessels are stateless. Even if a further jurisdictional nexus is necessary to seize these vessels, international law offers several possibilities to legally carry out seizures. The hypothesis that there is a tension between the freedom of the high seas and the objective of suppressing irregular migration by sea ignores the fact that the principle of the freedom of the high seas reflect and protects important interests, notably

¹³⁰¹ LEG, “Report of the Legal Committee on the work of its ninety-eight session”, *IMO Doc.* LEG 98/14 (18 April 2011), Annex 9.

¹³⁰² TUERK, Helmut, *Reflections on the Contemporary Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2012), 185. See also: TUERK, Helmut, “The Waning Freedom of the Seas”, in CASADO RAIGÓN, Rafael & CATALDI, Giuseppe (Eds.), *L'évolution et l'état actuel du droit international de la mer: Mélanges de droit de la mer offerts à Daniel Vignes* (Brussel: Bruylant, 2009), 935-936.

¹³⁰³ KLEIN, Natalie, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011), 301-302.

including security and law enforcement interests themselves.¹³⁰⁴ Nevertheless, States also have to bear in mind that they do not operate within a legal vacuum when operating on the high seas. The *Hirsi Case* confirms the trend towards an extraterritorial application of the *non-refoulement* principle in case of effective control. Although this is currently not yet customary international law, it is hoped that the jurisprudence of the ECtHR will influence jurisdictions in other world regions.¹³⁰⁵ Next to this, there is still a *lacuna*, namely in case of the diversion of vessels on the high seas. As there is probably no effective control – since the persons are for example not transferred onto a vessel of the diverting State – the *non-refoulement* principle will most likely not be applicable.

Lastly, when confronting safety and security with human rights, we saw that these different fields of law meet in many situations. Especially in the field of search and rescue at sea, the SAR and SOLAS Conventions and the accompanying soft law provisions, are taking into account the *non-refoulement* principle. On the other hand, the ECtHR considers the law of the sea when appropriate, especially in cases of interception. It is important to note that the factual and legal context can make the mechanical application of national or regional human rights standards inappropriate. As some human rights are simply very difficult to provide for at sea – such as access to an independent lawyer – courts should be realistic in case of such exceptional circumstances.¹³⁰⁶ Although a contextual interpretation of the relevant human rights is certainly pragmatic, we have to bear in mind that some of the problems encountered are reasonably foreseeable. Therefore, Governments are able to consider in advance the measures that could be taken to ensure compliance with ordinary and established human rights principles.¹³⁰⁷ Also, the confusion between maritime safety and security was discussed. The search and rescue framework is sometimes being (ab)used to intercept. Next to this, although the definition of migrant smuggling seems quite clear, it was

¹³⁰⁴ OXMAN, Bernard H., “Crimes at Sea and Trafficking of Weapons of Mass Destruction: General Report”, in FRANCKX, Eric & GAUTIER, Philippe (Eds.), *The Exercise of Jurisdiction over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction* (Brussels: Bruylant, 2010), 137-138.

¹³⁰⁵ GIUFFRÉ, Mariagiulia, “Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others v Italy*”, 61 *International and Comparative Law Quarterly* 728 (2012), 749.

¹³⁰⁶ ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Appl. No. 3394/03 (2008), Partly dissenting opinion of Judges COSTA, CASADEVALL, BİRSAN, GARLICKI, HAJIYEV, ŠIKUTA and NICOLAOU PARAS, para. 10.

¹³⁰⁷ ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Appl. No. 3394/03 (2008), Partly dissenting opinion of Judges TULKENS, BONELLO, ZUPANČIČ, FURA, SPIELMANN, TSOTSORIA, POWER and POALELUNGI, paras. 6-7.

pointed out that States sometimes confuse – willingly or unwillingly – rescuers with smugglers. These problems have one common element: different areas of international law cross, creating confusion on how to deal with a certain situation. The high-level interagency group on the treatment of persons at sea is able to address these interdisciplinary issues as each agency can rely on the diverse competences they have. The high-level interagency cooperation has already proved that it is efficient in improving the legal framework concerning search and rescue at sea by tackling some of the main practical problems. Unfortunately, until now interagency cooperation has almost exclusively been focusing on safety issues, such as rescue. By creating a new dialogue on the security concerns, the problem of migrant smuggling could be handled more efficiently. However, the most essential ingredient for an effective and a comprehensive response to the problem of migration by sea – together with the adoption and the implementation of the relevant international instruments – is strengthened cooperation between States.¹³⁰⁸

Nevertheless, even though States can take initiatives to tackle the root causes of migration – there will always be a certain level of migration. Moreover, as soon as a maritime migration route is identified and closed down, smugglers and/or migrants will adjust either the route or their *modus operandi* to stay ahead of detection. Therefore, even though States may cooperate and come to a workable solution, the job is never finished.

2. Suggestions

2.1. *Suggestions with regard to safety concerns*

- Sign, ratify and implement the relevant international legislation to ensure that migrants are rescued in accordance with the search and rescue regime and harmonize domestic legislation.
- Agree on the respective SRRs and avoid overlaps.

¹³⁰⁸ UNODC, “Smuggling of Migrants by Sea”, Issue Paper (2011), 8, available online: <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf>.

- Develop (regional) arrangements for disembarkation of persons rescued at sea and their delivery to a place of safety and link these arrangements to burden-sharing.
- Encourage shipmasters to use the IMO/UNHCR practical guide on rescue at sea and to inform IMO, UNHCR and other relevant actors when disembarkation proves problematic.
- Develop SOPs for seafarers and RCC personnel.
- Relieve shipmasters of responsibility to care for rescued persons as soon as possible.
- Put in place compensation mechanisms for ships that suffer financial losses.
- Impose sanctions against masters who ignore distress calls and do not rescue persons in distress at sea.
- Hold States, which ignore distress calls and do not rescue persons in distress at sea, responsible.
- Examine allegations of failure to rescue persons at sea.
- Consider new technologies to detect persons in distress.
- Consider new technologies to detect vessels that ignore distress calls.
- Consider means by which information on the migrants can be shared without compromising other sensitive information.

2.2. Suggestions with regard to security concerns

- Avoid embarkation of migrants, thereby respecting the right to leave.
- Carry out joint operations at sea and conclude cooperation or shiprider agreements.
- Clarify the role and responsibilities of all parties involved in joint operations at sea and/or cooperation or shiprider agreements.
- Investigate the smuggling of migrants at sea and identify the actual smugglers.
- Not criminalize shipmasters for migrant smuggling when they have rescued persons at sea.
- Not criminalize smuggled migrants and assess their protection needs.
- Reduce the profit incentives of migrant smugglers.

- Implement international standards into domestic legislation to reflect international and regional refugee law and human rights law.
- Equip vessels involved in interception to assess special (protection) needs of migrants at sea.
- In case of diversion to a third country, ensure the safety of the migrants and their effective protection.

2.3. Suggestions with regard to common concerns

- Recognize that the law of the sea and humanitarian/human rights law are not separate fields of law.
- Clarify whether – and in which circumstances – diversions of migrants at sea can be categorized as exercising effective control.
- Do not categorize interception operations as search and rescue operations and/or use rescue as a pretext to undertake interception without grounds.
- Develop strengthened high-level interagency cooperation which also deals with interception at sea and migrant smuggling.
- Stimulate (regional) cooperation between States by drafting burden-sharing agreements.
- Carry out research on push and pull factors of migration by sea.

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V. SELECTION OF WEBSITES

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