

<b>LLM/MA IN: INTERNATIONAL TRADE AND MARITIME LAW</b>
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<b>DISSERTATION TITLE</b> <b>State Responsibility and the Rescue of Migrants and Refugees at Sea</b> ----- ----- -----

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UNIVERSITY OF ESSEX

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DISSERTATION

**State Responsibility and the Rescue of Migrants and Refugees at Sea**

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## Introduction

The duty to rescue people in distress at sea is an important principle of the international law of the sea which is codified in customary law<sup>1</sup> and legal conventions. This duty is both for states and ships and their crew at sea, which is regulated under the United Nations Convention on the Law of the Sea (UNCLOS)<sup>2</sup> and International Convention for the Safety of Life at Sea (SOLAS)<sup>3</sup>. This duty is further developed in the International Convention on Maritime Search and Rescue (SAR Convention)<sup>4</sup>. SAR Convention requires the state parties to 'ensure that assistance be provided to any person in distress at sea.. regardless of the nationality or status of such a person or the circumstances in which that person is found'(Chapter 2.1.10) and to 'provide for their initial medical or other needs, and deliver them to a place of safety' (Chapter 1.3.2). Furthermore, The UNCLOS provides an extra obligation for coastal states to promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and to co-operate on a regional basis<sup>5</sup>.

The duty to render assistance to people in distress at sea can be considered as a manifestation of the principle of protection of human life<sup>6</sup> which is stated 'the right to life' by international human rights frameworks. Under relevant multilateral treaties, such as Article 2(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>7</sup> (European Convention on Human Rights) and Article 6(1) of the International Covenant on Civil and Political Rights<sup>8</sup> and Article 2 of Charter of Fundamental Rights of the European Union<sup>9</sup>, 'no one shall be arbitrarily deprived of his life'. States also have an obligation to take 'all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of smuggling as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment' under the Palermo Protocols<sup>10</sup>.

The international search and rescue (SAR) system and the humanitarian law require granting assistance to any person in distress at sea. Although international laws positively affirm a duty to rescue at sea

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<sup>1</sup> Aldo Chircop, 'The Customary Law of Refuge for Ships in Distress' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 163-229.

<sup>2</sup> UNCLOS, 10 December 1982 (in force on 16 November 1994), UN/Doc. A/ CONF.62/122, art 98

<sup>3</sup> SOLAS, 1 November 1974 (in force on 25 May 1980) 1184 U.N.T.S 2, as amended Chap. V, Reg.33

<sup>4</sup> SAR Convention, 27 April 1979 (in force on 22 June 1985).

<sup>5</sup> Art. 98 (2) of the UNCLOS.

<sup>6</sup> Tullio Scovazzi, *Human Rights and Immigration at Sea* (Oxford University Press 2014) 225.

<sup>7</sup> The ECHR entered into force on 3 September 1953.

<sup>8</sup> (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly . Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976.

<sup>9</sup> EU Charter became legally binding on the EU Member States when the Treaty of Lisbon entered into force in December 2009.

<sup>10</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, U.N. Doc. A/Res/55/25, (Jan. 28, 2004)

without discrimination, thousands of people<sup>11</sup> continue to die owing to the lack of assistance in the sea every year while trying to find a better future.

The movement of people in search of refuge has reached a peak with the outbreak of war and political unrest in Syria and other areas. Unfortunately, migrants and refugees often travel in unseaworthy, overcrowded and unequipped watercrafts like inflatable rubber dinghies and they will likely be exposed to distress situations at sea like bad weather conditions, starvation, dehydration, and illness. They will probably need to render assistance and at the end of the day, a safe place to be landed. Therefore, the State's responsibilities to rendering assistance and disembarking have a special significance in the case of migration and refuge by the sea.

Even though States have vital responsibilities within the scope of rescue system, they can be reluctant to attempt search and rescue operations at sea or they can refuse to allow disembarkation of rescued migrants at the country's ports due to the 'potential burden<sup>12</sup>' that may arise from refugee and asylum law. For instance, Australia was itself heavily criticized for *MV Tampa* incident when it refused to accept 433 asylum seekers rescued by a Norwegian vessel in international waters. In another case, Italy permitted the *MV Pinar* a Turkish cargo vessel to make landfall, but not before one migrant had died on board the rescue vessel. Moreover, maritime interception, deterrence and punishment policies are growing trends. States attempt to externalize border controls rather than waiting until persons arrive in their territory. For example, Australia launched Operation Sovereign Borders in September 2013. Media reports indicate that Australia is interdicting Indonesian vessels of irregular migrants (where exactly is unclear), transferring migrants to lifeboats stocked with food, water, and medical supplies, and towing those vessels back Indonesia's territorial waters<sup>13</sup>. In addition, nowadays, Italy is one of the most obtrusive countries in terms of deterrence and punishment policies. The Italian government has introduced a new security decree that would mean non-governmental organisation (NGO) rescue boats that bring migrants to Italy without permission could face fines of up to €50,000<sup>14</sup>.

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<sup>11</sup><<https://www.iom.int/news/mediterranean-migrant-arrivals-reach-95909-2018-deaths-reach-1969>>and <<https://www.iom.int/news/mediterranean-migrant-arrivals-reach-31649-2019-deaths-reach-682>> accessed 03 August 2019.

<sup>12</sup> Richard Barnes, 'Refugee Law at Sea' (2004) 53 ICLQ 47,49.

<sup>13</sup> George Roberts, 'Another orange lifeboat carrying asylum seekers arrives on Indonesia's Java coast: military source', ABC News (25 February 2014) <<http://www.abc.net.au/news/2014-02-25/another-orange-lifeboat-carrying-asylum-seekers-arrives-in-indo/5281484>>; George Roberts, 'Indonesia says second asylum seeker boat forced back by Australian Navy', ABC News (4 February 2014) <<http://www.abc.net.au/news/2014-01-07/indonesia-says-second-boat-forcedback/5189332>>

<sup>14</sup><<https://www.theguardian.com/world/2019/jun/15/italy-adopts-decree-that-could-fine-migrant-rescue-ngo-aid-up-to-50000>> accessed 28 June 2019.

Although international legal framework determines the basic legal obligations of States under the rescue system, the problem is the absence of a detailed regime. States have their own approaches and interpretations in favour of their interest which causes ongoing uncertainties. The rescue regime maintains its ambiguity in the event of deficit or negligent State's attitudes. The rescue system has not any compelling element to fulfil State's rescue duties. As a consequence, uncertainties hinder the full applicability of the duty to rescue.

This paper will first briefly analyse the international legal framework of rescue regime at sea. It will cover the flag and coastal states' responsibilities concerning the duty to render assistance and search and rescue operations. The duty to rescue is not limited to the obligation to assist, but also to deliver the rescued person to a place of safety. Therefore, this section will also address the complex legal issues arising in overlapping SAR zones, longstanding disembarkation problems and gaps in the international rescue framework with regard to states' liabilities in the event of failure of rescue.

The second section sets out the humanitarian dimension underpinning the international legal regime for search and rescue which binds states. It highlights a shift in the state application of these international norms if people who need to be rescued are migrants and refugees. I will address the issues about criminalizing humanitarian assistance because of rescued people's nationality or migration status and maritime interceptions to enhance border security. These are the main challenges which the rescue regime must deal with. Therefore, I will give particular emphasis on these issues. Additionally, there are legal issues arising from the international obligation not to return any person to a country where there is a real risk that they would face ill-treatment. I will then conclude by submitting some suggestions for improving maritime rescue regime,

## **1. International Legal Framework on Search and Rescue**

### **A. Duties of Search and Rescue at Sea**

Under the International Conventions, States have two basic duties. These are Rescuing and taking on board persons in distress and organizing a search and rescue service<sup>15</sup>. Article 98 of UNCLOS describes both the duties of the master of the ship and the flag state. It is SAR which specifies the coastal state's legal obligations and it is SOLAS which specifies the legal obligations as to the safety of ships with

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<sup>15</sup> Tullio Scovazzi (n 6) 225.

regard to flag state. Their purpose is to make sure that human lives are saved as effectively as possible<sup>16</sup>.

#### **a. Flag State Obligations: The Duty to Render Assistance**

There is a long-standing customary duty in the law of the sea to assist ships in distress<sup>17</sup>. Today, also the duty to render assistance to persons in danger at sea is set forth in several international conventions. The duty has special importance in the case of migration and refuge by sea because of the harsh conditions of migrants and refugees.

The duty to render assistance at sea is provided for in Art 98 of the United Nations Convention on the Law of the Sea (UNCLOS) as follows:

1. 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 (...)

This provision addresses the duty of flag States to oblige masters of vessels flying their flag to rescue people in distress. Flag states must enact domestic legislation to force the master of a ship to provide assistance in case of emergency<sup>18</sup>. This duty to rescue is further regulated in a number of international maritime Conventions, including the 1974 Convention for the Safety of Life at Sea (SOLAS) Convention<sup>19</sup>, 1979 Search and Rescue Convention (SAR Convention), and the 1989 International Convention on Salvage<sup>20</sup>.

While UNCLOS refers only to the obligation of States, the duty to rescue must be considered by both States and masters of ships<sup>21</sup>. In fact, in practice, the obligation is discharged by masters who may have to take action in specific circumstances<sup>22</sup>. Under Article 10(1) of the SALVAGE Convention “[e]very master is bound, so far as he can do so without serious danger to his vessel and persons

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<sup>16</sup> Stefan Kirchner, Katarzyna Geler-Noch, Vanessa Frese, ‘Coastal State Obligations in the Context of Refugees at Sea under the European Convention on Human Rights’ (2015) 20 *Ocean & Coastal L.J.* 57,66.

<sup>17</sup> Aldo Chircop, ‘Law of the Sea and International Environmental Law Considerations for Places of Refuge for Ships in Need of Assistance’ in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff Publishers 2006) 231,235.

<sup>18</sup> Kirchner, Geler-Noch, Frese (n 16) 57, 64.

<sup>19</sup> Chapter V, Regulation 7, 10(a) and 33

<sup>20</sup> Art 10

<sup>21</sup> Irini Papanicolopulu, ‘The duty to rescue at sea, in peacetime and in war: A general overview’ (2016) 98 *Int’l Rev. Red Cross* 491,495.

<sup>22</sup> Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein and Brian Opeskin, ‘Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia’ (2018) 67 *International and Comparative Law* 315,320.

thereon, to render assistance to any person in danger of being lost at sea". In Addition, Regulation 33.1 of the SOLAS Convention states that: "The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so."

Article 98 of UNCLOS has a general approach including warships and private vessels under the scope of the application of the duty. However, contrary to the UNCLOS, 1989 SALVAGE Convention explicitly exclude warships from their scope<sup>23</sup>.

Under the Article 98(1) of the UNCLOS a master is not required to endanger the rescuing vessel, his crew or passengers and under the SOLAS Convention it would not be unreasonable, unnecessary and the ship receiving the distress alert would not be unable<sup>24</sup>. For illustration, the master may not be required to render assistance if the vessel is too far away, the vessel is ill-equipped to render assistance or other vessels are more readily available to render assistance<sup>25</sup>. A master is not required to do more than may 'reasonably be expected'.

Commercial issues should not be considered as an exception to the duty to rescue life at sea. A rescuing vessel may have to interrupt its voyage to go to the rescue life<sup>26</sup>. However, cold facts can be completely different from the ideal one. In reality, there are compelling commercial reasons for refusing to provide assistance<sup>27</sup> such as loss of income, time and energy. Therefore, states must have domestic regulations which compel ships carrying their flag and masters to participate in search and rescue operations at sea<sup>28</sup>. In the UK, it is a criminal offence for masters to fail to render assistance to vessels in distress<sup>29</sup>.

It is obvious that it is a positive duty to rescue at sea, combined sometimes even with sanctions for inaction, in terms of States under the international and national laws. Although international law positively affirms a duty to rescue at sea, lack of assistance has brought about thousands of deaths in

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<sup>23</sup> Art. 4 of 1989 SALVAGE Convention.

<sup>24</sup> SOLAS Convention Regulation 33.1

<sup>25</sup> Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 136.

<sup>26</sup> Papanicolopulu (n 21) 491,497.

<sup>27</sup> Barnes, 'Refugee Law at Sea' (n 12) 47,51.

<sup>28</sup> Kyriaki Noussia, 'The Rescue of Migrants and Refugees at Sea: Legal Rights and Obligations' (2017) 31 *Ocean Yearbook* 155, 159.

<sup>29</sup> Merchant Shipping Act 1995, s 93(1) and (2).

the sea<sup>30</sup>. In 2011, it was a tragic case in which a small boat left Tripoli with 72 people on board and after two weeks at sea drifted back to Libya with only nine survivors. No one went to the aid of this boat. There were also a number of alleged direct contacts between the boat in distress and other vessels, including a helicopter, which dropped biscuits and water, two fishing vessels, and a large military vessel which refused to provide assistance although it came into close contact with the boat<sup>31</sup>.

The failure to render assistance at sea is attributed to the imperfection of law and portrayed as a problem of legal loopholes. The question becomes how to better enforce laws<sup>32</sup>. Legal vacuum requires specific provisions to address a failure and possible penalization measures who fail to exercise their responsibility to act<sup>33</sup>. Furthermore, there are not any international judge that would address the failure of the duty to rescue<sup>34</sup>.

UNCLOS provides a system of settlement of disputes which is related to mostly inter-State disputes<sup>35</sup>. This action could be based on the violation of the flag State's duty to force the master to save life and a violation of the coastal State's duty to have search and rescue operations. However, in practice States are unwilling to risk their relationship with another State and people who need rescue do not have any tool to provide for compliance with their duty<sup>36</sup>.

#### **b. Coastal State Obligations: The Duty to rescue and set up SAR services**

Article 98(2) of the UNCLOS established a general obligation on coastal States to maintain search and rescue services in the following terms:

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

This applies to the high seas. However, Article 58(2) renders article 88 to 115 of the UNCLOS applicable to the exclusive economic zone (EEZ) in so far as they are not incompatible with the other

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<sup>30</sup> At least 30,510 people died during irregular migration between 2014 and 2018. IOM Report <<https://www.iom.int/news/30000-irregular-migration-deaths-disappearances-between-2014-2018-iom-report>> accessed 03 July 2019.

<sup>31</sup> Tineke Strik, 'Lives Lost in the Mediterranean Sea: Who is responsible?' Report Committee on Migration, Refugees and Displaced Persons 29 March 2012.

<sup>32</sup> Tugba Basaran, 'The Saved and the Drowned: Governing Indifference in the Name of security' (2015) 46(3) Security Dialogue 205, 210.

<sup>33</sup> Enkelejda Koka, Denard Veshi, 'Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation' (2019) 21 European Journal of Migration and Law 26,48.

<sup>34</sup> Papanicolopulu (n 21) 491, 502.

<sup>35</sup> UNCLOS, Part XV.

<sup>36</sup> Papanicolopulu (n 21) 491, 503.



rules on the EEZ. On the other hand, the coastal State has the authority to regulate the territorial sea with regard to safe navigation and the regulation of maritime traffic under article 21(1) of the UNCLOS.

The obligations under Article 98(2) of UNCLOS remain weak due to the use of the word "shall"<sup>37</sup>. Even though this article represents a positive duty of SAR service, there is no clear understanding of its minimum threshold or outer limit<sup>38</sup>. It is argued that under Article 98(2) search and rescue cannot be the mere obligation of a service, but states should provide with a certain level of service in terms of due diligence<sup>39</sup>.

In addition, The IMO Conventions call upon states to cooperate to save lives through rescue at sea missions. SOLAS, Chapter V regulation 7 define the obligations of states to ensure arrangements for distress communication and coordination: 'Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation, and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons.' Furthermore, SOLAS also requires that Contracting Governments shall 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 ships' intended voyage<sup>40</sup>.

In particular, the SAR Convention states more specific obligations, addressing cooperation with other States<sup>41</sup>. Under the SAR Convention, the Parties shall set up by agreement search and rescue regions<sup>42</sup>. SAR regions do not necessarily correspond to States maritime zones<sup>43</sup>. Parties having accepted responsibility to provide search and rescue services for a specified area shall use search and rescue units and other available facilities to provide assistance<sup>44</sup>. Additionally, the Parties shall co-ordinate search and rescue operations with neighbouring States whenever necessary<sup>45</sup>. The Secretary-

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<sup>37</sup> Kirchner, Geler-Noch, Frese (n 16) 57,65.

<sup>38</sup> Amy E. Moen, 'For Those in Peril on the Sea: Search and Rescue under the Law of the Sea Convention' (2010) 24 OCEAN YB 377, 386.

<sup>39</sup> *ibid* 377,389.

<sup>40</sup> SOLAS Convention, Reg 33(1-1)

<sup>41</sup> SAR Convention, para 2.1.1

<sup>42</sup> SAR Convention, para 2.1.4. Search and rescue regions are defined under 1.3.4 as 'An area of defined dimensions associated with a rescue coordination centre within which search and rescue services are provided'

<sup>43</sup> Barnes, 'The International Law of the Sea and Migration Control' (n 25) 140.

<sup>44</sup> SAR Convention, para 2.1.9

<sup>45</sup> SAR Convention, para3.1.1

General of the IMO is the depositary of the SAR Convention and receives notification or modification of any SAR agreement<sup>46</sup>. IMO will in due course transmit such information to other parties<sup>47</sup>. As considered from all, it is clear that a coordination system of search and rescue services, including the exchange of information through Rescue Coordination Centres (RCC), is adopted at the international level under SAR Convention.

Australia and Indonesia agreed to terms of SAR region, RCCs interaction, exchange information and cross-border SAR operations in 2004<sup>48</sup>. Such agreements decrease the risks of non-rescue and give an economic advantage for the States that they can split the costs arising from the SAR operations<sup>49</sup>. In addition, the formation of a SAR region improves the efficiency of SAR services and the safety of life at sea<sup>50</sup>. However, determination of SAR regions and responsibilities are not the exact remedy for other problems particularly regarding a place of safety, disembarkation and non-refoulement principle.

On the other hand, there have been some coordination problems in SAR operations because of the disputes as to the proper demarcation of search and rescue zones<sup>51</sup>. For instance, although the SAR Convention states that search and rescue region shall be established by agreement among Parties concerned<sup>52</sup>, Italy<sup>53</sup> and Malta<sup>54</sup> have unilaterally declared their SAR regions. The extension of the Maltese SAR zone is equivalent to 750 times its territory and partly overlaps with the Italian SAR zone<sup>55</sup>. Greece and Turkey have conflicted with their sovereign rights in the Aegean Sea which has impacts on the determination of the SAR regions<sup>56</sup>.

Unilateral demarcations and overlapping SAR zones might result in eluding responsibility by indicating each other. Even if the States are easy-going, it might pose some problems in determining who provides search and rescue services and has the responsibility for the rescue operation<sup>57</sup>. If the

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<sup>46</sup> SAR Convention, para 2.1.4 and 2.1.11

<sup>47</sup> Barnes, 'The International Law of the Sea and Migration Control' (n 25) 140.

<sup>48</sup> SAR.6/Circ.22 (13 April 2004)

<<https://www.transportstyrelsen.se/contentassets/094dbc46aba74df79d450b8a5a593b45/22.pdf>> accessed 02 July 2019.

<sup>49</sup> Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 *The International Journal of Marine and Coastal Law* 523,529.

<sup>50</sup> *ibid* 523,539.

<sup>51</sup> Chiara Cardoletti-Carroll, 'Refugees and Migrants at Sea: A View from the Middle East and North Africa Region' (2016) 110 *AM. SOC'Y INT'L L. PROC.* 165, 178.

<sup>52</sup> SAR Convention, para 2.1.4.

<sup>53</sup> IMO Circular SAR.8/Circ.1/Corr.5 of 23 April 2007, Global SAR Plan Containing Information on The Current Availability of SAR Services.

<sup>54</sup> IMO Circular SAR.8/Circ.1/Corr.3 of 20 October 2005, Global Sar Plan Containing Information on The Current Availability of Sar Services, Annex 2 <[http://www.imo.org/blast/blastDataHelper.asp?data\\_id=16608&filename=1-Corr-3.pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=16608&filename=1-Corr-3.pdf)>

<sup>55</sup> Trevisanut (n 49) 523,524.

<sup>56</sup> Koka, Veshi (n 33) 26,42.

<sup>57</sup> Trevisanut (n 49) 523, 538.

States do not agree on this point, this situation can lead to unnecessary and in some cases fatal delays to rescue operations<sup>58</sup>. In October 2013 Lampedusa Migrant Shipwrecks<sup>59</sup> are prime examples of disputes which are arising from overlapping SAR zones. The Italian island of Lampedusa is both parts of the Maltese and the Italian SAR region. Migrants coming from the North African coast and crossing the Mediterranean to reach Italy, have to pass through the Maltese SAR region<sup>60</sup>. This gives rise to confusion regarding which state is responsible for coordinating rescues of people in distress in the overlapping areas. Additionally, the lack of clarity can lead states to inaction in terms of responsibilities<sup>61</sup>. A survivor from the Lampedusa Shipwreck recounts 'We called the Italian Red Cross and they told us we were in Maltese regional waters. We called the Red Cross in Malta and they told us they would come to us in a while'<sup>62</sup>. As a result of the Maltese and Italian Regional Coordination Centre passing rescue calls, more than 200 people died<sup>63</sup>. Unfortunately, a dispute in this contested area led to delays which cost migrants and refugees their lives.

In Malta SAR zones, very often the migrants want to continue their journey north in order to reach Italy, so they cannot want to be rescued. In these cases, the AFM<sup>64</sup> provide food, water and sometimes fuel for the boat and let them continue their journey to Italy<sup>65</sup>. It is the question whether it would be sufficient to merely provide food, water, basic sanitary assistance, fuel and allow the vessel to continue its journey in terms of the duty to rescue. According to the Fillippo<sup>66</sup>, freedom of navigation is granted only to vessels that have a set of conditions, including that of being registered under a state's flag, showing its flag, satisfying minimum requisites of safety and seaworthiness and being manned by a duly trained commander and crew. Thus, in the case of lack of such conditions, the rescuing unit should act in good faith and take on responsibility rather than on the hope that migrants will sail towards another state's shores. Once the distress call is received, the coastal State should not refrain from providing assistance on the grounds that the refugees on board prefer to be rescued by another State's

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<sup>58</sup> Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 214-216.

<sup>59</sup> <<https://www.bbc.co.uk/news/world-europe-24418779>> accessed 6 July 2019.

<sup>60</sup> Jasmine Coppens 'The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin' (2013) 44 J. MAR. L. & COM. 89,98.

<sup>61</sup> Amnesty International, 'Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean' (2014) 32. <<https://reliefweb.int/sites/reliefweb.int/files/resources/eur050062014en.pdf>> accessed 6 July 2019

<sup>62</sup> <<https://www.bbc.co.uk/news/world-europe-24510143>> accessed 6 July 2019.

<sup>63</sup> Koka, Veshi (n 33) 26,43. See S Osborne, 'Horror Phone Calls Reveal How Italian Guard Let Dozens of Refugees Drown' The Independent (Online, 8 May 2017) <<https://www.independent.co.uk/news/world/europe/italian-navy-lets-refugees-drown-migrants-crisis-asylum-seekers-mediterranean-sea-a7724156.html>> accessed 15 July 2019.

<sup>64</sup> Armed Forces of Malta performs a number of operations including; search and rescue. <<https://afm.gov.mt/en/Pages/Default.aspx>> accessed 08 July 2019.

<sup>65</sup> Silja Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea' (2011) 23(3) International Journal of Refugee Law 538, 554.

<sup>66</sup> Marcello Di Filippo, 'Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea' [2013] SSRN Electronic Journal 53,63.

vessel. Unfortunately, the rescue regime maintains its ambiguity in the event of deficit or passive State's attitudes. It is obvious that the rescue system has not any compelling element to fulfil State's rescue duties.

## **B. Personal and Territorial Scope of the duty of search and rescue**

With regard to the search and rescue duty it applies without geographical limitation<sup>67</sup>. Article 98 of the UNCLOS is included in the part which regulates high seas. It is clear that the duty applies fully on the high seas and also in the exclusive economic zone and the contiguous zone<sup>68</sup>. The key question is whether it applies to the territorial sea. The duty to render assistance at sea has a broader application field without distinction of the legal status of marine waters<sup>69</sup>. From its wording, the reference to 'any person found at sea', instead of to 'any person found on the high seas', in article 98 UNCLOS does not seem to allow for any geographical restrictions<sup>70</sup>. Otherwise, the effectiveness of the obligation would be put at risk<sup>71</sup>.

For illustration, foreign ships exercising their right of innocent passage through the territorial sea are entitled to stop to render assistance to people in distress<sup>72</sup>. Under the SOLAS Convention, a State party is required to regulate the activities of all ships flying its flag regardless of where they sail<sup>73</sup>. In addition, every coastal state undertakes to provide for the rescue of persons in distress at sea 'around its coasts'<sup>74</sup>. Under this regulation, there is no limit as to distance or maritime zone<sup>75</sup>. Under the SAR Convention, the notion of a person in distress at sea has been extended to include persons who have found refuge on remote coastal location<sup>76</sup>. It points out a move away from a mere territorial view of responsibility<sup>77</sup>.

With reference to the personal scope of the duty, it should state that It is universal. Regulation 2.1.10 of the SAR obligation is the core obligation of the States which indicates that search and rescue assistance shall be provided to any person in distress at sea, regardless of the nationality or status of

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<sup>67</sup> Mark Pallis, 'Obligations of States towards asylum seekers at sea: Interactions and Conflicts Between Legal Regimes' (2002)14(2 and 3) International Journal of Refugee Law 329-364.

<sup>68</sup> UNCLOS art 58(2).

<sup>69</sup> Scovazzi (n 6) 226.

<sup>70</sup> Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing as Sea' (2011) 23(2) International Journal of Refugee Law 174, 195.

<sup>71</sup> Pallis (n 67) 329,337.

<sup>72</sup> UNCLOS, art 18(2).

<sup>73</sup> SOLAS Convention, art II.

<sup>74</sup> SOLAS Convention, Chapter V Reg 7.

<sup>75</sup> Ghezelbash, Moreno-Lax, Klein and Opeskin (n 22) 315,321.

<sup>76</sup> SAR Convention, para 2.1.1 (2).

<sup>77</sup> Barnes, 'The International Law of the Sea and Migration Control' (n 25) 140.

such a person or the circumstances in which that person is found. This means that at the rescue stage, any issues associated with irregular maritime migration must not be considered<sup>78</sup>.

Although it is a clear duty in international law to arrange for the rescue of all persons in distress at sea, involving refugees<sup>79</sup>, in some cases, the obligated parts might reach a decision as to who should be saved or permitted to drown. A class of humans perceived as undeserving of rescue due to their legal status, including migrants and refugees<sup>80</sup>. In spite of all negative thought, it should be noted that all persons who are in distress should take advantage of the right to be assisted at sea irrespective of the status of those even if they put heavy burdens on States.

### **C. The Conception of 'distress' and 'rescue'**

While UNCLOS does not define the terms 'search' and 'rescue', a definition is included in the SAR Convention. A 'search' is defined under art 1.3.1 of SAR as 'An operation, normally co-ordinated by a rescue co-ordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress' 'rescue' is defined under art 1.3.2 of SAR Convention as ' an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety'

It is crucial to clarify the notion of distress because the definition of rescue reveals that rescue depends on distress situation which creates inconsistencies in practice. Distress is defined as 'A situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'<sup>81</sup>. It is for the State, the master of the ship to assess a specific case as a distress situation and whether it requires assistance. Nonetheless, states cannot agree on how the distress should be interpreted and applied<sup>82</sup>. For illustration, could unseaworthiness per se entail distress and trigger SAR obligations? While for some states the vessel must be on the point of sinking, for others that the ship is unseaworthy is sufficient<sup>83</sup>.

The definition of distress leaves room for interpretation in favour of non-intervention. Thus, some States might be reluctant to initiate rescue operations<sup>84</sup>. According to Malta, distress is the imminent

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<sup>78</sup> *ibid* 141.

<sup>79</sup> Erik Rosaeg, 'Refugees as rescuees—the Tampa problem' [2002] SCANDINAVIAN INST. MAR. L. Y.B. 43,54.

<sup>80</sup> Tugba Basaran, 'The Saved and the Drowned' (n 32) 205, 207-208.

<sup>81</sup> SAR Convention, para 1.3.13

<sup>82</sup> Koka, Veshi (n 34) 26,48.

<sup>83</sup> Moreno-Lax, 'Seeking Asylum in the Mediterranean' (n 70) 174,195.

<sup>84</sup> Klepp (n 65) 538, 553.

danger of loss of lives, so if the boat is not sinking it's not in distress<sup>85</sup>. In terms of Australia's SAR operations, in the National Search and Rescue Manual<sup>86</sup> is stated that 'The Distress Phase exists when there is reasonable certainty that persons, vessels or aircraft are in imminent danger and require immediate assistance'<sup>87</sup>. Therefore, presumably, unseaworthiness alone will not per se trigger a SAR operation on the part of Australia<sup>88</sup>. In contrast to this opinion on the issue, the IMO emphasises that 'even if a ship's passengers show no sign of distress, the suspicion of trafficking and transport in unsafe conditions only entitles states to take action in accord with humanitarian principles'<sup>89</sup>. When we consider that irregular migrants mostly travel in the unseaworthy and overcrowded boats like rubber dinghies, this should be proof of grave and imminent danger.

Under the EU Law, the 2014 Maritime Surveillance Regulation<sup>90</sup> (MSR) provides some guidance regarding SAR. This regulation states that 'A vessel or the persons on board shall be considered to be in a phase of distress in particular: when information is received which indicates that the operating efficiency of a vessel has been impaired to the extent that a distress situation is likely.'<sup>91</sup>. Pursuant to this regulation the existence of an explicit request for assistance is considered unnecessary<sup>92</sup>. Furthermore, MSR referred that the existence of a request for assistance shall not be the sole factor for determining the existence of a distress situation<sup>93</sup>. Seaworthiness of the vessel, the number and medical condition of persons on board, the availability of water, fuel and food supplies, the absence of qualified crew and equipment, weather and sea conditions are other elements must also be considered for the determination of a distress situation<sup>94</sup>. These regulations demonstrate that EU law complements the definition of 'distress', adding an extra layer of specification<sup>95</sup>.

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<sup>85</sup> *ibid* 538,554.

<sup>86</sup> Australian National Search and Rescue Council, National Search and Rescue Manual <<https://natsar.amsa.gov.au/natsar-manual.asp>> 14 July 2019.

<sup>87</sup> Australian Search and Rescue Manual, January 2019 edition, para 2.6.13

<sup>88</sup> Ghezelbash, Moreno-Lax (n 22) 315,328.

<sup>89</sup> IMO quoted in Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) 17 (1) *Journal of Refugee Studies* 50,59.

<sup>90</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014. It is an EU regulation which sets out new rules on maritime surveillance and rescue operations coordinated by Frontex, the EU's borders agency. Steve Peers, 'New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean?' (2014) <<http://eulawanalysis.blogspot.com/2014/06/new-eu-rules-on-maritime-surveillance.html>> accessed 14 July 2019.

<sup>91</sup> Regulation (EU) No 656/2014 Article 9/2 (e) (iii)

<sup>92</sup> Ghezelbash, Moreno-Lax (n 22) 315,325.

<sup>93</sup> Regulation (EU) No 656/2014 Article 9/2 (f) (i)

<sup>94</sup> Regulation (EU) No 656/2014 Article 9/2 (f) (ii-x)

<sup>95</sup> Ghezelbash, Moreno-Lax (n 22) 315,326.

#### **D. 'Place of Safety', disembarkation and termination of Search and Rescue Operations.**

The provisions related to rescue at sea which are mentioned under the Conventions demonstrates that States' obligations are not limited to the retrieving of persons in distress, but extend also to disembark the rescued person in a place of safety, namely the location where the rescue operations can be considered as completed<sup>96</sup>.

The rescued people must be delivered somewhere after being taken on board. The presence on board of many people may pose problems of overcrowding, lack of food and water, or spreading of infectious diseases that compel the disembarkation of the rescued persons as an urgent need<sup>97</sup>. Particularly in terms of refugees, beyond safe crossing of a border, the duty to rescue will not be fulfilled satisfactorily unless safety in a broader sense, including deliver to a place of safety, is accessible<sup>98</sup>.

A place of safety is 'a location where rescue operations are considered to terminate', and where: (i) the survivors' safety is no longer threatened; (ii) basic human needs (such as food, shelter, and medical needs) can be met; and (iii) transportation arrangements can be made for the survivors' next or final destination<sup>99</sup>.

The challenging question arising from the providing for assistance at sea is how to determine the place of safety. The different states that may be joined the rescue operation, namely the flag state, the state responsible for the search and rescue region, the state in whose exclusive economic zone or territorial sea the search and rescue occur, the states of nationality of the rescued persons, the state from where the rescued ship has sailed and perhaps other states<sup>100</sup>. Hypothetically, the next port of call of the rescuing ship, the nearest land to the place where the rescue has happened, the destination where indicates by the rescued people or another place where they could receive assistance could be options related to disembarkation<sup>101</sup>.

Before the rescue duty was codified in international conventions, in accordance with established international practice, a vessel rescuing persons in distress at sea would proceed to its next port of call to disembark the persons rescued<sup>102</sup>. Nonetheless, there is no an express obligation for the country of

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<sup>96</sup> Trevisanut, 'Search and Rescue Operations in the Mediterranean' (n 49) 523,525.

<sup>97</sup> Scovazzi (n 6) 230.

<sup>98</sup> Jean-François Durieux, 'The Duty to Rescue Refugees' (2016) 28(4) International Journal of Refugee Law 637,644.

<sup>99</sup> IMO Resolution MSC 167(78) 'Guidelines on the Treatment of Persons Rescued at Sea' (2004) para 6.12.

<sup>100</sup> Scovazzi (n 6) 230.

<sup>101</sup> Papanicolopulu (n 21) 491,500.

<sup>102</sup> UNHCR ExCom, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, EC/SCP/18 26 August 1981.

the first port of call to permit the disembarkation of rescued persons in any international instruments<sup>103</sup>. The disagreement between Italy and Malta concerning whether disembarkation should be in a port of the state of the SAR zone or in the nearest safe port can be taken as a sample of a situation of lack of clarity<sup>104</sup>. In August 2013, the MV Salamis, a tanker ship flying the Liberian flag was requested by the Italian Coast Guards to assist 102 migrants in distress located 45 nautical miles off the Libyan coast. Tanker's location is from the Libyan port of Al Khums towards Malta. The tanker was requested by the Italian authorities to disembark the migrants in the port of Al Khums, the vessel's last port of call and the closest port to the site of the rescue. The Tanker however refused and continued heading towards its planned next port of Valletta. The Maltese Government informed the captain that it would not be allowed to disembark the migrants in Malta. The tanker Salamis has received a strict refusal by Maltese authorities. The Italian authorities finally accepted to allow the Salamis to disembark the 102 migrants in the port of Syracuse<sup>105</sup>. Malta expresses that illegal immigrants rescued at sea would be disembarked at the nearest safe port (very often Lampedusa or Sicily)<sup>106</sup>.

In fact, there are two general principles which regulates disembarkation<sup>107</sup>. The first is that there is no general right of entry to ports of third States for the purpose of disembarkation without the consent of the port state<sup>108</sup>. The second is the non-refoulement principle<sup>109</sup> which prohibits persons from being returned to States where their life or freedom would be threatened or where they might be subject to torture or other inhuman or degrading treatment<sup>110</sup>.

States are often unwilling to accept migrants, refugees and asylum-seekers and may prefer to close their ports. As coastal States refuse disembarkation, the problem is transferred to rescuing vessels, putting a strain on financial and personnel resources of the vessel<sup>111</sup>. Furthermore, seeking permission for disembarkation leads to interruption of commercial shipping schedules<sup>112</sup>.

On 26 August 2001, the Australian authorities directed the MV Tampa, a Norwegian flagged ship on its way to Singapore, to rescue people aboard a sinking fishing boat. They were trying to reach

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<sup>103</sup> Barbara Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception' (2006) 30 Fordham Int'l L.J. 75,89.

<sup>104</sup> Scovazzi (n 6) 234.

<sup>105</sup> <<http://watchthemed.net/reports/view/18>> accessed 10 August 2019.

<sup>106</sup> Fillippo (n 66) 53,72.

<sup>107</sup> Papanicolopulu (n 21) 491,500.

<sup>108</sup> Barnes, 'The International Law of the Sea and Migration Control' (n 25) 118.

<sup>109</sup> It will be examined in the next part of dissertation.

<sup>110</sup> Convention relating to the Status of Refugees, Art 33.

<sup>111</sup> Miltner (n 103) 75,89.

<sup>112</sup> UNHCR ExCom, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, EC/SCP/30. 1 September 1983.



Australia to request asylum. Even though the Norwegian ship was licensed to carry no more than fifty people, it rescued 433 persons. The Captain asked the Australian Coast Guard where he should disembark the people which they rescued, but the Coast Guard responded that they did not know. As the assisted people threatened to commit suicide if the ship were to disembark them in Indonesia, the master decided to proceed to the Australian Christmas Island. However, Australia refused access. The Captain was concerned that due to the lack of sufficient food and water and the complications of further travel at sea, there was a significant risk of loss of life. The Captain decided to enter Australian territorial waters in spite of lacking permission from the state<sup>113</sup>. As the captain wanted to enter Australian territorial waters, Australian Special Air Services intercepted and boarded the ship<sup>114</sup>. The migrants were finally transferred to an Australian navy vessel and were taken to the Pacific island of Nauru, which is an independent state<sup>115</sup>. Such circumstances give rise to a significant loss of time and money for ship owners and create uncertainties regarding the consequences of rescue operations<sup>116</sup>.

Australia's refusal to disembark rescued migrants on the Tampa prompted discussions as to whether a definitive duty of disembarkation could be imposed on particular States<sup>117</sup>. The 2004 SOLAS and SAR Amendments and the IMO Guidelines on the Treatment of Persons Rescued at Sea were drafted after the Tampa incident in 2001 to strength the SAR system, minimize the inconveniences for ships carrying out an intervention<sup>118</sup> and to make the responsibilities of coastal states more transparent<sup>119</sup>.

Article 3.1.9 SAR and Article 4.1-1 SOLAS, as amended, is drafted in almost identical terms. Article 3.1.9 states: 'Parties shall 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 ships' intended voyage, provided that releasing the master of the ship from the obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the

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<sup>113</sup> Cecilia Bailliet, 'The Tampa Case and its Impact on Burden Sharing at Sea' (2003) 25 Human Rights Quarterly 741, 742.

<sup>114</sup> Coppens (n 60) 89, 112.

<sup>115</sup> Klepp (n 65) 538,547.

<sup>116</sup> *ibid* 538,548.

<sup>117</sup> Natalie Klein, 'A Case For Harmonizing Laws on Maritime Interceptions of Irregular Migrants' [2014] ICLQ 787,797.

<sup>118</sup> Fillippo (n 66) 53,66.

<sup>119</sup> Klepp (n 65) 538,548.

case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effective as soon as reasonably practicable'. The obligation arising from the SAR Convention does not mean that the State, which is responsible for the search and rescue zone, is obliged to disembark the survivors in its own territory when disembarkation anywhere else is not possible<sup>120</sup>. States' responsibility relates only to ensuring such co-ordination and co-operation occurs. The text is silent what will happen, and which criteria should apply in the event of no agreement<sup>121</sup>. In practice, this can bring about problems when the relevant States cannot agree as to the appropriate place to disembark persons rescued<sup>122</sup>.

SAR Convention addresses the question of the place of safety, but it is criticized that it does not provide clear-cut answers<sup>123</sup> and it does not require a State to accept rescued persons<sup>124</sup>. On the other hand, The IMO adopted a set of Guidelines on the Treatment of Persons Rescued at Sea. Pursuant to this guideline '...The responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered.'<sup>125</sup> 'RCC (rescue co-ordination centre) should immediately accept responsibility for co-ordinating the rescue efforts, since related responsibilities, including arrangements for a place of safety for survivors, fall primarily on the Government responsible for that region...'<sup>126</sup>. Governments and the responsible RCC should make every effort to minimize the time survivors remain aboard the assisting ship<sup>127</sup> and responsible state authorities should make every effort to expedite arrangements to disembark survivors from the ship<sup>128</sup>.

By considering these guideline principles, some commentators<sup>129</sup> have argued that the coastal state which carries out the SAR operations has a 'residual obligation' to allow disembarkation on its own territory if it has not been possible to do so anywhere else. Thus, these States brings the SAR operations effectively to an end<sup>130</sup>. Nonetheless, one problem with the Guidelines is its legal status as a non-binding

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<sup>120</sup> Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (first edn, Hart Publishing, 2013) 299.

<sup>121</sup> Papanicolopulu (n 21) 491,501.

<sup>122</sup> Barnes, 'The International Law of the Sea and Migration Control' (n 25) 142.

<sup>123</sup> Scovazzi (n 6) 230.

<sup>124</sup> Klein (n 117) 787,797.

<sup>125</sup> Resolution MSC.167(78) Guideline 2.5

<sup>126</sup> Resolution MSC.167(78) Guideline 6.7

<sup>127</sup> Resolution MSC.167(78) Guideline 6.8

<sup>128</sup> Resolution MSC.167(78) Guideline 6.9

<sup>129</sup> Seline Trevisanut, 'Is there a right to be rescued at sea? A constructive view' (2014) 4 QIL 3,7.

<sup>130</sup> *ibid* 3,7.

instrument<sup>131</sup>. The IMO's Facilitation Committee<sup>132</sup> (FAL) clarified that If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support<sup>133</sup>. In addition, FAL has indicated the master's preferred arrangements for disembarkation and the immediate basic needs of the rescued persons should take into account to ensure that disembarkation of the persons rescued is carried out swiftly<sup>134</sup>. Goodwin-Gill and McAdam<sup>135</sup> go further and state that under the SOLAS and SAR Convention the master has sole discretion to decide on the treatment and care of rescued persons and where they are to be landed.

On the other hand, in contrast to Goodwin-Gill and McAdam, Richard Barnes<sup>136</sup> does not share the view of the master's preferred place which contradicts the cooperative paradigm being developed. Moreover, coastal States still have the authority to refuse access to ports, regardless of the master's determination of the circumstance as in the case of MV Pinar E incident<sup>137</sup>.

In April of 2009, the Turkish cargo ship PINAR, navigating under a Panama flag, rescued an estimated 140 people, at least 10 of them were reportedly injured; the body of a dead woman was also taken on board the rescue ship, from two sinking boats about forty miles south of Lampedusa, in the Maltese SAR zone and upon request of the Maltese authorities. The cargo ship was however impeded from reaching either a Maltese port or a closer Italian port to disembark the migrants Italian authorities requested the vessel to proceed to Malta because the rescue occurred in Malta's SAR zone. Malta insisted that Italy should receive the vessel as the nearest port State. The migrants were left stranded for four days, with insufficient water and food for the migrants, who were forced to "camp" on the deck of the ship, in the absence of accommodation<sup>138</sup>. Eventually, Italy relented on humanitarian grounds

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<sup>131</sup> Miltner (103) 75,111.

<sup>132</sup> The IMO Facilitation Committee, a body that meets annually. Membership of the FAL Committee includes all IMO Member States. <<http://www.imo.org/en/OurWork/Facilitation/Pages/Home.aspx>> FAL deals with matters related to the facilitation of international maritime traffic, including the arrival, stay and departure of ships, persons and cargo from ports. <<http://www.imo.org/en/MediaCentre/MeetingSummaries/FAL/Pages/Default.aspx>>

<sup>133</sup> Para. 2.3 of the Principles Relating to the Administrative Procedure for Disembarking Persons Rescued at Sea. IMO Doc. FAL.3/Circ.194, 22 January 2009 <<http://www.imo.org/en/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/FAL.3-Circ.194.pdf>>

<sup>134</sup> *ibid*, para.2.3

<sup>135</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, 2007) 284.

<sup>136</sup> Barnes, 'The International Law of the Sea and Migration Control' (n 25) 146.

<sup>137</sup> *ibid*.

<sup>138</sup> Amnesty International Public Statement EUR 30/007/2009 7 May 2009 <<https://www.amnesty.org/download/Documents/48000/eur300072009en.pdf>>

and allowed to disembark after one migrant had died on board the rescue vessel and another had to be airlifted because of a medical emergency<sup>139</sup>.

Malta charges that too many migrants trying to reach Italy arrive on its shore by mistake while Italy accuses Malta of not properly fulfilling its search and rescue duties<sup>140</sup>. Malta has not ratified 2006 amendments both to the SAR and SOLAS Conventions. In addition, Malta does not have sufficient capacities to carry out all the rescue duties in its SAR zone<sup>141</sup>. The strain between Malta and Italy runs deep. In August 2019, a Spanish Humanitarian Ship has stranded for nine days after Italy and Malta denied it entry. Malta was willing to accept some of the rescued migrants. The Maltese government said the other 121 migrants were picked up 'in an area where Malta is neither responsible nor the competent co-ordinating authority'. Rescue ship face fines of a million euros if they enter Italian water without permission<sup>142</sup>.

Disembarkation of rescued persons remains a matter within the discretion of the coastal states<sup>143</sup>. If the States act in good faith and reach an agreement, a common place can be determined. Nevertheless, there is no legal guarantee that such a result will necessarily be achieved<sup>144</sup> because good faith does not provide a source of autonomous legal rights and duties<sup>145</sup>.

The EU has made an effort to tackle the disembarkation issue in the 2014 Maritime Surveillance Regulation (MSR). According to Article 10 of the MSR, in the event of a search and rescue, the host Member State and the participating Member States shall cooperate with the responsible Rescue Coordination Centre to identify a place of safety. The migrants should be disembarked in a place of safety where designated by the responsible RCC. States shall ensure that disembarkation of the rescued persons is carried out rapidly and effectively. If that is not possible to disembark the migrants in a place of safety, then they shall be disembarked in the host Member State. There is no geographic limitation

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<sup>139</sup> Ghezelbash, Moreno-Lax, Klein and Opekin (n 22) 315,316.

<sup>140</sup> Angela Huemer, 'Safety and Rescue at Sea: Contentious Legal Issues and Their Potential Detrimental Effect on Boat People' in Vedran Dzihic and Thomas Schmidinger (eds), *Looming Shadows* (Center for Transatlantic Relations 2011) 57.

<sup>141</sup> The Maltese SAR zone 750 times bigger than its size and partly overlaps with the Italian zone. Malta sees the large SAR zone as a bonus from the colonial past and earns millions of euros each year from air traffic control charges. This is the reason why it insists on its large SAR zone, Huemer (n 140) 57.

<sup>142</sup> <<https://www.independent.co.uk/news/world/europe/italy-refugee-crisis-malta-humanitarian-ship-mediterranean-migrant-matteo-salvini-libya-crossing-a9051261.html>> accessed 13 August 2019.

<sup>143</sup> Rosaeg (n 79) 43,63.

<sup>144</sup> Scovazzi (n 6) 231.

<sup>145</sup> *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55 at [ 60-63].

on the place of safety for disembarkation. This allows irregular migrants to be disembarked in non-EU countries<sup>146</sup>.

Although EU norms are more detailed and prescriptive than the related Conventions, they represent a regional arrangement followed by 28 EU Member States. Thus, MSR provisions only can apply to EU Coastguard coordinated operations that exclude unilateral action or collaborative operations outside the Frontex<sup>147</sup> framework<sup>148</sup>. Moreover, in practice the disembarkation dilemma continues even nowadays. The migrant rescue ship Lifeline, carrying 230 migrants, has docked in Malta after five days stranded at sea. Another migrant rescue ship, Aquarius, was blocked from docking by both Italy and Malta, spending days at sea with 630 migrants on board before being accepted by Spain<sup>149</sup>. These are just one example of many tragic events. The UN Refugee Agency states that 'It is likely that reductions to search and rescue capacity coupled with an uncoordinated and unpredictable response to disembarkation led to an increased death rate'<sup>150</sup>

There is no satisfactory determination of when the rescue operation is complete<sup>151</sup>. The problem is whether the rescue operation is completed once the persons in distress have been transferred to a safe vessel. As in the case of Tampa, the process clearly distinguished between the obligation to assist and the obligation to rescue<sup>152</sup>. During the Tampa incident Australia claimed that its rescue obligations were at an end once the ferry passengers were transferred on board the Tampa. This approach is considered subjective and unsatisfactory<sup>153</sup>. The Guidelines point out that 'An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship... Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made'<sup>154</sup> As pointed out by Barnes<sup>155</sup>, where persons remain in difficulty, for example on a vessel incapable of providing essential human requirements like food, water and shelter, it is wrong to claim that a search and rescue operation has ended. If disembarkation from

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<sup>146</sup> Koka, Veshi (n 33) 26,44.

<sup>147</sup> European Border and Coast Guard Agency is an agency of EU which supports EU Member States and Schengen Associated Countries in the management of EU's external borders and fighting cross-border crime. <<https://frontex.europa.eu/faq/key-facts/>> accessed 14 July 2019.

<sup>148</sup> Ghezelbash, Moreno-Lax, Klein and Opeskin (n 22) 315,327.

<sup>149</sup> <<https://www.bbc.co.uk/news/world-europe-44636556>> accessed 16 July 2019.

<sup>150</sup> Desperate journeys, executive summary <<https://www.unhcr.org/desperatejourneys/>> accessed 16 July 2019.

<sup>151</sup> Barnes, 'Refugee Law at Sea' (n 12) 47,51.

<sup>152</sup> Frederick J. Kenny, Jr & Vasilios Tasikas, 'The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea' (2003) 12 Pac. Rim L & Pol'y J. 143,159.

<sup>153</sup> Miltner (n 103) 75,110.

<sup>154</sup> Resolution MSC.167(78) Guideline 6.13

<sup>155</sup> Barnes, 'Refugee Law at Sea' (n 12) 47,54.

one ship can simply mean delivery to another vessel, the potential for survivors to languish on board a vessel remains a risk<sup>156</sup>. Filippo Grandi, UN High Commissioner for Refugees, has stated that “Rescue at sea does not end when someone is pulled out of the water, it means getting them to dry land and a place of safety as soon as possible,”<sup>157</sup>

The disembarkation issue was raised at the Sixth Ministerial Conference of the Bali Process<sup>158</sup> on People smuggling, Trafficking in Persons and related Transnational Crime held in March 2016. In the Bali declaration it was referred that states should be encouraged to work to identify more predictable disembarkation options<sup>159</sup>. The UN Refugee Agency (UNHCR) and IOM believe a new approach is needed to make disembarkation of people rescued at sea more predictable and manageable. This should build on ongoing collaboration between the EU, UN and African Union. People rescued in international waters should be quickly brought ashore in safe locations<sup>160</sup>.

The conclusion that can be drawn that there is an obligation on states to cooperate to rescue people and deliver them to a place of safety as soon as possible. Unfortunately, States are reluctant to engage in SAR operations regarding migrants and refugees due to the responsibilities which arise from international refugee law, human rights and international sea law. Many aspects such as ‘distress’, ‘place of safety’ and the selection of a point of disembarkation are left indeterminate and the interpretation is varying in practice. In particular, cooperation among States is strained when it comes to the last stage of the rescue operation. The master of a ship should not have to worry about vessel’s capacity or out of business for a longer period of time when the vessel rescues persons in distress. However, it is impossible to predetermine exactly where the place of safety is located. SAR and SOLAS Conventions were not able to clarify which state is bound to provide a place of safety. Instead, the application of the concept is guided by the International Maritime Organization’s (‘IMO’) Guidelines on the Treatment of Persons Rescued at Sea. However, guidelines do not have a mandatory character. In

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<sup>156</sup> Miltner (n 103) 75 110.

<sup>157</sup> <<https://www.unhcr.org/uk/news/press/2019/1/5c361c824/unhcr-welcomes-malta-disembarkation-sea-watch-sea-eye-passengers-calls.html?query=place%20of%20safety>> accessed 9 July 2019.

<sup>158</sup> It is an Inter-regional forum on migration which covers Europe, Asia, Americas and Africa regions. Bali Process aims to address practical issues related to smuggling, trafficking and related transnational crime <<https://www.iom.int/bali-process>> accessed 5 July 2019.

<sup>159</sup> Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime (23 March 2016) <<https://www.baliprocess.net>> accessed 15 July 2019.

<sup>160</sup> <<https://www.iom.int/news/iom-unhcr-appeal-region-wide-action-eu-countries-over-mediterranean-tragedies>> accessed 15 July 2019.

addition, EU norms have more detailed provisions they can only apply operations which is conducted by EU Coastguard. This uncertainty hinders the full applicability of the duty to rescue.

In Summary, the rescue regime is challenged by both longstanding problems pertaining to disembarkation duties. In the lack of more detailed international rules, such as new IMO Guidelines or a reform of the maritime conventions, the problem can be resolved through international cooperation. It is completely up to State's willingness how to work out the drawbacks and accept a balance between their interests and the need to assist the masters which have fulfilled their humanitarian obligation.

## **2. Humanitarian Dimensions of the International Legal Regime and Drawbacks which the rescue regime is challenged.**

Pursuant to the provisions of international instruments, States owe human rights duties to individuals under their jurisdiction. However, violations of human rights are mostly the main reason for migration flows, turning individuals into refugees and asylum-seekers. The humanitarian law of the sea and refugee law are interconnected when it comes to migration at sea, especially in terms of a place of safety and disembarkation issues.

### **A. Right to life and Non-Refoulement Obligation**

The right to life is the most significant right which every individual enjoys under human rights. In fact, the duty to rescue people in distress at sea is another side of the right to life. This right is codified in several treaties such as International Covenant on Civil and Political Rights and Article 2 of ECHR.

The text of international instruments involves not only negative obligations such as not killing people intentionally but also positive obligations of States<sup>161</sup>. A related positive obligation is to provide individuals with suitable measures of protection against immediate threats to their lives<sup>162</sup>. This obligation is first articulated by the ECtHR in its *Osman v. United Kingdom*<sup>163</sup> decision. Unfortunately, Mediterranean coastal States have faced criticism for the way in which they have implemented this obligation<sup>164</sup>. In addition, as noted by Human Rights Watch, the system encourages ships to ignore dangerously overcrowded and ill-equipped migrant boats unless there are very clear signals of need for

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<sup>161</sup> Papanicolopulu (n 21) 491,511.

<sup>162</sup> Alastair R. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004) 15.

<sup>163</sup> ECtHR *Osman v. United Kingdom* (App. No. 23452/94), Judgment of 28 October 1998 [Grand Chamber].

<sup>164</sup> Silvia Borelli, Ben Stanford, 'Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights' (2014) 10 REV. INT'L L. & POL. 29, 57.

assistance<sup>165</sup>. States are required to investigate cases in which an individual has lost his or her life, so as to punish the person which is liable and avoid similar instances occurring in the future<sup>166</sup>.

Everyone is entitled to flee if he/she is experiencing or has a risk to experience a harmful situation<sup>167</sup>. The United Nations Geneva Convention Relating to the Status of Refugees (1951 Refugee Convention) is the principal international agreement which provides the basis for the treatment of refugees. The key provision Article 33 of this Convention requires the obligation not to expel or return a refugee in any manner whatsoever to the frontiers of a territory where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion. This is the principle of non-refoulement. Due to this principle, it is not permissible for states to send refugees back to countries in which their life or liberty would be at risk.

The non-refoulement principle in human rights law is provided by Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>168</sup>. At a regional level, protection against *refoulement* is also guaranteed by Article 3 of the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>169</sup>. American Convention on Human Rights<sup>170</sup> and 1981 African Charter on Human and Peoples' Rights<sup>171</sup>.

Although it is the uncontentious character of this principle, its application to persons rescued at sea, particularly in terms of migrants and refugees, are not completely clear. Refugees once onboard, the master of a vessel cannot disembark the persons to any State where they faced danger. However, the ability of a master to act consistent with the principle of non-refoulement depends on a coastal State willing to allow disembarkation<sup>172</sup>. Art 33 of Refugee Convention gives a de facto duty to admit the refugee when admission is the only means of avoiding the alternative, impermissible consequence of exposure to risk<sup>173</sup>. The principle of non-refoulement is a significant limit to states' discretion as to their right not to admit entry into port or to expel refugees from their territory<sup>174</sup>.

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<sup>165</sup>Human Rights Watch, Hidden Emergency: Migrant deaths in the Mediterranean, August 2012 <<https://www.hrw.org/news/2012/08/16/hidden-emergency>> accessed 14 August 2019.

<sup>166</sup> ECtHR, *McCann and Others v. United Kingdom*, Application No. 18984/91, Judgment, 27 September 1995.

<sup>167</sup> The Universal Declaration of Human Rights, article 14.

<sup>168</sup> A/RES/39/46 of 18 December 1984.

<sup>169</sup> 213 UNTS No. 2886

<sup>170</sup> 1144 UNTS No. 17995.

<sup>171</sup> 58 ILM (1982) 21.

<sup>172</sup> Barnes, 'Refugee Law at Sea' (n 12) 47,63.

<sup>173</sup> James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005) 301.

<sup>174</sup> Seline Trevisanut, 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea' (2014) 27 LJIL 661, 663.



On 11 July 2011, the *Almirante Juan de Borbon*, a Spanish frigate participating in NATO Operation Unified Protector, rescued 114 migrants from drowning in the Mediterranean. After the vessel left Libya, the engine broke down and the persons on board drifted for two days without food or water. When the warship was informed about their condition, they provided immediate assistance. However, Spain, Italy, and Malta all refused 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<sup>175</sup>. This was a violation of the non-refoulement principle because some of the asylum-seekers were of Tunisian origin and there was political turmoil in the country<sup>176</sup>.

In order to support the application of the principle of non-refoulement at sea, particular attention given to the decision of the European Court of Human Rights (ECtHR) in the case of *Hirsi Jamaa and others v. Italy*<sup>177</sup> (*Hirsi case*). The humanitarian dimension of search and rescue obligations have been recognized by *Hirsi Judgment*<sup>178</sup>. Hirsi and other applicants were part of a larger group of some 200 migrants who intended to leave Libya for the Italian coast<sup>179</sup>. On May 2009 they intercepted by Italian Coastguards on the high seas within the Maltese Search and Rescue Region when they were 36 nautical miles off the island of Lampedusa<sup>180</sup>. They were then transferred onto Italian warships and returned to Tripoli without informing the refugees of the place of disembarkation<sup>181</sup>. The migrants were handed over to the Libyan authorities. Although they actively resisted the hand-over to Libya, the applicants were forced to disembark<sup>182</sup>.

The Court stated that the principle of non-refoulement entails some positive obligations, such as the identification of the persons and the need 'to find out about the treatment to which the applicants would be exposed after their return'<sup>183</sup>. Italy was not exempted from its responsibility to avoid an indirect violation of the non-refoulement principle because the applicants had failed to request asylum or to describe the risks faced in Libya<sup>184</sup>. The Court focused on the fact that Libya is not a Party to the 1951 Refugee Convention, does not operate asylum procedures, does not recognise any legal status for

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<sup>175</sup> <<https://migrantsatsea.org/tag/almirante-juan-de-borbon/>> accessed 14 August 2019.

<sup>176</sup> Jasmine Coppens (n 60) 89, 95.

<sup>177</sup> *Hirsi Jamaa and others v. Italy* App No. 27765/09 (ECtHR, 23 February 2012)

<sup>178</sup> Ghezelbash, Moreno-Lax, Klein and Opeskin (n 22) 315,323.

<sup>179</sup> *Hirsi Case* para.9

<sup>180</sup> *Hirsi Case* para.10

<sup>181</sup> *Hirsi Case* para.11

<sup>182</sup> *Hirsi Case* para.12

<sup>183</sup> *Hirsi Case* para. 133

<sup>184</sup> Violeta Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) Human Rights Law Review 574,586.

refugees, and has regularly conducted indiscriminate removals of irregular migrants to neighbouring States as a multitude of independent observers had confirmed<sup>185</sup>. As a result, the Court confirmed that government vessels not to return irregular migrants to their country of departure without assessing their individual circumstances<sup>186</sup>.

#### **B. Interceptions and adverse effects of border control issues on rescue operations.**

It is a well-established norm of customary international law that a State has sovereignty over its territory and its internal waters<sup>187</sup>. This point was also considered by the International Court of Justice in the *Nicaragua v United States of America*<sup>188</sup> judgment where it was reaffirmed that ‘the basic legal concept of State sovereignty in customary international law ... extends to the territorial waters and territorial sea of every state. ... It is also by virtue of this sovereignty that the coastal State may regulate access to its ports’<sup>189</sup>.

The rights and obligations of States in different maritime zones are regulated under the UNCLOS. The issue of State sovereignty in internal waters is dealt with in Article 2(1) of the UNCLOS and this Article states that ‘the sovereignty of a coastal State extends, beyond its land territory and internal waters ... to an adjacent belt of sea, described as the territorial sea’. The territorial sea is an area starting from land and extending up to 12 nautical miles which the coastal State has sovereignty<sup>190</sup>. Thus, the coastal State authority to prescribe and enforce domestic migration laws in the territorial sea<sup>191</sup>. One limitation on the coastal State’s sovereignty over the territorial sea is the right of innocent passage<sup>192</sup>. The right of innocent passage allows vessels to navigate territorial sea without entering internal waters or ports and additionally if the passage is continuous and expeditious<sup>193</sup>. Article 19 of UNCLOS lists activities that are considered in violation of the right of innocent passage which includes unloading persons contrary to migration laws. A coastal State is permitted to take necessary steps in its territorial sea to prevent non-innocent passage under Article 25 of UNCLOS including the escorting it or towing it beyond the coastal State’s territorial sea<sup>194</sup>. Similar power may exist in the contiguous zone,

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<sup>185</sup> *Hirsi Case* at para 153-54 and 123-30.

<sup>186</sup> Trevisanut, ‘The Principle of Non-Refoulement’ (n 174) 674.

<sup>187</sup> Robin Churchill and A Vaughan Lowe, *The Law of the Sea* (3<sup>rd</sup> edition, Manchester University Press 1999) 61. [1986] ICJ Reports 14

<sup>188</sup> *ibid.*, at [212–213].

<sup>189</sup> UNCLOS Art 2 and 3.

<sup>191</sup> Klein (n 117) 787, 794 and UNCLOS Art 27 and 28.

<sup>192</sup> UNCLOS Art 17.

<sup>193</sup> UNCLOS Art 18.

<sup>194</sup> Klein (n 117) 787, 795.

which extends up to 24 nautical miles from the coast<sup>195</sup>, to prevent the breach of its customs and migration laws<sup>196</sup>.

On the other hand, no State has sovereignty over the high seas<sup>197</sup>. No State may interfere with foreign-flagged vessels unless the flag State consents or in exceptional circumstances, such as the right of visit. Article 110 of UNCLOS provides a basis for the right of visit in terms of piracy, slave trading, unlawful radio broadcasting, where a vessel is stateless or where questions arise as to the nationality of a particular vessel<sup>198</sup>.

States have sovereignty over their ports and can regulate access of ships within ports unless obliged to do so by treaty or international law. Therefore, there is no general right to access ports<sup>199</sup>. Customary practices permit trading vessels to enter a port for international trade, which otherwise could not function<sup>200</sup>. Nonetheless, immigration does not lead to a similar reason for entry into a foreign port. While the law of the sea involves a human rights dimension, it is not intended to alleviate access to the coastal State's land territory<sup>201</sup>. However, human smugglers are aimed at taking advantage of international human rights law and the search and rescue regime. In particular, human smugglers are aware that the principle of non-refoulement, which prohibits the return of individuals to a country where they might face ill treatment, limits the sovereign rights of States related to regulating immigration matters<sup>202</sup>.

On the grounds that reaching the territorial sea of the destination State to request assistance, migrants were put onto small boats to get off the shoreline and were then transferred to a larger boat for several hours to get out into international waters. At this point, they would be transferred back to large rubber dinghies and one migrant would be given a satellite phone and a number to call. The boats were then pointed in one direction and the smugglers would then return to shore on different vessels. At this stage, from the smugglers' perspective, their job is done. For them, both the migrants and the rubber boats they are loaded onto are disposable and their fates inconsequential<sup>203</sup>.

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<sup>195</sup> UNCLOS Art 33

<sup>196</sup> Klein (n 117) 787, 795.

<sup>197</sup> UNCLOS Art 89.

<sup>198</sup> UNCLOS Art 110.

<sup>199</sup> Anthony P. Morrison, *Places of Refuge for Ships in Distress* (Martinus Nijhoff Publishers, 2012) 73.

<sup>200</sup> *ibid* 73.

<sup>201</sup> Kirchner, Geler-Noch, Frese (n 16) 57,66.

<sup>202</sup> Koka, Veshi (n 33) 26,34.

<sup>203</sup> Tuesday Reitano and Peter Tinti, 'Survive and advance: The economics of smuggling refugees and migrants into Europe' (2015) ISS Paper 289, 12.

In response, coastal States use extraterritorial measures beyond the territorial sea to return the migrants' boats to the country of departure<sup>204</sup>. Mainly developed States have taken steps to prevent the arrival of illicit migrants rather than waiting until they reach their territory<sup>205</sup>. A primary role is attributed to interception amongst the "non-arrival" policies<sup>206</sup>. Interception is generally understood to constitute all extraterritorial activities applied by a State to prevent entry to its territory by undocumented migrants<sup>207</sup>.

According to Natalie Klein interception measures have multipurpose endeavour. On the one hand, stopping vessels of irregular migrants and forcing those to different places might prevent human trafficking activities or people smuggling enterprise. On the other hand, persons can rescue from unseaworthy vessels, otherwise, they will probably perish at sea. It may also allow States to control who arrives within their territory<sup>208</sup>. However, as pointed out by Goodwin-Gill, when they were intercepted and compelled to different places, nobody knows that who they were, where they came from, why they were on the move and last but not least what happened next?<sup>209</sup>.

In the maritime context, interception has attained even more vigour in the light of the adoption of the Protocol against the Smuggling of Migrants (2000)<sup>210</sup>. The stated purpose of the Migrant Smuggling Protocol is to prevent and combat migrant smuggling, to promote international cooperation to that end and to protect the rights of smuggled migrants<sup>211</sup>. The Protocol gives great emphasis to the strengthening of border controls<sup>212</sup>. State Parties are required to strengthen border controls to the extent possible and necessary to prevent and detect migrant smuggling<sup>213</sup>.

Under UNCLOS if the vessels flagged to another State, an interdicting State may not conduct a right of visit to intercept irregular migrants<sup>214</sup>. However, under Article 8 of the 2000 Migrant Smuggling Protocol, a warship or a ship clearly marked and identifiable as being on government service and

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<sup>204</sup> Koka, Veshi (n 33) 26,37.

<sup>205</sup> Klein (n 117) 787, 788.

<sup>206</sup> Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 Syracuse J. Int'l L. & Com. 145,147.

<sup>207</sup> UNHCR Executive Committee of the High Commissioner's Program ("ExCom"), Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach 10, EC/50/SC/ CRP.17 (9 June 2000) <<https://www.unhcr.org/4aa660c69.pdf>>

<sup>208</sup> Klein (n 117) 787, 788

<sup>209</sup> Guy S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23(3) International Journal of Refugee Law 443,450.

<sup>210</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, U.N. Doc. A/Res/55/25, (Jan. 28, 2004) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-12-b&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-b&chapter=18&lang=en)>

<sup>211</sup> Migrant Smuggling Protocol Art 2.

<sup>212</sup> Anne T. Gallagher, *The International Law of Human Trafficking* (first published, Cambridge University Press 2010) 91.

<sup>213</sup> Migrant Smuggling Protocol Art 11(1)

<sup>214</sup> Klein (n 117) 787, 796.

authorized to that effect<sup>215</sup>, with reasonable grounds to suspect that a foreign-flagged ship is engaged in illegal migrant smuggling, may request the consent of the flag State and take necessary measures against that ship as set out in the Protocol. However, Article 8(7) of the Protocol does not clearly specify what the visiting state can do after having found that a ship engaged in the smuggling of migrants is without nationality. It is impossible to take authorization from the flag state because there is no flag state. Meanwhile, the reference to the right to 'take appropriate measures in accordance with relevant domestic and international law' is not a concrete solution. As Tullio stated clear specification of the rights that must be granted to illegal migrants<sup>216</sup>.

When we look at the State practice of intercepting vessels of irregular migrants at sea, stricter immigration policies in some countries aimed at keeping out those. Unfortunately, Australia has gained some notoriety. Australian Government commits to protect Australia's borders, combat people smuggling in their region and prevent people from risking their lives at sea. Australia Operation Sovereign Borders is established in 2013 to deliver these commitments. Australian authorities state this harsh policy as 'zero chance of success' in their official website<sup>217</sup>. Operation Sovereign Borders have interdicted Indonesian vessels and the tow back of those vessels to waters adjacent to Indonesia's territorial sea boundary<sup>218</sup>. Intercepting boats to direct them back to the country from where the vessel departed is the push-backs<sup>219</sup> policy of the government of Australia<sup>220</sup>. It is questioned the legality of towing a detained vessel on the high seas when we consider the freedom of navigation<sup>221</sup>.

The European Union created the European Agency for the Management of External Borders (Frontex) in 2004. Frontex helps Member States in implementing community legislation on the surveillance of EU borders, including maritime borders, and to coordinate their operational cooperation and has launched a series of joint maritime operations in the Atlantic and Mediterranean regions<sup>222</sup>.

In particular, Italian and Greek extraterritorial practices of interception and push-backs to Libya and Turkey should be examined in terms of humanitarian dimensions. In May 2009, Italy started a new

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<sup>215</sup> Smuggling Protocol Art 9(4).

<sup>216</sup> Scovazzi (n 6) 212,220.

<sup>217</sup> <<https://osb.homeaffairs.gov.au/#>> accessed 25 July 2019.

<sup>218</sup> <<https://www.abc.net.au/7.30/passengers-describe-drama-of-turning-asylum-seeker/5326978>> accessed 26 July 2019.

<sup>219</sup> Boats intercepted in territorial waters may be forcibly 'escorted' back out onto the high seas to prevent disembarkation in the State territory. Miltner (n 103) 75,84.

<sup>220</sup> <<https://www.theguardian.com/australia-news/2017/oct/30/australias-asylum-boat-turnbacks-are-illegal-and-risk-lives-un-told>> accessed 24 July 2019.

<sup>221</sup> Klein (n 117) 787, 794.

<sup>222</sup> <<https://frontex.europa.eu/>> accessed 26 July 2019.

policy of intercepting migrants at sea and sending them back to the countries from which their ship's departure, in particular Libya and Algeria ('push-back policy')<sup>223</sup>. Most of the intercepted migrants have the nationality of Eritrea, Somalia, or other African countries. The Hirsi Judgment by the ECtHR, as mentioned above, confirms that the Italian push-back policy does not comply with the obligations arising from the ECHR because they returned a group of Eritrean and Somali migrants intercepted on the high seas back to Libya without consideration of individual circumstances.

Greece has the same push back policies. Thousands of refugees and migrants arrive at the Greek-Turkish border hoping to cross the European Union. Amnesty International reports<sup>224</sup> that Greek officials are routinely and illegally "pushing back" refugees and migrants into Turkey which means the breach of international law and human rights standards. Victims describe how some Greek law enforcement officials ill-treated them<sup>225</sup>. More recently, the EU-Turkey deal can be seen as an attempt to facilitate the return of irregular migrants from Greece to Turkey and provide an end to irregular migration from Turkey to Greece through the Aegean Sea. The EU-Turkey "deal" refers to an agreement between the European Union and Turkey whereby Turkey agreed to take back all irregular migrants intercepted in Turkish waters in return for 6 billion euros for projects, visa liberalization for Turkish nationals, and reenergized EU accession talks<sup>226</sup>. Additionally, for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the European Union, and Turkey will take measures to prevent new sea or land routes opening from Turkey to the European Union<sup>227</sup>.

The greatest risk caused by an interception at present is the lack of any uniform procedural standards governing intercepted persons<sup>228</sup>. The problem lies not merely in absence of rules, meanwhile, there is a problem in operationalising the existing rules in making protection a reality at the point of enforcement<sup>229</sup>. For example, what happens when a State vessel identifies an unseaworthy boat under reasonable suspicion of smuggling? The majority of migrant vessels are dangerously overloaded, unseaworthy or unsafe. When we consider the point which I made at chapter two about the ambiguity of the meaning of the term 'distress', there remains confused as to the distinction between rescue and

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<sup>223</sup> <<http://news.bbc.co.uk/1/hi/world/europe/8037803.stm>> accessed 27 July 2019.

<sup>224</sup> <<https://www.amnesty.org/download/Documents/8000/eur250042014en.pdf>>

<sup>225</sup> Greek Authorities Beat, Push Back Migrants into Turkey. <[https://www.youtube.com/watch?v=X2olpuc\\_tqA](https://www.youtube.com/watch?v=X2olpuc_tqA)>

<sup>226</sup> Margarite Helena Zoetewij, Ozan Turhan, 'Above the Law-Beneath Contempt: The End of the EU-Turkey Deal' (2017) 27 *Swiss. Rev. Int'l & Eur. L.* 151, 155-158.

<sup>227</sup> European Council Press Release, EU-Turkey Statement (Mar. 18, 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement.>>

<sup>228</sup> Miltner (n 103) 75,85.

<sup>229</sup> Goodwin-Gill, 'The Right to Seek Asylum' (n 209) 443, 455.

interception in some contexts<sup>230</sup>. 'When vessels respond to persons in distress at sea, they are not engaged in interception'<sup>231</sup>. The common problem is failing to think of human rights before thinking policy.

While States are attempting to prevent irregular migrant flows to their territories, unfortunately, these attitudes might lead to violation of international obligations. Interception operations can directly or indirectly have an impact on the rights of individuals some or many of whom may be in need of international protection<sup>232</sup>. The European Court of Human Rights in the case of *M.S.S. v. Belgium and Greece*<sup>233</sup> expressly acknowledged the competence of Member States to take steps to prevent unlawful immigration whereas The Court stressed the necessity to comply with international obligations<sup>234</sup>. According to Goodwin-Guy<sup>235</sup>, transposing this approach to the case of maritime interceptions, the failure of States to make distinctions where international law requires distinctions to be made as to passengers' nationality, reasons for departure and possible protection needs are resulting in the summary return of individuals in need of protection and breach of international obligations. The right to life is the most valuable right all over the world. The object and purpose of EU operations in maritime areas should be first to ensure protection and secondarily to prevent irregular migration<sup>236</sup>. Although it is recognised that every State has the right to use various measures in border management, they must do so in conformity with international law<sup>237</sup>.

### C. Sanctioning Rescue

Putting into a port is a vital step in preserving the vessel or saving the lives of people aboard. While seeking shelter in a port because of factors beyond their control, mariners can face penalties arising from breaches of domestic law. Thus, when the vessel enters a port under conditions of necessity or force majeure she is not subject to local regulations and cannot be subject to any prohibition, penalty or tax at that port<sup>238</sup>. Under the international rescue regime, to encourage rescue, one of the most significant responsibilities of the States is to diminish sanctioning action and protecting the Samaritan<sup>239</sup>.

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<sup>230</sup> Miltner (n 103) 75,113.

<sup>231</sup> UNHCR ExCom, Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV)- 2003

<sup>232</sup> Goodwin-Gill, 'The Right to Seek Asylum' (n 209) 443, 453.

<sup>233</sup> *M.S.S. v. Belgium and Greece*, Application no. 30696/09 (Grand Chamber, 21 Jan. 2011)

<sup>234</sup> *ibid* at [216-218].

<sup>235</sup> Goodwin-Gill, 'The Right to Seek Asylum' (n 209) 443, 454.

<sup>236</sup> *ibid* 443, 455.

<sup>237</sup> Koka, Veshi (n 33) 26,34.

<sup>238</sup> Barnes, 'The International Law of the Sea and Migration Control' (n 25) 135.

<sup>239</sup> Basaran, 'The Saved and the Drowned' (n 32) 205,209.

Pursuant to Smuggling Protocol, 'smuggling of migrants' is defined as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefits, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'<sup>240</sup>. The reference to 'financial or other material benefit' to ensure that the activities of people who provide support to migrants on humanitarian grounds do not come within the scope of the Protocol<sup>241</sup>.

In contrast to the Smuggling Protocol, the EU opted for the creation of new criminal concept as 'facilitation of entry and transit' under the 2002 EU Directive<sup>242</sup>. The new notion of 'facilitation of entry and transit' does not require proof of financial benefit or other material benefit to be considered a crime<sup>243</sup>. This Directive has been criticised for rendering humanitarian protection optional by lifting the distinction between for-profit and non-profit acts<sup>244</sup>. Furthermore, The Facilitation Directive suggests that each Member State can choose whether to criminalise civil society acting for humanitarian purposes for the facilitation of entry without profit motives, which is legally, politically and morally wrong<sup>245</sup>. The relevant article provides the clause, stating that the Member States 'may decide not to impose sanctions... where the aim of the behaviour is to provide humanitarian assistance to the person concerned'<sup>246</sup>. Therefore, the EU legislation is accused of opening up possibilities for humanitarian actors with criminal sanctions<sup>247</sup>.

We can see prime examples of criminal sanctions when we look at the *Cap Anamour* and *Morthada* and *El-Hedi* cases. In June 2004, while cruising the international waters of the Strait of Sicily, the German humanitarian ship *Cap Anamur* came across an inflatable dinghy with 37 people aboard. The dinghy had partially deflated and was taking in water, while the engine was over-heating and letting off fumes. All passengers were taken on board the *Cap Anamur*<sup>248</sup>. The shipmaster asked for permission to land at Porto Empedocle, in Sicily. As soon as the permission was granted, the humanitarian ship headed northwards. Immediately before the *Cap Anamur* entered Italian territorial waters, however, the

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<sup>240</sup> Migrant Smuggling Protocol Art 3(a).

<sup>241</sup> Gallagher (n 212) 91.

<sup>242</sup> Council Directive 2002/90 of 28 November 2002 defining the Facilitation of Unauthorised Entry, Transit and Residence (OJ L 328/17) in combination with the Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence 2002/946 (OJ L 328/1)

<sup>243</sup> Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update, (hereinafter Fit for purpose?) 10  
<[http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL\\_STU\(2018\)608838\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf)>

<sup>244</sup> Tugba Basaran, 'Saving Lives at Sea: Security, Law and Adverse Effects' (2014) 16 Eur. J. Migration & L. 365, 382.

<sup>245</sup> Fit for purpose? 11.

<sup>246</sup> EU Facilitation Directive 2002/90, Article 1 para.2

<sup>247</sup> Tugba Basaran, 'Saving Lives at sea' (n 244) 365,383.

<sup>248</sup> Paolo Cuttitta, 'From the *Cap Anamur* to *Mare Nostrum*: Humanitarianism and Migration Controls at the EU's Maritime Borders' (2014) 7 Clear Working Papers 21,22.



Italian authorities suddenly revoked the permission. The Italian government declared that it was not its responsibility to receive the migrants and examine their asylum applications and sent navy ships and helicopters in order to prevent the German vessel from crossing the sea border. Germany, as the flag State of the *Cap Anamur*, declared it was not responsible either. Both Italy and Germany attempted to pass the buck to Malta that the ship had transited Maltese territorial waters after rescuing the migrants. The authorities of Malta denied any involvement, making clear that they had never been aware of the *Cap Anamur* transiting their territorial waters. Furthermore, Malta argued that the *Cap Anamur* should have brought the migrants to Libya, the country closest to the place of rescue. In sum, nobody wanted the rescued migrants to land on their territory<sup>249</sup>. The master of the *Cap Anamur*, fearing that he might no longer be able to guarantee the safety of the people on board, entered the harbour even without the authorities' consent. However, immediately upon landing at Porto Empedocle, the ship was confiscated while the shipmaster, the first officer and the head of the humanitarian organisation *Cap Anamur* were all detained accusing of aiding and abetting illegal immigration<sup>250</sup>. In 2009, after a five-year trial, the court acquitted the three accused from all charges, recognizing that they had acted for humanitarian reasons and not for profit<sup>251</sup>. *The Cap Anamur* case showed that states need better coordination among them both at the international and European Union level because rescued migrants cannot be considered as hostages so they must not wait for the solution<sup>252</sup>.

The second trial, *Morthada and El-Hedi* happened in the same period with *Cap Anamur* against two Tunisian fishing boats. Two fishing boats took on board 44 shipwrecked people near Lampedusa. All crew were detained owing to human smuggling in 2007. All fishermen were acquitted in the tribunal in 2009 and the captain was acquitted by the Court of Appeal of Palermo in 2011<sup>253</sup>.

Although both cases eventually ended in acquittal, the defendants were punished by the trials lasting for many years. The suspects were detained, their boats were confiscated and became unusable, they lost their economic livelihoods and maybe their families were ruined. Besides the financial cost of the trial, the psychological cost of the trial must be considered<sup>254</sup>. It is obvious that the legal system is making an instrument to deter irregular migration functions.

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<sup>249</sup> *ibid* 21,23.

<sup>250</sup> *ibid*.

<sup>251</sup> *ibid* 21,24.

<sup>252</sup> Scovazzi (n 6) 212,237.

<sup>253</sup> Basaran, 'The Saved and the Drowned' (n 32) 205,211.

<sup>254</sup> *ibid* 205,212.

UNHCR officials highlighted a number of concerns about measures being taken by coastal States that negatively affect the willingness of vessels to fulfil their obligation of rescue at sea. Such measures include criminal sanctions for aiding and abetting irregular migrants. It is clear that commercial vessels, including small fishing vessels, seem to be increasingly reluctant to rescue mixed flows of migrants in distress at sea<sup>255</sup>.

While some States were unwilling to conduct effective SAR activities and unable to manage their responsibility, civil society actors filled 'the protection gap' at sea<sup>256</sup>. Apparently, countries gradually moved away from humanitarian concerns by focusing on border control operations and restricting nongovernmental organizations<sup>257</sup>.

Even, nowadays the same policies towards rescued migrants are maintained by the governments. Carola Rackete, a 31-year-old German national, had rescued 53 migrants off the coast of Libya on 12 June in 2019 who were drifting on an inflatable raft in the Mediterranean Sea<sup>258</sup>. She disobeyed Italian military orders and entered the port of Lampedusa to bring some African migrants to land in the Dutch-flagged Sea-Watch boat. She was immediately detained and placed under house arrest, but the judge ruled that Rackete had been carrying out her duty and had not committed any act of violence. Rackete still faces possible charges of helping illegal immigration<sup>259</sup>.

In fact, just before this event breaks out, The Italian government has introduced a new security decree that would mean non-governmental organisation (NGO) rescue boats that bring migrants to Italy without permission could face fines of up to €50,000<sup>260</sup>. UNHCR is calling on the Italian Government to reconsider the decree and for Parliament to amend it with a focus on saving lives at its core<sup>261</sup>.

Given these examples, rescue at sea became a costly operation in terms of both financial and physiological. While small fishing boat and commercial vessels attempt to refrain from rescue

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<sup>255</sup> Tineke Strik (n 31) 18.

<sup>256</sup> Paolo Cuttitta, 'Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End of the Humanitarian Turn (Part I)' <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/pushing-migrants>>

<sup>257</sup> Paolo Cuttitta, 'Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End of the Humanitarian Turn (Part II)' <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/pushing-0>>

<sup>258</sup> <<https://www.bbc.co.uk/news/world-europe-48809134>> accessed 31 July 2019.

<sup>259</sup> <<https://www.euronews.com/2019/07/02/sea-watch-captain-carola-rackete-released-by-italian-judge>> accessed 31 July 2019.

<sup>260</sup> <<https://www.theguardian.com/world/2019/jun/15/italy-adopts-decree-that-could-fine-migrant-rescue-ngo-aid-up-to-50000>> accessed 28 June 2019.

<sup>261</sup> <<https://www.unhcr.org/uk/news/press/2019/6/5d0124a74/unhcr-urges-italy-reconsider-proposed-decree-affecting-rescue-sea-central.html>> accessed 28 July 2019.

operations, non-governmental organizations ships are curbed directly or indirectly by the governments by the help of sanctions. Unfortunately, political authorities encourage seafarers to look away and even to let people die at borders in support of a policy of border deterrence<sup>262</sup>. All cases and examples demonstrate clearly that rescue migrants and refugees at sea is a sanctioned enterprise even if all defendants were acquitted at the end of the day. Furthermore, it is evident that anti-smuggling legislation can be used to sanction rescue, even though rescue obligation guarantee under the international regulations<sup>263</sup>.

## **Conclusion**

In recent decades, there is no doubt that the international community is faced with great challenges in respect of the movement of people. Particularly, the movement of refugees and migrants by sea is one of the most remarkable issues because of the thousands have lost their lives to reach a place. If those are in distress at sea, States have vital responsibilities arising from international law governing search and rescue, such as rendering assistance and bringing the refugees to a place of safety.

On the other hand, States have legal responsibilities arising not only from international law governing search and rescue regime but also from international human rights law and moral rules. States owe both negative and positive human right duties to individuals within their territory and under their jurisdiction<sup>264</sup>. Whereas negative obligations require the State to abstain from taking human life, positive obligations require the State to protect the right to life and to take all necessary measures to ensure that the risk of losing life to be taken away<sup>265</sup>. Meanwhile, these refugees cannot be returned to a place where they are persecuted, and they could be tortured. Refugee law, international human rights law, the law of the sea, and the human smuggling and trafficking frameworks are all relevant to the SAR regime.

Under the SAR regime, a certain degree of consensus only on general rules have been managed via international conventions. However, there are still longstanding ambiguities surrounding the duties of States and poor implementation of these duties that lead to the weakening of the rescue regime. In particular, the issues of distress, a place of safety and disembarkation need greater clarity.

Treaty amendments to SOLAS and SAR that entered into force in 2006 designate the Rescue Coordination Centres with primary responsibility for coordinating the rescue. However, the amendments

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<sup>262</sup> Basaran, 'The Saved and the Drowned' (n 32) 205,206.

<sup>263</sup> Basaran, 'Saving Lives at Sea' (n 244) 365,384.

<sup>264</sup> Article 2 of International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966.

<sup>265</sup> Papanicolopulu (n 21) 491,511.

themselves are silent as the meaning of a 'place of safety'. In particular, the guidelines, which have a non-binding character, define a place of safety, thereby failing to definitively resolve the disembarkation issue. The provisions are not drawn clearly as to require the immediate disembarkation of rescued persons at the next port of call or the closest coastal State. The particular circumstances of each incident must be considered.

Moreover, the SAR convention sets forth only that the state co-ordinates SAR services in the area under its responsibility. The state does not need to perform the SAR activity but can act in cooperation with other states and coordinate that private vessels contribute to rescue operations.

As stated by Richard Barnes<sup>266</sup>, this system has two main drawbacks. First of all, the completion of the rescue operation remains bound up with the goodwill of other States<sup>267</sup>. As in the case of Tampa, States have been careful to maintain their discretion to deny access to vessels carrying migrants rescued at sea<sup>268</sup>.

In the absence of a detailed legal regime, coastal States have adopted their own approaches to irregular migrants at sea and this situation leads to contest the essence of their international commitments in terms of refugees, asylum seekers and vulnerable persons in distress at sea<sup>269</sup>. Secondly, the need of a high degree of cooperation and coordination between several States could complicate and delay the completion of rescue operations rather than facilitate the disembarkation of rescued persons<sup>270</sup>.

The duty to render assistance requires that all people in distress at sea to be assisted regardless of their status, nationality or circumstances. Assisting people in distress should not only be desirable but a required responsibility. The status of the individuals on board as refugees and migrants should not make any difference. However, people might be met with a harsh response by states. The humanitarian goal to save lives is often replaced by deterrence and punishment. Australia is one telling example of such an approach. Italy discourages seafarers and non-governmental organizations to participate in rescue operations via sanctioning the rescue. Greece carries out the practice of push-back on the refugees by sending those who they catch on the border back to Turkey. All these practices, which are used as a means to repel arrivals, are contrary to duties deriving from the international legal instruments

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<sup>266</sup> Barnes 'The International Law of the Sea and Migration Control' (n 25) 139.

<sup>267</sup> *ibid.*

<sup>268</sup> Barnes 'Refugee Law at Sea' (n 12) 35.

<sup>269</sup> Moreno Lax, 'Hirsi Case' (n 184) 575.

<sup>270</sup> Barnes, 'The International Law of the Sea and Migration Control' (n 25) 139.

governing search and rescue system and violate the legal obligation to protect human life. In addition, these kinds of attitudes cause vessels may experience an economic cost and delays in their schedule. Thus, they are unacceptable on both ethical and legal grounds.

In the interception context, States have the rights to control and prevent irregular migration arising from their sovereignty. There are legal bases for States to interdict vessels carrying irregular migrants. However, this entitlement must be applied in accordance with international human rights obligations. States of destination have commonly used measures such as patrolling, interception of irregular migrants on the high seas and redirection of intercepted migrants to the coasts of third states<sup>271</sup>. Border control issues do not exempt the States from the obligations deriving from SAR and human rights regulations.

Preventing the loss of life at sea should be a common desire. Otherwise, the duty to rescue at sea may be ignored. There is no sufficient enforcement of existing duties concerning the rescue of people at sea. In fact, sanctions are not a necessary criterion for the law's existence. According to *pacta sunt servanda*, states have assumed these obligations and they must respect them<sup>272</sup>. Nonetheless, the examples of Tampa, Pinar, Cap Anamur, Tripoli, Lampedusa Shipwrecks showed how problems arise when States do not perform their duties concerning rescue at sea.

Papanicolopulu suggests that the best option would be to combine duties under the law of the sea and human rights law, so as to support the application of international protection obligations at sea. Thus, human rights violations during the SAR operations may be brought in front of international tribunals which is not the case for the law of the sea and maritime law instruments<sup>273</sup>.

According to the Goodwill<sup>274</sup> due to the dynamic nature of international law, we need new rules dealing with the detail may be required. It is worth noting that 'statements of principle, fundamental rights and international obligations are essential, but clearly, they are not sufficient to ensure compliance'<sup>275</sup>. As Richard Barnes pointed out that there needs to be greater cooperation by coastal States in rescue operations<sup>276</sup>. Additionally, burden sharing is necessary in the context of the rescue of irregular migrants at sea in order to save those who risk their lives in search of freedom<sup>277</sup>. Some States fear that clarifying

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<sup>271</sup> Trevisanut, 'The Principle of Non-Refoulement' (n 174) 662.

<sup>272</sup> Pallis (n 67) 329,362.

<sup>273</sup> Papanicolopulu (n 21) 513.

<sup>274</sup> Goodwin-Gill, 'The Right to Seek Asylum' (n 209) 447.

<sup>275</sup> *ibid* 455.

<sup>276</sup> Barnes, 'Refugee Law at Sea' (n 12) 54.

<sup>277</sup> Bailliet (n 113) 741, 772.

obligations and solving the problem through burden sharing would produce an enormous pull factor. Thus, this factor encourages migrants to come to Europe by sea<sup>278</sup>.

The conclusion to be drawn is that the present regime should be improved as soon as possible. Overall considered, there is no sufficient protection for the refugees who are in distress at sea because of ongoing uncertainties and gaps in the search and rescue legal regime. In the face of these deficiencies and gaps, practical options should be found, by improving the legal framework.

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<sup>278</sup> European Union Committee of the House of Lords, 'FRONTEX: the EU external borders agency,' 9th Report of Session 2007-08, para. 115, <<https://publications.parliament.uk/pa/ld200708/ldselect/ldcom/60/60.pdf> >

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