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TESIS DOCTORAL

Search and rescue at sea: straddling the duty to render assistance and the interests of the coastal States

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Búsqueda y salvamento en el mar: a caballo entre el deber de socorro y los intereses de los Estados ribereños

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Escuela de doctorado

Plan de estudio: Estado de derecho y gobernanza global

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Search and rescue at sea: straddling the duty to render assistance and the interests of the coastal States

(Búsqueda y salvamento en el mar: a caballo entre el deber de socorro y los intereses de los Estados ribereños)

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Proyecto doctoral que incluyó una estancia de investigación superior a tres meses en la Facultad de Derecho de la Universidad de Oporto, Portugal, como parte de los requisitos para optar a la Mención Internacional

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Año 2023

Salamanca, España

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DEDICATION

To my daughter Patricia in the hope that this work will encourage her not to forget her years at law school.

NOTA BENE

This doctoral thesis is written by a Spaniard and for a university with a long tradition in Spain, such as the University of Salamanca. Given that Spain is one of the European Union (EU) State Members with the greatest migration problems, the following text focuses primarily on the problem of migration in the West Mediterranean Sea from the perspective of an EU country, although many aspects discussed here may be applicable to other Member States or geographical regions around the world.

The information and references are up to date until 15 June 2023.

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SUMMARY

As a result of an ancient maritime custom and its subsequent sanction in several international conventions, the rescue of persons in distress at sea has an established legal procedure. The migratory phenomenon and the smuggling of migrants distort this regulatory framework, which was not designed for such an avalanche. The situation is aggravated especially in the receiving States and by the fact that even within the European Union (EU) there is no homogeneous policy, demonstrating in many cases more an intention of territorial protection –that is, a policy of barriers, with deterritorialisation of the problem through agreements and disembarkation and confinement centres in third countries, extended jurisdictions (creeping jurisdiction), and disembarkation difficulties– than of compliance with the conventions on human rights and the principles of protection of fundamental rights that inspired the construction of Europe..

What is striking about the approach is that irregular migration that has gained access through irregular border crossings is in a minority. In both the EU and Spain, less than 10% of irregular migrants irregularly cross the maritime border. Most of the immigration that later becomes irregular enters through legal entry. These data do not seem to be of interest to the media or known to public opinion. In order to ascertain that public opinion, fieldwork was carried out in three regions of Spain (Galicia, Valencia and the Balearic Islands), territories that represent different profiles of economic development. The results confirm that the population studied is unaware of the relative magnitude of migratory flows, which leads to a negative bias towards immigrants arriving by sea, for fear that they will consume resources that could be used by national citizens. There seems to be a tendency for governments and their media to remain silent on the actual consumption of resources by those who are in an irregular situation but have entered legally. The deployment of border controls and the lack of enforcement of legal regulations and respect for human rights, focusing only on the small percentage of irregular migrants who enter by sea, is totally paradoxical.

Law and good governance of rescues of migrants in distress at sea require compliance with conventions and the protection of fundamental rights. These fundamental rights are an integral part of the founding principles of the EU. Barrier actions cannot be justified and the international agreements must be respected. A general education and outreach campaign is needed to bring politicians and citizens together, but within the legal framework and the fundamental principles of

European integration. The EU is not just a set of economic interests orbiting around the euro. It is a project that, according to the Treaty on European Union, revolves around three fundamental principles: democratic equality, representative democracy and participatory democracy. Attempting to reduce the flow of irregular migrants by sea by delaying the disembarkation of ships that are legally obliged to carry out rescue operations is a reprehensible action, with a minimal effect on the total number of migrant arrivals and one that seriously harms shipowners, violates human rights conventions, and puts the lives of those rescued at risk.

In addition to the human drama, in the midst of this conflict are the merchant ships and their masters. They have a moral and legal obligation to rescue people in distress at sea, but they also have the right to proceed as quickly as possible, without undue delay. A rescue vessel is not a place of safety. The shipmaster uses the means at his/her disposal, but a rescue at sea is always expensive. In addition, rescued persons need accommodation, provisions and, in many cases, medical care. Monitoring them for weapons, drugs, or control of wandering in restricted areas such as engine rooms or the ship's operational centres, may not be an easy task. The rescuing merchant ship inevitably delays its voyage, with commercial repercussions. Even with insurance cover, salvage often has negative financial consequences for the shipowner.

RESUMEN

Fruto de una antigua costumbre marítima y de su posterior sanción en varios convenios internacionales, el salvamento de personas en peligro en el mar tiene un procedimiento legal establecido. El fenómeno migratorio y el tráfico ilícito de migrantes distorsionan ese marco normativo que no fue concebido para semejante avalancha. La situación se agrava especialmente en los Estados receptores y por el hecho de que incluso en el seno de la Unión Europea (UE) no existe una política homogénea, demostrando en muchos casos más una intención de protección territorial ─es decir, una política de barreras, con desterritorialización del problema a través de acuerdos y centros de desembarco y confinamiento en terceros países, jurisdicciones ampliadas (*creeping jurisdiction*), y dificultades de desembarco─ que de cumplimiento de las convenciones sobre derechos humanos y los principios de protección de los derechos fundamentales que inspiraron la construcción de Europa.

Lo sorprendente del planteamiento es que la migración irregular que ha accedido a través de cruces fronterizos irregulares es minoritaria. Tanto en la UE como en España, menos del 10% de los inmigrantes irregulares cruzan irregularmente la frontera marítima. La mayor parte de la inmigración que luego se convierte en irregular entra por la vía legal. Estos datos no parecen interesar a los medios de comunicación ni ser conocidos por la opinión pública. Para conocer esa opinión pública se realizó un trabajo de campo en tres regiones de España (Galicia, Valencia y Baleares), territorios que representan diferentes perfiles de desarrollo económico. Los resultados confirman que la población estudiada desconoce la magnitud relativa de los flujos migratorios, lo que se traduce en un sesgo negativo hacia los inmigrantes que llegan por mar, por temor a que consuman recursos que podrían ser utilizados por los ciudadanos nacionales. Parece existir una tendencia de los gobiernos y sus medios de comunicación a guardar silencio sobre el consumo real de recursos por parte de quienes se encuentran en situación irregular pero han entrado legalmente. El despliegue de controles fronterizos y la falta de aplicación de la normativa legal y de respeto de los derechos humanos, centrándose únicamente en el pequeño porcentaje de inmigrantes irregulares que entran por mar, resulta totalmente paradójico.

La ley y la buena gobernanza de los rescates de migrantes en peligro en el mar exigen el cumplimiento de los convenios y la protección de los derechos

fundamentales. Estos derechos fundamentales son parte integrante de los principios fundacionales de la UE. Las acciones de barrera no pueden justificarse y los acuerdos internacionales deben respetarse. Es necesaria una campaña general de educación y divulgación para acercar a políticos y ciudadanos, pero dentro del marco jurídico y los principios fundamentales de la integración europea. La UE no es sólo un conjunto de intereses económicos que orbitan en torno al euro. Es un proyecto que, según el Tratado de la Unión Europea, gira en torno a tres principios fundamentales: igualdad democrática, democracia representativa y democracia participativa. Intentar reducir el flujo de migrantes irregulares por mar retrasando el desembarco de los buques que están legalmente obligados a realizar operaciones de rescate es una acción reprobable, con un efecto mínimo sobre el número total de llegadas de migrantes, que perjudica gravemente a los armadores, viola los convenios de derechos humanos, y pone en riesgo la vida de los rescatados.

Además del drama humano, en medio de este conflicto están los buques mercantes y sus capitanes. Tienen la obligación moral y legal de rescatar a las personas en peligro en el mar, pero también tienen derecho a proceder lo más rápidamente posible, sin demoras indebidas. Un buque de salvamento no es un lugar seguro. El capitán del buque utiliza los medios de que dispone, pero un rescate en el mar siempre es costoso. Además, las personas rescatadas necesitan alojamiento, provisiones y, en muchos casos, atención médica. Vigilarlos en busca de armas, drogas o controlar su deambulación por zonas restringidas, como las salas de máquinas o los centros operativos del buque, puede no ser tarea fácil. El buque mercante que realiza el rescate retrasa inevitablemente su viaje, con repercusiones comerciales. Incluso con cobertura de seguro, el salvamento suele tener consecuencias financieras negativas para el armador.

INTRODUCTION

> The world is a dangerous place to live; not because of the people who are evil, but because of the people who do not do anything about it (Albert Einstein).

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This is a doctoral thesis on the Rule of Law and Global Governance. Consequently, this work is in two parts, although the Rule of Law part occupies seven of the eight chapters. Beginning with the second part, and in order to leave aside, in this introduction, the question of global governance, its ideas contain two basic postulates: first, that global problems cannot be solved locally, and second, that the complicity of citizens is necessary, indeed indispensable, in political action.

The way for good governance has been posted by the UN in the Millennium Declaration.[1] Good governance is based on democracy and democracy is based on the people. Making laws based on good governance means understanding how citizens think and what they want, in continual feedback. Translating citizens' thinking into law, but also making the law (and its consequences) widely known to the people, and constantly feeding it back can bring permanent improvement and adaptation (Jacobs, 1992; Matti, 2009; Page & Shapiro, 1983; Parkhurst, 2017; Soroka & Wlezien, 2010; Wlezien & Soroka, 2012). This idea is the key consideration guiding the governance part of this doctoral project.

To this end, the research encompass fieldwork, including a self-designed survey to find out the degree of rapprochement between legislators and the citizens they represent, in relation to rescue and migration issues. The analysis entails an implicit question which justifies the fieldwork: How close is the information of the lawmaker sitting on his/her chair in the House to that of the ordinary people? The results of this fieldwork will be commented on in Chapter 8 of the main text, with expanded technical data and full results in Appendix III. Before temporarily abandoning governance and ‘embarking’ on a maritime voyage towards the laws related to distress at sea, it is needed to remember that transnational laws mean global governance, that global governance means noble principles, and democracy means a true representativity of citizens.

♦

[1] United Nations General Assembly. Millennium Declaration. A/RES/55/2 of 18 September 2010.

The rule of law of maritime salvage constitutes the main body of this thesis. The issue of distressed migrants at sea is not a minor issue. As reported by Reuters in 2015, "since January 2014, more than 1,000 merchant ships have helped rescue more than 65,000 people, according to estimates from the International Chamber of Shipping."[2] Notably, maritime law does not expressly regulate the use of sea routes by migrants. International normative agreements were not designed with this possibility in mind, and the Convention on the Law of the Sea (UNCLOS III)[3] does not have a particular human rights focus. Human rights and the law of the sea were codified from two different structures. The law of the sea is inter-State (i.e., horizontal), while human rights start from international law, State jurisdiction and go down (vertically) to the individual (Abrisketa-Uriarte, 2020).

The development of sea rules and usages, related to rescue at sea (Chapter 1) has further been enshrined in several international conventions. The current framework is supported by four legal milestones: i) The Collision Convention;[4] ii) The International Convention for The Safety of Life at Sea (SOLAS);[5] iii) UNCLOS III;[6] and iv) the International Convention on Maritime Search And Rescue (SAR).[7] There are also a large number of instructions, regulations and additional information that will appear throughout the text, mainly from the International Maritime Organisation (IMO) and the International Chamber of Shipping (ICS), an association representing more than 80% of shipowners.

Consequently, the main focus of this part of the thesis on the rule of law will not be on whether legislation exists to rescue migrants in distress at sea, but rather on the problems of enforcing these laws, conflicts, and jurisprudence, complemented by the governance part on the degree of social awareness and support for rescue actions.

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[2] Special Report: Commercial ships scoop up desperate human cargo [press release, 21 September 2015] (electronic resource), available at:
https://www.reuters.com/article/us-europe-migrants-ship-specialreport-idUKKCN0RL0W320150921

[3] United Nations General Assembly, Convention on the Law of the Sea [UNCLOS III], Montenegro Bay, 10 December 1982 into force 16 November 1994. The First United Nations Conference on the Law of the Sea (UNCLOS I), Geneva 24/2−29/4 of 1958. adopted the four conventions, which are commonly known as the 1958 Geneva Conventions: The Convention on the Territorial Sea and Contiguous Zone; The Convention on the High Seas; The Convention on Fishing and Conservation of the Living Resources of the High Seas; and The Convention on the Continental Shelf. Into force on 30 September 1962. United Nations, Treaty Series, Vol. 450, p. 11. UNCLOS II (1960) did not result in any international agreements.

[4] Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels Brussels, 23 September 1910. Followed by the Collision Regulations of 1960 which were adopted at the same time as the 1960 SOLAS Convention, and the current Convention on the International Regulations for Preventing Collisions at Sea (**COLREGs**), London 20 October 1972 [IMO: 1050 UNTS 16, UKTS 77 (1977), 28 UST 3459, Cmnd. 6962, as amended by Inter-Governmental Maritime Consultative Organization Resolution A.464 (XII), adopted on 19 November 1981, Art. 11.

[5] International Convention for the Safety of Life at Sea (**SOLAS 1974**), Adoption: 1 November 1974; Entry into force: 25 May 1980. Last consolidated edition (paid resource) IMO 2020, chapter 4, Regulation 2.8.

[6] UNCLOS III, as above, Art. 98.

[7] International Maritime Organization (IMO), International Convention on Maritime Search and Rescue (**SAR 1979**), 1403 UNTS. Hamburg, Adoption: 27 April 1979; entry into force: 22 June 1985, as amended by Resolution MSC.70(69), London 18 May 1998, Art.2.3.

One main problem is that the international agreements were established with a focus on regular merchant vessels that may run very occasional risks at sea, and not on the problem of the so-called boatpeople,[8] who travel in precarious vessels running constant and repeated risks on each of their voyages. The second major problem is that the rescue of these migrants implies the assumption of legal and, above all, economic responsibilities generating divided political opinion on the issue. Thus, on the one hand, States are obliged to assume these responsibilities for the rescued, but on the other, they are very reluctant to do so, alluding to the social burden that irregular immigrants represent. Added to this is the position of certain political parties (some in government) that consider that social resources should be allocated to the indigenous population only and not to immigrants.

The crux of the matter is that there are two conflicting legal aspects to the issue of rescue and migration. On the one hand, the human rights of the migrant, a human being in such dire economic need as to risk his or her life at sea, if not, and worse, persecuted simply because he or she does not belong to the «right ethnic or political group» or the «right religion» and, on the other hand, the application in practice of border control laws, which do not always follow the Conventions protecting human rights, nor the Recommended Principles of the Office of the High Commissioner for Human Rights (OHCHR):[9]

> International borders are not zones of exclusion or exception for human rights obligations. States are entitled to exercise jurisdiction at their international borders, but they must do so in light of their human rights obligations. This means that the human rights of all persons at international borders must be respected in the pursuit of border control, law enforcement and other State objectives, regardless of which authorities perform border governance measures and where such measures take place (p. 1).

With regard to those rescued, two types of people can be distinguished: The migrant, normally with an economic motivation, and the one seeking international protection, which adds the circumstance of a threat as advanced above. The differences will be analysed throughout the text in various sections, but although this legal difference between economic migrant, asylum seeker and refugee is of utmost legal importance, for the shipmaster who rescues people in distress at sea it is practically irrelevant as it does not establish their status. As we will discuss later, the declaration of refugee must be done on land and only by governments or by the United Nations High Commissioner for Refugees (UNHCR) following a standard procedure, not on board.

♦

[8] It is not a legal term. It was coined after the wave of refugees who fled Vietnam by sea after the Vietnam War, especially during 1978 and 1979. It was later used generically for all those who fled because of that war and later for all those fleeing for protection, although desperate migration for economic reasons is now also included in the term.

[9] UN. Human Rights. Office of the High Commissioner. Recommended Principles and Guidelines of Human Rights on International Borders (electronic resource), available at: *https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf (accessed on 25 May 2021).*

It is now about time to comment on the methodological approach and some of the limitations of the work. It is not possible to cover the whole complex world of migration flows, their problems and possible solutions in a single text. Throughout the thesis constant focus has been maintained only on maritime rescue issues. This may lead to abbreviated reviews of some collateral aspects that are no less interesting but are outside this research. One of the out-of-focus issues concerns the analysis and development of solutions for the circumstances that motivate the migration, and possible coordinated actions in their countries of origin to prevent outflux. Such an analysis would bring some paradoxes to the debate, as e.g., the African continent has enormous wealth in gold, platinum, copper, diamonds, uranium, oil, natural gas, coltan, fishing wealth, extensive regions of tropical and equatorial forest and immense tourist resources (Fernández Herrera, 2012). "A wealthy and stable Congo can provide electricity to the whole continent, […] the wealth, resources and know-how of South Africa, can help as an engine of Africa's development" (wa Muiu & Martin, 2009, p. 192).

Another topic out of the scope of this dissertation is a comparative review of all the international regulations of migration, and the different legal consequences resulting from accepting migrants in distress at sea. This thesis is mainly focused on the European Union (EU) and the rescue and disembarkation of migrants in a Member State.

There are many other unaddressed collateral issues, such as the policies to be followed if a rescuee in a transit centre does not want to follow the instructions given, or if he or she refuses to receive a vaccination or refuses to have his/her child injected with a vaccine or does not accept treatment for a contagious infection. Also, cases of irregular behaviour or even crimes committed intentionally for the purpose of remaining in the country as a detainee, although some crime-related issues are analysed in chapter 6, but again the focus is basically on rescue. Neither is this dissertation about rights in general nor those affecting migrants in particular, which are well established in many legal texts, and include, among others, respect for human rights, inherent dignity, avoidance of punishment or any form of illegal deprivation of liberty and return to their places of origin in safe transit, although they will be mentioned repeatedly, including numerous case law, throughout the text.

There is an unconcealed sympathy in this research towards the migrants and their drama, including the consideration of whether in the punishable actions that these migrants may carry out, the *dolus eventualis*, or even the state of extreme necessity, may apply. That said, it does not mean that the researcher of this thesis reaches an acceptance that irregular border crossing is justifiable. Much less the lenient consideration of the criminal liability of the promoters of this illegal activity. Although this investigation contains an entire chapter dedicated to criminal aspects, it is not a treatise on criminal aspects related to the law of the sea either. Nor is this because the researcher considers the criminal aspects to be

of lesser interest. Smuggling and trafficking in human beings are comparable to those of the slave trade (David et al., 2019) and constitutes a repugnant criminal activity, which does not stop at pregnant women or children, with absolute disregard for the most elementary moral principles by which human beings must govern, regardless of their beliefs, derived from the very law of nature, and considered to be immutable and universal principles.

The last exclusion concerns general methodological approaches to law studies. There are excellent treaties published in this regard (McConville & Chui, 2017; Stelmach & Brożek, 2006; Van Hoecke, 2011; Watkins & Burton, 2017). As per Juan Carlos Riofrío Martínez-Villalba, over 100 methodological approaches to the study of law have been described (Riofrío Martínez-Villalba, 2015). Notwithstanding, it seems pertinent to outline the concrete methodological approach used in this work.

> Tratar de sacar todas las conclusiones del derecho de la Teoría Pura del Derecho, o de los postulados de la Escuela Histórica, o de la sociología jurídica, o de cualquier otra rama o metodología parece ser, al menos prima facie, un grave reduccionismo que ha de evitarse a toda costa.[10] (Riofrío Martínez-Villalba, 2015, p. 19).

According to this author, juridical science is characterised by being a phenomenal knowledge, which, as science, interrogates the causes (p. 9). Following this reasoning, a preventive perspective as outlined above —analysing and proposing legal actions at the political and economic level— would be perfectly appropriate for the purpose of making illegal migration disappear or be mitigated, by focusing on the causes that originate it. However, as advanced above, this dissertation focuses on positive law only.

This does not imply any renouncing of the hermeneutic resources, be they literal, extensive, contextual, harmonic or of any other type that *lato sensu* can be applied to the written norm (Riofrío Martínez-Villalba, 2015, p. 10). Also, it must be remembered that the reality of the law is not limited to written rules or jurisprudence. The hermeneutics of the text is not enough to decipher the law, which is a human, social and environmental phenomenon (p. 22). This is particularly applicable to some circumstances that the shipmaster may face in rescuing migrants in distress at sea, and not only due to a situation not foreseen in the rules, but very often due to the reluctance of States to comply with their obligations under the law. In this regard, the project reviews some international jurisprudence, analysing the *pacta sunt servanda* principle under these circumstances.

If law enriches and shapes itself when all its sources are considered, in aspects with a high moral and affective component such as the issue of the migrant in distress at sea, it is even more necessary to consider all the possible sources. It does not seem wise, on such a delicate question, to be governed solely

[10] [To try to draw all the conclusions from the Pure Theory of Law, or from the postulates of the Historical School, or from legal sociology, or from any other branch or methodology seems to be, at least prima facie, a serious reductionism that must be avoided at all costs]

by *ex autoritate legis*. On the one hand, the possibility of considering alternative sources of law could have a convenient result, as e.g., exploring the possibilities of inclusion of certain customs of hospitality, and on the other hand, a certain discretionary interpretation of the law hinted at above. There is an intention in this work to pursue the comprehensive *Juristischen Methodenlehre,* including the comparative perspective, and in this regard, both Savigny and Schleiermacher were advocates of the assumption that "in the case of comparative understanding […] we must appeal to material, as well as grammatical-historical, cognition" (Stelmach & Brożek, 2006, p. 184).

When inconsistencies or loopholes are presented, they are linked to a specific framework, to a European society and morality. Those legal gaps will offer an opportunity for proposals of improvement. This does not mean, in any way, a criticism of the legislator. On many occasions, it is the evolution of the society itself that shapes and redefines the needs of the law. According to Feibleman: "Morality is the essence of the society, and every society has a morality […] when the society changes, the morality changes with it. The administration of law is the carrying out of the kind of justice a particular morality requires" (Feibleman, 1985, p. 33)[11] or what this author summarises as "the laws follow the shifts in morality, even though at a discreet distance" (p. 33). This is nothing more than another expression of the above-mentioned feedback.

> The exact content of a legal system is not (only) something which is given, but something which is constantly worked out through the interpretation of the law in legal doctrine and in case law. Via this interpretation, non-legal views, values and norms inevitably penetrate the law. (Van Hoecke, 2002, p. 56)

The researcher recognizes that his impartiality and neutral political positioning, in line with Professor Van Hoecke, is limited and although an objective intention and a scientific effort have been sought "to eliminate personal biases, prior commitments and emotional involvement," (Husa & Van Hoecke, 2013, preface) there is no other way to make progress in a dissertation like this than to include personal views and opinions, always trying to be doctrinally supported. The hope is also advanced that if there is any legal or governance change concerning migrants in distress at sea, resulting from this work, it will not serve economic or political interests only, but will also respect ethical and moral aspects. What may emerge from this research is offered with the intention that future improvements should be made within the deontological framework and in harmony with the legal system, including the customs and habits to which the rescuer and the rescued belong, since no change can be made in good global governance by ignoring the point of view of the society served by the legislator. In other words, and following Medina Morales, to practise «the art of law» with the vocation of service that is innate in the discipline (Medina Morales, 1993). The information provided in the survey could be a useful tool in this regard.

[11] A softcover edition (Springer, 2013) is also available, reprint of the first (1985) edition.

For the realisation of this thesis the investigator has had access to physical and online sources from various universities with which he has links, including the University of Salamanca, the University of the Balearic Islands, the University of Alicante, the Polytechnic University of Valencia, the University of Valencia, and the Faculty of Law of the University of Porto (Portugal) with its associated archives of the CIIMAR. Also, different databases of the United Nations Office on Drugs and Crime, and of the Spanish governments at both national and regional level have been consulted together with extensive material provided by the thesis supervisor Prof. Dr Juan Santos Vara.

♦

Finally, as in any introduction to a doctoral thesis, come the questions of what, how, etc., i.e., the personal and unique drivers of this research work, including specific research questions. With an impressive number of instruments at both global (UN) and EU level, and with the Frontex Agency, with more than 1,500 employees, dedicated to border control, migration and rescue logistics, and the European search and rescue system (EUR-SAR), what can a single researcher contribute to this impressive organisation? Firstly, illusion. The illusion of spending many hours of work over the years with the *ambition* that, at the end, perhaps one life could be saved. Because there are periodically new dramas at sea, with a cost of enormous suffering and loss of human lives. Secondly, a critical review of the current legal framework, analysing, interpreting, comparing, and looking for gaps, with a particular focus on the reasons why regulations are not always followed. Thirdly, highlighting the need for some changes. Whether or not future changes will be made, and whether their spirit will be as commented on above, is beyond the scope of the investigation. This thesis has a *hypothesis*: Considering the drama of suffering and death in migrant rescues at sea, is it possible to identify gaps for improvement? It has a *vision*: A world free of migrants in distress at sea, and a *mission*: a legal contribution to the reduction of cases of migrants in distress at sea and their dramatic consequences. This work thus *aim*s to provide legislators with information on gaps in the legal framework or its development and doctrinal support to implement changes or proposals for new legal initiatives. The *target* of this research is to identify, within the temporal frame of four years of research, the most significative weaknesses detected on the legislation and governance of migrants in distress at sea, with particular focus on EU sea waters.

As for the research questions, for the rule of law part of the thesis, these are:

Q1: On the basis of legal developments, can we say that rescue at sea is a historically established obligation that prevails over decisions to the contrary by States and, particularly, in the case of rescue of migrant vessels? What if the State has not adhered to the international agreements on rescue at sea?

Q2: Is there an accepted definition of a ship in distress at sea and established procedures for ships as to how to proceed? To what extent a shipmaster, bound to the shipowner by a private law contract, is obliged to carry out salvage work under a public law agreement signed by the flag State?

Q3: What are the limitations of EU asylum policies that should apply to (rescued) migrants arriving on the shores of Member States?

Q4: Is it legally possible for NGO and other civilian-owned vessels to engage in rescue at sea?

Q5: Does maritime salvage also include the legal obligation to disembark?

Q6: Is there evidence that tough criminal action against migrant smugglers will reduce irregular migration?

Q7: What can be expected from a legal claim for breach of SAR obligations?

Q8: What is the key barrier to maritime rescue development and its possible address?

Q9: Could outsourcing be a solution for rescue at sea?

As for the governance part, the research question is:

Q10: What is the level of public knowledge of the actual migration figures and the percentage of irregular entries by sea?

There are eight goals, which coincide with each chapter of the thesis. The first goal is to review and understand that the current situation is the result of a long process of development of maritime salvage rules going back many centuries. The second goal is to assess the concept of a ship in distress and the current legal framework, including the obligations of ships and coastal states. The third goal focuses on the analysis of maritime salvage on EU coasts including some recent developments in this field. The fourth goal also related to EU coasts focuses on the role in maritime rescue of other actors, particularly Frontex and NGOs. The fifth goal introduces the polemic question of mixed migration and its impact in rescue. The sixth goal reviews some criminal aspects focusing on the rescue of migrants at sea. The seventh objective deals with jurisdictional principles, including an overview of courts and remedies. The eighth and last additional objective is dedicated to global governance and explores through a survey the beliefs and opinions of (Spanish) citizens on rescue at sea and migration flows. Each goal has different objectives as sections within each chapter.

The chapters are followed by the general discussion, the conclusion ,and the appendices. Appendix I presents a chronological list of selected legal instruments by issuing authority. Appendix II provides glossaries of terms. Appendix III provides further information on the fieldwork with details of the survey, including statistics and an expansion of the results. Appendix IV is devoted to the style of the text and contains information on abbreviations, acronyms, formatting, and copyright data used. References close the thesis.

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CHAPTER ONE. RESCUE OF PEOPLE IN DISTRESS AT SEA: THE LONG WAY FROM ANCIENT CUSTOMS TO FIRST CONTEMPORARY BINDING RULES

> A Lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect (Sir Walter Scott, Guy Mannering, 1815).

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Although many countries have acceded to the international agreement on the law of the sea (UNCLOS III) that will be discussed later in this doctoral thesis, some relevant countries such as the USA or Turkey have not, so this review of customary maritime law principles and customs could provide useful in those cases. This chapter deals with maritime law with a special focus on rescue at sea, from the earliest times to the development of the current international agreements, to be discussed in the following chapters.

This review offers a focused approach to maritime salvage, which obviously does not cover the entire law of the sea, which has been addressed in authoritative studies.[12]

The chronological review that follows is oriented to illustrate that rendering assistance at sea has been present in the sea uses and regulations since the oldest times, although the extent and procedure for the application of this practice has been a matter of open debate.

[12] For example the monographic work published by the Centre of International Law of Paris-Nanterre, under the direction of Mathias Forteau & Jean-Marc Thouvenin, counting with 58 expert authors (Forteau & Thouvenin, 2017). This key reference, in French, follows that rational stepwise approach (omitted here) of defining, sources, subjects, spaces, activities, the implementation (*mise en œuvre*), and the role of the law of the sea and the other branches of the international law. For other authoritative references on the law of the sea in English see (Churchill & Lowe, 1999; Rothwell & Stephens, 2010; Tanaka, 2019), The text in several volumes published between 1985 and 1991 of Nordquist, Myron H. (Ed.), Nations Convention on the Law of the Sea, 1982. The over 2000 page review and the law with comments by (Proelss, 2017), etc.

1.1. Maritime Rescue from a World Perspective

As with other disciplines, there has been a tendency, in our cultural environment, to consider that academic sea-law knowledge begins with the scholars of Ancient Greece or Rome, ignoring centuries-old traditions from other places, e.g., India, China or Persia (Achaemenid Empire), which can antedate some knowledge to European and Europeanised cultures in centuries or even millennia.[13] The colonialist superiority of seizing seas and lands belonging to "inferior civilisations" was already questioned by Grotius himself: "the East Indies were not *terrae nullius* which could be discovered or occupied. Nor could ancient countries be acquired on the presumption of their inferior civilisation" Grotius as cited in (Anand, 1981). The consideration of the full legal capacity of Asian countries, presented in the Santa Catarina case discussed below, as opposed to that view of colonialist superiority and terrae nullius, is also remarkably modern, based on mutual recognition in trade agreements, and payment of fees and taxes, a germ of current good and peaceful global governance tendencies.

Buddhism expansion played an important role in trade. Buddhistic monastic life developed in close proximity to trade centres and routes (e.g. Taxila, currently in Pakistan) (Neelis, 2011, pp. 197 & 206). Ancient South Asia trade networks included seaport regulations and maritime routes across the Indian Ocean recorded since at least the sixth/fifth century BCE (Neelis, 2011, p. 184).

However, as this dissertation is mainly focused on the Mediterranean Sea, once tribute and recognition is paid to the historical interest of maritime usages and rules in other civilisations, particularly those of India or China, which could have established, prior to *Roman Corpus Iuris,* concepts such as, or similar to, *contra bonos mores*, with the Buddhistic recommendation to fair and honourable trade in order to produce 'good karma (pāli kusala)', the rest of this section focuses on Western usages and laws of the sea. Maritime regulations from an Islamic perspective have recently been reviewed by (Khalilieh, 2019).[14]

Since the first maritime regulations (maritime law) were related to commerce, it is reasonable to think of cross-cultural influences even before the Iron Age; these intercultural exchanges of Persian, Egyptian, Greek, and Phoenician traders with the territories of Western Mediterranean —which could reasonably include even some ancient maritime usages— are emphasised by Manning in a Princeton University publication (Manning, 2018, pp. 263–269). The oldest known maritime

[13] An Oxford publication (1967) by C.H. Alexandrowicz "An introduction to the History of the Law of Nations in the East Indies (16th, 17th, and 18th centuries)" is one of the few exceptions to this Eurocentrism. Eric Wilson, from Monash University in Australia, has revisited Alexandrowicz's text suggesting (in opposition to the author himself) that maritime rules in South and Southeast Asia played a significant role in the development of Grotius' maritime jurisprudence (see "Early Modern Southeast Asia, 1350 – 1800", Routledge. Ooi Keat Gin and Hoang Anh Tuan editors, 2015, pp. 28-54). In Mesopotamia irrigation system regulation from the Euphrates River dates from at least 4,000 years BCE, and The Code of Hammurabi (ca. 1,754 BCE) includes legal aspects about water, although it does not include the sea (Kornfeld, 2009).

[14] It includes a thoroughly review of the piracy from the Islamic viewpoint (pp. 170-213).

regulation is the *Lex Rhodia de Jactu or iactu,* ca. 475 BCE (Sánchez-Moreno Ellart, 2012; Söğüt, 2017).

Graf Vitzthum suggests that the name Rhodes was taken because there were already maritime uses on the island from around 800 BC, which served as a basis for later regulations such as those adopted by the Romans (Chevreau, 2005).

These earlier rules were not a State regulation (*ius*) but sea trade legal regulation (*lex*). "Those rules emanated from the customs of seafaring merchants and others who participated in maritime trade and filled the gap that was left by a lack of state-sponsored legislation" (Graf Vitzthum, 2003, p. 56).

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1.2. Maritime Law in the Roman Empire

> *Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris* (Corpus Iuris Civilis, Dig. I, viii, 2).

Usages, since the most ancient times, have considered the sea as a common good of humanity with no owner. This is how it was recognised in the *Roman Corpus Iuris*,[15] and it is reflected even in recent international conventions establishing the freedom of the high seas and allowing landlocked States to flag ships. The next paragraphs will concentrate on Roman rules at sea and their historical evolution focused on sea salvage, which was nourished from Lex Rhodia.

According to Aelius Marcianus' Institutes of Roman Jurisprudence, the sea was considered *res communis omnium*. From there it reaches the Justinian Institutes, which prefer this guidance to that of Gaius, the usual reference in other subjects.[16] The concept is reinforced under the consideration that due to its impossibility of being parcelled out, the sea could not be considered among *res privatae: "Flumina autem omnia et portus publica sunt: ideoque ius piscandi omnibus commune est in portubus fluminibusque*" (Inst. Iust, II.1.3).[17] Note that this has an immediate corollary: all rescue actions take place in a commonly owned sea.

[15] The authoritative reviews of Roman Law of the Sea by Chair Professor of Roman Law Bernardo Periñán Gómez from Pablo de Olavide University of Seville (Periñán-Gómez, 2018) and Ana Alemán Monterreal, Full Professor in Roman Law at the University of Almería have been used as key references in this Roman-law subsection.

[16] Gaius did not extend to the laws of the sea, as once established in his Institutes the distinction between ius *divinum et ius humanum*, those elements belonging to *ius divinum* were excluded from further consideration within the context of *res patrimonium,* as not being owned by anyone (cited in Periñán-Gómez, 2018).

[17] [All rivers and harbours are public: therefore, the right of fishing is common to all in harbours and rivers], cited by (Periñán-Gómez, 2018). Despite above declaration of the sea as «common to all», Rome used the laws to its advantage. For an authoritative review of the sea-related economy during Roman rule and an analysis of the jurisprudence in defence of Roman economic interests against other competitors for the same natural marine resources see (Marzano, 2013).

The «common» approach was reinforced in the classification of things: Marcianus' idea, starts from a systematisation of things into four categories: those that are common to all; those that have a collective owner; those that have no owner; and those that have unique owners. Marcianus adds: "*Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.*"[18]

This notion of natural law and common things almost with the same words is repeated in the Institutes of Justinian, in reference to water, air, sea, and even the littoral (although littoral is not a homogeneous concept among Roman authors): "*Et quidem naturali iure communia sunt omnium haec: aer, aqua profluens et mare, et per hoc litora maris*" (IJ, 2, 1,1).[19]

The common ownership of littoral lands is defined by Roman law *as res extra commercium*, and while it was permitted to tend the nets to dry out, to seek or create a shelter, or to use the coastal area in various other ways, the construction of monuments, lodgings, or any other buildings where the *dominium ex iure quiritium* could be applied were not allowed.[20]

On some details of these issues, there has been no doctrinal agreement, even after in-depth studies on the subject (Periñán-Gómez, 2018). The consideration of *res communis omnium* was widely accepted for the unrestricted air, sea, or sun light, but not so clearly for other elements, e.g., whether the littoral land, where limits can be established, could also be included as *res publica*. The same consideration applies to parks or gardens in the city of Rome, *res publicae iuris gentium* or even *res nullius*.[21] A detailed review of this classification and its legal consequences may be found in (Monterreal, 2013; Periñán-Gómez, 2018; Terrazas-Ponce, 2012).

It is remarkable that despite appeals to natural law, and common ownership of the seas, rescue practices were based on trade rules (*lex*) rather than an obligation issued by the rulers (*ius*), It took many centuries after the concept of the State was consolidated (15th century) for them to realise the need for a State-regulated maritime rescue system.

[18] [And indeed, by natural law these are common to all: air, flowing water, and the sea, and thereby the shores of the sea] (cited in Periñán-Gómez, 2018).

This classification extended in the *Res Humani Iuris* appears in the Justinian Institutes. The *littus maris,* as instituted by Roman jurisprudence, with its legal classification and position between the public and the private, posed a problem that persists in modern coastal law (Monterreal, 2013).

[19] [And indeed, by natural law these are common to all: air, flowing water, and the sea, and thereby the shores of the sea] (cited by Boyle, 1913).

[20] (Martianus, D, 1,8,4. Ulpian D, 45,2,1).

[21] The disquisition is not innocent; res nullius opens the possibility to acquire the property constructed on the coast and the land "without owner" by *ius gentium*, as denounced, among others, by Ulpian and Neratius Priscus (Monterreal, 2013). A commentary on the res nullius versus res communis nuance is also found in the early and detailed analysis of the Treaty on the Law of the Sea from the US point of view (Reiff, 1959). For a review of common heritage of mankind over time see: (Noyes, 2020).

From an early date, Roman law established several actors in maritime trade. This seems to be clearly related to the respective responsibilities, and as far as maritime salvage is concerned, it becomes of interest in the case that in order to save a ship it was necessary to throw the cargo overboard. In Ulpian appears an early reference of three different legal actors (not necessarily coincident), the one who obtains the service or benefice (*exercitor navis*), the owner (*dominus navis*) and the person who is hired as a master (*domino navem per aversionem conduxit*).[22]

The Roman laws, thus, had already considered the possibility of lease, usufruct, or a loan for use (bailment or *commodatum*) of a ship. Although in Rome the seafarers were initially mentioned as a *nauta*, while the owners were called *navicularius*, from the 3rd century onwards, with the progressive development of corporative institutions (*Collegia navicularii*), this distinction was weakened as even masters could eventually be accepted into nautical colleges (Salazar-Revuelta, 2007).

The first rules thus appear to be more concerned with the preservation and salvage of cargo than with the salvage of persons. Care for distress at sea and preventive measures were already in place in Rome. According to Boisson, the Romans established a restricted period for navigation (only from 27 May to 14 September) (Boisson, 1999a). They also set the economic responsibility in case it was necessary to throw the cargo into the sea, based on the ancient *Lex Rhodia de jactu*[23] "if part of the cargo had to be jettisoned, the loss was to be borne by the owner of the ship and the owners of the cargo […]. This provision survives in modern maritime law, with the system of 'general average'" (Boisson, 1999b, para. 5–6).

This establishes a confluence of (*lex*) and (*ius*), of legal interest in the event of non-compliance with the prohibition of sailing on the dates indicated, and the corresponding responsibilities to be applied in case of rescue of the vessel and crew.

After the fall of the Western Roman Empire, the legislative effort concentrated in Byzantium. Among many other aspects of the reform for which Justinian I (ca. 482 – 565 CE) became famous, his rule was marked by a thorough revision of Roman laws, although his reform does not seem to have included a compendium of new laws of the sea, which remained based on previous uses: "it is manifest that we have no Code adopted by Rhodian authority, but a setting forth of what was adopted by Roman authority" (Benedict, 1904, p. 226).

[22] Ulpian 28, ad ed. Digest, 14,1,1,5.

[23] Despite the coincidence in the name, it is several centuries older and unrelated to the Rhodial-sea law, which will be discussed below. Boisson refers to Pardessus as source (see later). This *Lex Rhodia de Jactu* was later included in the Digest (title 14.2). See also the work *La Loi Rhodiene de jactu* [Rhodian law of jactu] (1873).

The new Macedonian dynasty instituted by Basil I (811 – 886) felt the need to update Justinian's ancient *Corpus Ius Civilis* and translate the texts into Greek, the new language of the empire. His successor (and dubious son) Leo VI (the Wise) achieved this purpose with a complete systematisation of Byzantine Empire legislation: the *Basilika* Collection.

This treaty of 60 books in six volumes was completed a few years after his death (892). The *Basilika* included the *Nomos Rhodion Nautikos* (Rhodial Sea-law) as an appendix to book 53.[24] However, the Byzantine rules remained limited to the territories under Byzantium domination, basically Eastern Europe, although the Rhodial Sea-Law had a significant influence on trade and shipping as a kind of international proto-law of the sea (Chitwood, 2017).[25] However, it brought no significant developments with regard to rescue at sea, which remained outside the legislation. From this ancient stage, the foundations of the salvage law were laid, which, under certain conditions, allows financial compensation to be claimed for salvage.

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1.3. Middle Ages and Maritime Rules

During the Dark Ages, the laws of the sea continued to be mainly based on verbal transmission of customary maritime rules. In Western Europe, the *Lex Mercatoria* was used as reference.[26] It was applied in merchant courts established throughout the main trade routes. It was not a substantive trade law as pointed out, centuries later, in a recompilation: “the ancient name Lex Mercatoria, and not Ius Mercatorum; because it is a Customary Law approved by the authoritie of all Kindgomes and Commonweales, and not a Law Established by the Soveraigntie of any Prince”.[27]

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[24] Full text of 1909 English edition from Oxford Clarendon Press (electronic resource) is available at: *https://archive.org/details/nomosrhodinnauti00rhoduoft/page/n9/mode/2up (accessed on 21 April 2021).* The first part of the treaty cites the manuscripts used as sources. The second part includes comparative legislation while a comprehensive third part has sections for the ship, shipowner, mariners, transportation of goods, etc. This *Rhodion Nautikos* has been thoroughly studied by Georgios Emmanouil Rodolakis from the Democritus University of Thrace (cited in some English sources incorrectly as Rodolakes) (Rodolakis, 2007). The author even suggests the possibility of this nautical compendium being based on an Early Empire text. This position has not been proved historically, although there are some references to working documents on sea law prior to *Rhodion Nautikos*.

[25] And continued to play a role in Greece until replaced by civil Code. Προεδρικο Διαταγμα Υπ’ Αριθμ. 456 Φεκ Α’ 164/24.10.1984. Αστικοσ Κωδικασ Και Εισαγωγικοσ Του Νομοσ. [Presidential Decree No 456 FEK A 164/24.10.1984. Civil Code and Introductory Act to the Law] of 24.10.1984, GRC-1984-L-87906

[26] Whether the modern Lex Mercatoria has its roots in the Medieval regulations or not is discussed by Volcart and Mangels (Volckart & Mangels, 1999).

[27] Malynes, Gerard, (1629). *Consuetudo, Vel Lex Mercatoria, Or the Ancient Law-Merchant. London*. The quotation comes from the Ghent University Library first edition of the text. It was later printed in two volumes by T. Basset, R. Chiswell, T. Horne, and E. Smith (London 1686) with successive editions (late reprints: 2009, 2014 by The Lawbook Exchange, Ltd. (ISBN-13: 9781584778714. ISBN-10: 1584778717). As opposite to Medieval *Lex Mercatoria*, basically based on usages and privileges, the «new lex» includes several «new» chapters dedicated to the vessels, shipping (including shipwreck), masters and their powers, seafarers, navigation, dominion of the sea, assurance, etc.

Still being customarily based, it included progressively a series of "advantages and privileges granted to merchants in the field of civil litigation" (Cordes, 2003, para. 14), reaching notable development in places of great commercial activity such as Venice (which later served as inspiration for the immortal William Shakespeare's Merchant of Venice court plea).

Over time, the customary jurisprudence began to be compiled, and it is speculated that Eleanor of Aquitaine, after returning from the Second Crusade (ca. 1160) —presumably after acquaintance of the Rhodial Sea-law, also adopted by Baldwin III King of Jerusalem— promoted the compilation of the *Rôles d´Oléron* (Rolls of Oléron) a relevant French medieval code, considered as the first compendium of maritime laws in Western Europe. The name came from the Island of Oléron off the Atlantic French coast where a powerful guild existed.[28] "Most of the medieval sea codes of Europe adopted after the *Rôles d'Oléron* copied and reflected the law of general average exemplified in the *Rôles d'Oléron* […] later incorporated into English law" (Chijioke, 2016, n.p.).[29] In any case the first publication of the *Rôles d'Oléron* appears to be dated from the second half of the 13th century, several decades after the long-lived Queen Eleanor had passed away (Serna-Vallejo, 2000). A series of maritime regulations including the Rôles d'Oléron have been documented in England and Scotland since the 14th century (Frankot, 2012).[30]

What is noticeable in the *Rôles d'Oléron* is that, for the first time, it contained many elements relating to distress at sea which will later be reinforced and updated by subsequent regulations, including the duty to help and to take charge of recovery, appearing here as a legal obligation; the illegality of excessive rewards and promises made by persons in distress to their potential rescuers; the obligatory nature of assistance to shipwrecked persons by coastal authorities is also remarkable, including the prosecution of those who take advantage of the survivors or their effects; the pretence of shipwreck; etc. Notoriously, the core of modern legal regulation of the provision of assistance at sea is here in its embryonic form.

According to Serna-Vallejo, the *Rôles* were in force until much of the modern period on the European coasts bathed by the Atlantic Ocean, the North Sea and even the Baltic Sea, being one of the elements on which the French Navy Ordinance of 1681 was drafted. The early Articles of the collection, consisting of 24 chapters, were also incorporated into Nordic maritime law, becoming part of the

[28] The name comes from the Dutch language and means a type of merchant association. As per Kieger, there was a powerful Aquitanian maritime association of Oléon, and this was the probable reason for naming the *Rôles "d'Oléon*" (Kieger, 1970).

[29] The author refers this information to Cooke, Cornah and Schoenbum sources. For details on the origin and roots of the *Rôles d'Oléron* see (Kieger, 1970).

[30] For the whereabouts, including its lost-and-found history and other descriptive details, of Bute Manuscript see (Heffernan, 1982).

so-called Maritime Ordinances or Supreme Maritime Law of Visby (Serna Vallejo, 2020).

Visby (Wisbuy), in the island of Gotland, was an increasingly active Hanseatic port in international trade in the Baltic Sea. At the beginning of the 14th century, at the peak of its prosperity, it got the statute of town and the right to build a defensive wall.[31] The Wisbuy Sea Law is allegedly published at that time, and it had great influence in the Hanseatic League.

Note that its existence, however, did not imply widespread acceptance of its rules. The degree of extension and application of the local regulations depended on each port town and its autonomy to establish a legal body. Thus, the jurisprudence could range from the application of uses and customs transmitted mainly by word of mouth, to council exclusive regulations, which could (although partially) be applied to other port towns. “Danzig possessed a large collection of written sea laws in the fifteenth century […] In the case of the Lübeck Town Law, these laws were also spread elsewhere, but the use of the Lübeck Sea Law, the Danzig judgements and the Kampen laws remained restricted to their respective councils” (Frankot, 2007, p. 108).

Pardessus has realised a thoughtful analysis of the differently adaptation of the *Rôles d'Oléron* as Dutch Ordinances in the south as compared to the north. The normative was adapted with few changes in the south. In contrast, in the north, with a greater Baltic influence, the usages took the name of *Stavern* or *d'Enchuysen*, and additional local regulations were also occasionally included, as was the case in Amsterdam (Pardessus, 1828, p. 50).[32] Other sea-coastal territories adapted or implemented sea regulations, as in Scotland with the *Leges Quatuor Burgorum* and the *Custuma Portum.*[33]

[31] Whether the Laws of Wisbuy were merely a translation and adaptation of the Rôles d'Oléron, or based on previous jurisprudence, is unclear since “the oldest maritime regulations appeared in writing in Scandinavia in the late twelfth century” (Frankot, 2007, p. 158). Lübeck and Hamburg, among many other ports, had their own Medieval regulations written in Latin. Hamburg archives keep jurisprudence from early 13th century, which was adopted in other places. The *Ordnung für Schiffer und Schiffsleute* [Ordinance for skippers and seamen] already in German, was published in the first half of the 14th century. An authoritative review of the Medieval Atlantic maritime law, and the jurisprudence details for each of the main ports may be found in that reference (Frankot, 2007).

[32] Pardessus, Jean Marie (although only the initials of the name appear in the book) was a renowned French lawyer of the early 19th century. He brilliantly obtained, by competition, the new chair of commercial law at the Paris Faculty of Law. He was a counsellor to the court of cassation and received numerous recognitions and decorations, including the Legion of Honour. He left an extensive repertoire of legal publications, highlighting —on the subject of this dissertation— his collection of marine laws in four volumes (1828 –1845) and *Les us et coutumes de la mer* [Uses and customs of the sea] (two volumes, 1847). The facsimile of the first volume on maritime laws, from where the above quotation was taken — *Collection de Lois Maritimes antérieures au XVIIIe siècle*. [Collection of Maritime Laws prior to the 18th century] (*Imprimerie Royale*) [Royal printing press], (1828)— (electronic resource). Available at: *https://gallica.bnf.fr/ark:/12148/bpt6k109656h/ (accessed on 16 April 2021).*

[33] The laws of the sea in Scottish and Northern European ports, from the 12th century, have been revised by Edda Frankot. However, the aforementioned *Leges Quatuor Burgorum* only includes sea issues in its Art. 25 *(De contencione orta inter nautas extraneos) stipulating “that* the bailies were to judge any cases in which foreign skippers and merchants were involved”. The name of four cities does not mean that jurisprudence was used in only four places; probably either as a written or verbal rule it

During the reign of King Alfonso X (1252 – 1282) an important intent to unify the varied rules took place in the Kingdom of Castille, with the so-called *Siete Partidas* (Seven-part Code) (ca. 1265). Originally the «Book of Laws» it took its present name after the 14th century.[34] Martínez-Jiménez reviewed the specific regulations, again focused on cargo (Martínez-Jiménez, 1991).[35] As in the previous case (Rôles d'Oléron), the legal recitals are mainly focused on financial liabilities in the event of distress at sea.

Notoriously, the Seven-Part Code also includes several recommendations for seaworthiness. Despite persistent efforts by the rulers of the Hispanic kingdoms to unify legal norms, many local ordinances have remained in effect over time, e.g., Bilbao ordinances. The first one was granted during the rule of King Juan II of Castille (11 August 1447), being updated periodically up to mid-18th century, with an impact on Spanish-American legislation that extended to the end of the 19th century.[36]

The Middle Ages also saw the first banns to prevent accidents at sea, in addition to the above-mentioned seaworthiness considerations. A growing interest, both in Northern and Southern European ports, in regulating the load limit of the vessels appeared and it became customary to include a limit load line on the hull, (a cross in Venice, three horizontal lines in Genoa, etc.), a precursor of the customary waterline or Plimsoll line still in use in vessels nowadays.[37] Following the Roman tradition, ships had to stay in port in winter.

In the Late Middle Ages, the West Mediterranean Sea was under the influence of the Kingdom of Aragon. The Mediterranean area remained basically

was widely used in Scotland. The *Custuma Portuum*, together with the adaptation of *Rôles d'Oléron*, and several acts issued by the Scottish parliament both in Scottish and English, were long used as maritime and port regulations (Frankot, 2007).

[34] A facsimile (Madrid: Lex Nova, 1989) of the 1491 edition, with glosses by Alonso Díaz de Montalvo (electronic resource) is available at:
http://bdh.bne.es/bnesearch/detalle/bdh0000005119 (accessed on 16 April 2021).
Part of *Rôles d'Oléron* was integrated in the Seven-Part Code with the name of "*Fuero de Layron*" a jurisprudence in use in the Castilian ports of the Cantabrian Sea (Manuscript 716, pp 91-94. Spanish National Library). To the best of knowledge, the only monographic work about the *Rôles d'Oléron* in Spain was published by Hernández-Morondo (El Escorial 1928). See also (Casariego, 1947).

[35] Full text edited by P. Sánchez-Prieto Borja, Rocío Díaz Moreno, Elena Trujillo-Belso from CORDE online data bank (electronic resource) is available at: *https://core.ac.uk/download/pdf/58907648.pdf (accessed on 18 December 2020).*

[36] For a review of the Bilbao Consulate regulations, the ordinances and their impact in Spanish America see the work by Clotilde Olaran-Múgica (electronic resource) Available at*:*
https://dialnet.unirioja.es/servlet/articulo?codigo=4108232 (accessed on 16 April 2021).

[37] It is a waterline, or maximum load line, up to which the ship can be loaded to safely maintain buoyancy. These lines are engraved on the hull of the ship on both port and starboard sides, as a horizontal diameter of a 300 mm disc called a Plimsoll disc. Additional letter and/or marks may appear, indicating the surveyor of the load line, e.g., in case of a ship surveyed by Lloyd's Register it will show "LR". There may also be load lines according to the corresponding navigational waters: "tropical fresh water" (RF), "winter temperature seawater" (W), "Winter North Atlantic" (WNA), etc. (Masters, 1955). Contemporary regulation began with texts dated 1932, 1949, 1965 taking shape in the International Convention on Load Lines signed in London on 5th April 1966, and in the current International Convention for the Safety of Life at Sea (SOLAS) as above.

ruled by Roman jurisprudence, Rhodial Sea-law, and the (ancient) *Lex Mercatoria* for trade disagreements. However, a new regulation, although based on previous jurisprudence, was issued in Barcelona, the so-called, *Llibre de Consolat de Mar* (Book of the Consulate of the Sea).[38] "Spreading from Barcelona throughout Mediterranean Spain, Italy, and France, it influenced the development of maritime law in northern Europe. The most complete and popular version was the Consulat [sic] del Mar of 1370; a printed version appeared in 1494" (Runyan, 2015, p. 1627).

Similar regulations appeared soon in other Adriatic and Mediterranean ports such as Marseille, or Geneve and Venice, where they took the Italian name of *Consolato del Mare.* They included the rescue at sea: "These are concerned with the ownership of vessels, the rights and duties of masters and captains, of seamen and freight, salvage, general average, and contribution, the rights of neutrals in time of war ─in short, with all admiralty matters" (Sherman, 1913, p. 874).

Not infrequently distress at sea was the result of piracy, a crime much clear under Islamic law. In case of piracy and other offences, unlike the Islamic sea-law, which makes no distinction between crimes committed on land or at sea (Khalilieh, 2019), the European kingdoms "failed to address the issues of piracy, and reprisals [… took] place in a juridical grey area […] influenced by […] policies of the realm. [There were] two types of government-authorized seizures: arrest and manque" (Heebøll-Holm, 2013, p. 127).[39]

Piracy claims still, resolved in local courts, posed a difficulty for jurors to establish the details of the crime which could be reconstructed only indirectly; not infrequently the convict had ties with the community, "consequently, the jurors were more likely to sympathise than to convict the indicted" (Heebøll-Holm, 2013, p. 128).

Additionally, there were serious difficulties in finding a legal framework for prosecution. As commented on above, the *Lex Mercatoria* was not a government-issued law but a series of merchant uses and referred to commercial transactions, (consequently applicable only to traders) while "the *Rôles d'Oléon*, […] mostly was occupied with freight and the relationship between shipmaster, crew and merchants […] and therefore did not concern itself with issues which felt [sic] under criminal law" (Heebøll-Holm, 2013, p. 128).

[38] The Consulates of the Sea (*consule maris, consolats de mar*), usually attached to the fish markets, were medieval institutions of the Crown of Aragon. They had the function of regulating mercantile and maritime affairs.

[39] This solidly documented reference analyses piracy from 1280 to 1330, focusing mainly on the waters and ports of Gascony, Normandy, and the Confederation of the Five Ports of South-East England. Chapter «Ports and wine» (pp. 55-82) reviews how merchants were linked to piracy, ignoring the laws of their own kingdoms. The many examples of piracy punishment inconsistency given in the chapter under the heading "Crime and lack of punishment?" (pp. 229–244) illustrate how on more than one occasion crimes of piracy were redirected towards a civil-merchant litigation.

Neither piracy nor sea war conflicts were then formally included in the law. It is true that in the *Fasciculus de superioritate maris (1339),* there is a reference to “the protection of the peace and justice between people sailing the English Channel and was formulated as a promise to protect shipping, to punish pirates and to assure restitution to the victims” (Heebøll-Holm, 2013, p. 133). However, Krieger considered that the *Rôles d'Oléron* was a civil law and this local inclusion was not derived from the *Rôles*, but rather from a Gascon petition of 1331 (Kieger, 1970).

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1.4. The Sea Rules in Early Modern Period. Mare Clausum and the Santa Catarina Case Law

Sea security was further promoted progressively with different laws or ordinances (Spain, 1563, Venetia 1569, France 1584, etc.) and the establishment of a compulsory survey of ships. “Northern countries were the first to impose a system of surveys. The Recesses of the Diet of the Hanseatic League of 1412, 1417 and 1447 contain references to this requirement” (Price, 2021, para. 19).

The modern era also saw the establishment of standards for the training of shipmasters: “In France, an edict on the Admiralty issued by the French king Henri III in March 1584 required maritime cities to oversee the abilities of ships' captains.” (Price, 2021, para. 18). The Great Ordinance of Marine of August 1681,[40] established under the administration of Colbert, introduced the office of *huissier-visiteur,* or surveyor. A Royal declaration of 17 August 1779[41] completed these provisions by instituting the requirements of dual survey of ships, on the outward voyage and on the return trip.

Regarding assistance to persons in distress at sea, the modern period did not see much progress, because disputes centred on the jurisdiction of the seas and eventually the establishment of territorial waters. Consequently—once the obligatory nature of assistance had long been established by custom and uses but basically as (private) admiralty law (as opposite to the law of the sea based on a body of public international agreements— the interest shifted towards territorial jurisdiction, and sea sovereignty, something with an impact on maritime salvage and its economic consequences. In this respect, the development of Protestantism and the consequent lack of recognition of the Pope as the possessor and arbiter of the world played a key role.

[40] Ordonnance de la marine, du mois d'aoust [sic] 1681 ([Reprod.] (Electronic resource), available at: *https://gallica.bnf.fr/ark:/12148/bpt6k95955s/f2.item (accessed on 15 August 2022).*

[41] Déclaration du Roi Concernant les assurances, Donnée à Versailles, le 17 août 1779, Registrée en Parlement, le 6 septembre 1779 [Declaration of the King concerning insurance, Given at Versailles, 17th August 1779 Registered in Parliament on 6 September 1779] (electronic resource) available at: http://www.fortunes-de-mer.com/mer/images/documents%20pdf/legislation/Francaise/Declaration%20du%20Roi%201779.pdf *(accessed on 15 August 2022).*

With the «discovery» of the American continent the transatlantic trade began to develop. The maritime powers of the time Spain and Portugal,[42] promoted the policy of *Mare Clausum*, to prevent other countries from taking advantage of the discovered lands and merchant routes, claiming a monopoly on the East Indian trade.[43]

The position started after a long negotiation period between Spain and Portugal —prior to their joined rule period— first with the treaty of Alcáçovas, and later with the relevant treaty of Tordesillas, ordered to be kept on pain of excommunication by a bull of Pope Alexander VI in his role of supreme lordship of the world (dominus mundi).[44]

The resolution favourable to the Spanish interests open the «Spanish age» (1492 – 1648). However, in growing «covenant» movements, neither England (after Henry VIII broke his ties with Rome), nor the powerful Dutch East India Company (*Vereenigde Oostindische Compagnie*, V.O.C.), which belonged to a Protestant power, recognised neither the treaty nor the authority of the Pope.

On 25 February 1603, during the Eighty Years' War (1568 – 1648) against the Iberian Union for the sovereignty of the Habsburg Netherlands, the *Santa Catarina*, a Portuguese 1500-ton carrack was seized by three Dutch vessels, supposedly while anchored off the coast of Singapore, with a rich booty (3,389,772 florins of the time).

The cargo included Chinese fine porcelains, jade, silk, and hundreds of ounces of musk perfume. The capture was declared a war prize by the Amsterdam Admiralty Court on 4 September 1604, and the issue had international resonance. Some shareholders of the V.O.C., fundamentally Mennonites, objected to the moral use of seizure outside the statute, even more so as the Dutch vessels under command of Jacob van Heemskerck lacked authorisation to use offensive force. In addition to religious or moral concerns, the shareholders feared that the action would allow another emerging maritime power (notoriously England) to carry out similar acts against Dutch mercantile interests in its enclaves and factories in Brazil, the coasts of the African continent or Southeast Asia (Martínez-Torres, 2017).

Portugal demanded the return of the cargo, and the dispute went to judicial hearing (Prize court). Hugo Grotius (Hugo de Groot) was called upon to defend

[42] There was a dynastic union between Portugal and Spain (1580-1640) called the Iberian Union, and Spanish Kings Philip II, III and IV were also rulers of the entire Iberian Peninsula and the overseas possessions.

[43] The position in favour of the *Mare Clausum* postulate was backed in the well-known work by John Selden, *Mare clausum seu de dominio maris (libri duo)* published by John Stansby in London, 1635. The impact was such, that up to three Dutch editions were produced swiftly in the following year (1636). See also (Lucas, 2001).

[44] Bulls «*Inter caetera*.» Full text transcription of first (1493) and second (1494) bulls into modern Spanish (electronic resource) available at: *http://www.artic.ua.es/biblioteca/u85/documentos/1572.pdf (accessed on 16 April 2021).*

the seizure, in what must be regarded as the most relevant and pioneering legal dispute over the law of the sea.

Grotius argued the concept of sea as free international waters (*Mare Liberum*) on the basis of natural principles of justice. In his plea, he went back to Ancient Greek scholars (Isocrates, even to Demosthenes' "Freedom of Rhodes") (Grotius, 1618, p. 103), and to the Roman concept of sea as no-one's property, citing Cicero, Ulpian, and the common law, in support for the Dutch (Batavica terram) right to freely navigate the sea:

> *Omnes igitur vident eum qui alterum navigare prohibeat nullo jure defendi, cum eundem etiam injuriarum teneri Vlpianus dixerit: alij autem etiam interdictum utile prohibito competere existimaverint. Et sic Batavorum intentio communi jure nititur, cum fateantur omnes permissum cuilibet in mari navigare etiam à nullo Principe impetrata licentia: quod Legibus Hispanicis diserte expressum est.* (Grotius, 1618, p. 65)[45]

Grotius, in his allegation against the postulates of Serafim de Freitas,[46] denied the Pope's lordship of the world, making use of principles formulated by the Spanish School of Salamanca itself, by quoting Francisco de Victoria and Fernando Vázquez de Menchaca.[47] In 1609, Grotius treatise on *Mare liberum*[48] was partially published, initially anonymously for political reasons.

There were great differences between Grotius and Freitas, not only religious but also conceptual. Freitas, given his ecclesiastical background, made extensive references to canon law (to the point of recognising himself that they could become burdensome for non-specialist readers). In his arguments and his writings (*De iusto imperio lusitanorum asiatico)*, Freitas maintained the idea of the ultimate authority and judging of the Pope as lordship extending over the whole

[45] [All see, then, that he who forbids another to sail, does not do so protected by any right, and as Ulpian pointed out: for others, this prohibition is not considered applicable to such a thing. And so, the intention of the Dutch is based on the common law, that it is generally admitted that anyone may sail the sea, even without obtaining premise from any prince: which is clearly expressed in the Spanish laws].

[46] Although Portuguese in origin, Serafim de Freitas, a religious belonging to the Order of Mercy and professor of canon law at the University of Valladolid, was the jurisconsult sent by the Iberian league. Years later (1625), he would publish a notorious legal text in response to Mare Liberum postulates (the authorship by Grotius was still unknown to him): *De iusto imperio lusitanorum asiatico* (edited by *Ex officina Hieronymi Morillo, Almae Vniuersitatis typographi*). In addition to Freitas, opposition to the postulates of *Mare Liberum* were collected in several treatises: *Minos seu mare tutum* (incomplete and unpublished text written by the Flemish Jesuit Nicolás Bonaert in 1610), «an abridgement of all the sea laws» (1613), by Scotsman William Welwood, and the best known treatise *Mare Clausum* (1635) by Englishman John Selden (Martínez-Torres, 2017).

[47] For a comprehensive review of Fernando Vázquez de Menchaga's doctrinal postulates see the doctoral thesis: *El pensamiento republicano de Fernando Vázquez de Menchaca* [The Republican Thought of Fernando Vázquez de Menchaca], by José Luis Egio-García (Murcia University, 2015) (electronic resource) available at *https://www.tesisenred.net/handle/10803/287164#page=1 (accessed on 9 May 2021)*. The question of free seas is discussed in chapter six of his dissertation. In the work *Illustrium Controversiarum*, he positioned himself against the Spanish official thesis and attacked Venice and Genoa's claims to dominion over parts of the Mediterranean, defending the freedom of the seas.

[48] *Mare liberum sive de iure quod Batavis competit ad Indicana commercia, dissertatio* [The Free Sea, a dissertation on the right of the Dutch to trade with the Indies] (1618). Elzevirian Office (electronic resource), available at: *https://www.sciencedirect.com/book/9781483283036/mare-liberum (accessed on 22 March 2023).*

world (dominium mundi) (Rojas-Donat, 2000) who handed over the East Indies to the kings of Spain and Portugal.

In contrast, Grotius not only did not validate the papal donations from the East Indies, but he also questioned the legal basis of such donations. Grotius declared that no one could grant what he, or anyone else on his behalf, did not possess, and that the «discovered» territories of the Indies had their own owners, kings, laws, and rights, and full legal subjecthood. He reinforced his point with the fact that there were concessions from local authorities to European traders, something clearly deduced by the fact that the traders paid taxes and requested the right to trade to local authorities, i.e., recognising them with legal personality (Grotius, 1618, pp. 69-77; Martínez-Torres, 2017). Only three years later (1612), the Spanish Inquisition included Grotius' text in the *Index librorum prohibitorum et derogatorum.*[49]

The work of Grotius, in favour of the development of an international legal framework for free use of the sea, was followed decades later by another prominent Dutch jurist, Cornelius van Bijnkershoek (1673 – 1743), who arrived to chair the Dutch Republic Supreme Court (1724 – 1743).[50] His works related to this issue included *De Domino Maris Dissertatio* (1702), *Observatines Juris Romani*, *De foro legatorum* (1721), and the *Questiones Juris Publici* (1737). His thesis about the juridical principles for trade, sea, diplomatic relationships, private property, wartime, contraband, and other questions were in high consideration. Bijnkershoek backed Grotius' idea that jurisdiction over the sea extended only to those waters that could be controlled from land, and the concept became widespread: *terrae potestas finitur ubi finitur armorium vis.*[51] This established the seeds of the jurisdictional differentiation between international waters and territorial waters which will be of crucial importance for future rules of the sea and for the rescue of persons in distress to be crystallized in the late modern period.

England —the third sea power in the dispute— under Queen Elizabeth I has engaged in fierce trade competence with the Dutch, adopting a *sui generis* convenient *Mare Clausum* position, but only when applied to English sovereignty (Widener, 2009). The in-between position of Queen Elizabeth I of England was not followed by the Stuarts in Scotland who fully adopted the *Mare Clausum* premise

[49] [List of prohibited and derogated books]. Grotius liberal ideas extended against Calvinist orthodoxy and the House of Orange causing annoyance in his own country leading him to prison, from where he escaped picturesquely with the help of his wife, hidden in a trunk supposedly full of dirty clothes and books. The vicissitudes of the negotiations between the Dutch and the Iberian Union, the reasons why the author was not made known until the 1618 edition, and many other details of the treaty, the jurisconsults biographies and the trade dispute between the Iberian Union and the Dutch can be found in the reference by Martínez-Torres (2017). Grotius' full text edition (1618) in Zip format is an electronic resource (through a university log-in) available at.
https://www.elsevier.com/books/mare-liberum/de-groot/978-1-4832-8303-6 (accessed on 16 April 2021).

[50] Hoher Rat von Holland, Zeeland und Westfriesland [High Council of Holland, Zeeland and Westfriesland].

[51] [The power of the earth ends where the force of arms ends] This created the basis for the «cannon-shot» rule to be commented next.

"perhaps mindful of Scotland's dependence on coastal fisheries and envious of the rise of Holland as a great maritime and trading power" (Koh, 2020, p. 176). The *Mare Clausum* premise was extended to the whole of Britain when the House of Tudor —after the childless Queen Elizabeth passed away— was replaced by the Stuarts (1603). One of the notorious advocates of this thesis was John Selden (*Mare Clausum sive De Domino Maris*, 1635). The *Mare Clausum* position was maintained by the kingdom for most of the 17th century.

With the end of the Eighty Years' War came the start of the «French age» (1648 – 1815). That war, and the need to protect the growing French colonial empire, required an organised Navy. In 1624 Richelieu promoted its implementation himself took care of its organisation and development, a function he later ceded to his protégé Jean Baptiste Colbert to create a first-power navy. A gigantic task with many lights and shadows (Pilgrim, 1975). According to Pilgrim, the *Règlement* of 6 October 1674 and *L'ordonnance sur les armées navales et les arcenaux* [sic] *navales* are key documents from which many current legislations emanate (Pilgrim, 1975).[52]

Little can be said about this period with regard to rescue at sea. Although as we have seen, the period contributed to laying the first foundations of maritime jurisdiction, it did not incorporate any relevant regulation on maritime rescue.

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1.5. Sea Law in the Late Modern Period: The Cannon-shot Rule and the Doctrine of Continuous Voyages. Territorial waters

The ideas of Grotius and Bijnkershoek laid the foundations of the «cannon-shot» rule, which later enjoyed wide, though not universal, recognition. Bijnkershoek, a man of law rather than numbers, did not specify how far that distance might be. It was estimated later by Fernand Galiami, an Italian economist interested in commercial matters: "Adoption of this form of territorial sea was not universal but, by the early nineteenth [sic] century the three-mile limit had been, for all intents and purposes, accepted as customary international law" (Lajeunesse, 2016, p. 16).

[52] Or even before that date. *L'institution du service des classes* [the institution of the class service], becoming after the French Revolution *l'inscription maritime* [maritime inscription] for sailors to be called upon to serve in the French war vessels, may be traced several years back (1668–1671). The *Rolle General de tour les officiers, mariniers et matelots de la province de Bretagne* [Rolle General de tour the officers, bargemen, and sailors of the province of Brittany] was printed in 1671. The *class service* (later maritime inscription) was questioned politically and had not a great success (Pilgrim, 1975). Criticism and resistance arose, even to the point of being considered by some scholars as a return to feudalism. This aspect has been thoroughly reviewed by Prof. Eugene Asher (Asher, 1960). However, the administration and financial organisation of the seafarer affairs, promoted by the controversial Colbert couple, was a great advance of that time. It included the establishment of the *Caisse des invalides de la Marine Royale (September 22, 1673) et Les Hôtels des Invalides* precursors of subsequent systems of labour protection for seafarers.

By 1761, France equated the cannon shot rule to three miles, which caused some conflict with England, as they were at war at the time.[53] In 1792 the Neapolitan economist Ferdinando Galiani wrote the monograph: *The Duties of Neutral Princes towards Belligerent Princes* fixing the three-miles limit with or without the need of erecting fortifications and placing cannons that effectively assured the control of the territorial sea: "[…] the distance of three miles, as that which surely is the utmost range that a shell might be projected with hitherto known gun powder" (Gaiani as cited by Koh, 2020, p. 180).[54] However throughout the 19th century or «British age» (1815 – 1919). "when Britain achieved naval supremacy […] the balance tilted in favour of the doctrine of the freedom of the seas" (Koh, 2020, p. 177).

The doctrine of Continuous Voyages, or wartime neutral third-party commercial activities, was probably insurmountable on the list of disputes related to sea law in the second half of the 18th century and the first decades of the 19th century. Following the Seven Years' War (1756 –1763), Britain's growing supremacy allowed her to interfere with French maritime interests and colonial trade. The question of whether trade in colonial possessions should be limited to the monopoly of the home country or not —a contentious issue even in peacetime— was further questioned in wartime, and American merchants sought the opportunity to enter the prohibited market, arguing that they provided the colonies with scarce supplies because of the war. "Unable to maintain the monopoly of this trade, France attempted to retain a part of its benefits by transferring it to the care of the neutral Dutch" (Elliott, 1904, p. 61).

Although initially the Dutch vessels were allowed to trade with French colonies, soon Great Britain realised that this would deprive her "of the advantage she had gained" and "captured and condemned the [Dutch] ships upon the theory that they had forfeited their natural character and had been in effect incorporated into the French marine" (Elliott, 1904, p. 61).

The rules of war of 1756, and later of 1793, set out that "neutrals could not properly claim the right to intrude into a commerce which has been uniformly closed to them and which had been forced open merely by the pressure of war" (Elliott, 1904, p. 63).

France reacted by opening the colonies to any flag ship trade. Also the trick of «parcelling» the trip was blocked by the doctrine, which took the name of *Continuous Voyages*: The attempt to break the rule that prohibits the transport of goods from A to C, by means of several trips, is annulled as it is considered a

[53] For a monographic review of the three-mile topic see the doctoral thesis of Commander S.A. Swarztrauber (1970) (electronic format) available at: *https://core.ac.uk/download/pdf/36708492.pdf (accessed on 16 April 2021).*

[54] For more about the author, also known as Abbe Ferdinando Galiani, —and how the expanding position of the three-mile limit in France (where he served as secretary and chargé d'affaires at the embassy of the Kingdom of the Two Sicilies) influenced him as opposite to the four miles of the Scandinavian League — see (Wilder, 1998, p. 16)

single (continuous) trip (Elliott, 1904, p. 72). Also the case of "a vessel sailing from A to C with a pretended destination to an intermediate destination at B claims the benefit of a fiction when it asserts that the run from A to B constitutes a complete voyage" (Elliott, 1904, p. 96).

Leaving aside the doctrine of Continuous Voyages, and other issues relating to periods of war —where, in any case, it would be difficult to find jurisprudence and courts accepted by the parties in conflict— in the 19th century, and according to the recital in the Berlin Decree, the rulers, including Napoleon himself, have already recognised the theses of *Mare Liberum*, accepting free navigation as a «law universally observed by all civilised nations.» Another issue on which broad agreement was reached in the 19th century, although only after a long trajectory from its first attempts at delimitation, was that of the territorial sea limits "a narrow belt of the sea placed under coastal State jurisdiction in matters of piracy and of offences […] Alberto Gentili (1552 – 1608) was apparently the first scholar to use the expression «territorium»" (Koh, 2020, p. 178). As control of territorial waters was mainly based on the capacity of the coastal State artillery to make effective its sovereignty, the cannon-shot rule, already mentioned was widely accepted as an acceptable option for territorial sea delimitation.

But in its early stages, the first consequence of this rule was that it could not be exercised where there was no artillery and, furthermore, the artillery pieces could be of different ranges, making the delimitation imprecise. Spain was the first sea-power to claim for the line-of-sight rule. "Like the canon-shot rule, the line-of-sight rule was imprecise and a coastal State could claim anything from three to twenty miles" (Koh, 2020. p. 179). The third and most accurate option, eventually becoming widely accepted, was to establish the territorial sea up to three miles from the coast, or the rule of the one-league limit, whether fitted with coastal artillery or not.[55]

This long period of disputes over jurisdiction and maritime sovereignty, which served as a substratum for subsequent salvage legislation brought nothing new to the matter, which remained governed by custom and usage.

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1.6. Contemporary Regulations related to Law of the Sea. The Development of Sea-related Conventions and Tribunals. The UNCLOS

The French revolution (1789) and the independence of the United States of America (1776) are landmarks of the starting of the contemporary period. The three-mile territorial sea rule was gradually included in legislation and confirmed by

[55] "The Scandinavian league happened to contain about 4 miles as against the 3-mile league in general use elsewhere" (Ghosh, 1988, p. 44). This reference, published by Naya Prokash in Calcutta, contains a detailed review of the development of the territorial sea. The historical relationship between the cannon-shot and the one-league rule is questionable and "has recently been challenged by Wyndham Walker" (Kent, 1954, p. 537). Kent's publication is another key reference, this time from Cambridge University, particularly for North seas coastal States. Kaye analyses the question of establishing the limits in the case of ice-covered coasts (Kaye, 2004).

case-law. A further step towards internationalisation of the three-miles rule was the Anglo-American Convention, popularly known as convention respecting fisheries, boundary and the restoration of slaves.[56] Art. 1: “And the United States hereby renounce for ever, any liberty […], to take, dry, or cure fish, on or within three marine miles of any of the Coasts, Bays, Creeks, or Harbours, of His Britannic Majesty's Dominions in America […].” It was an important development as the three-mile rule was, for the first time, incorporated into a treaty between States (Koh, 2020). By the end of the 19th century the rule of the three miles was universally accepted.

The contemporary era sees the development of earlier and current maritime salvage conventions moving from admiralty law to sea law, i.e., based on international agreements, the growth of arbitration instruments and the creation of specialised courts. However, in this chapter, devoted to the chronological description of the process, only the first steps of this historical progression will be included, while the legal framework arising from these developments and currently in force, will be reviewed in the following chapters.

According to the International Court of Justice[57] “The modern history of international arbitration is generally recognized as dating from the so-called Jay Treaty of 1794 between the United States of America and Great Britain.” Two further arrangements between these countries followed, the Treaty of Washington of 1871 and the Alabama Claims Arbitration (1872).

On the initiative of Russian Czar (Nicholas II), the First International Hague Peace Conference took place in 1899. A second Peace Conference was soon held in the same city (1907). Thanks to the joint efforts of academic historian Andrew Dickson White, and the more than generous financial support of steel magnate Andrew Carnegie, the Peace Palace was built in The Hague, and officially opened on 28 August 1913, as the residence of a Permanent Court of Arbitration.

At the beginning of the 20th century, the issues of assistance and salvage at sea, returned to the scene with renewed interest and the C*onvention Pour L'unification de Certaines Règles En Matière D'assistance et de Sauvetage Maritimes* was signed in 1910.[58]

However, despite this new agreement, the sinking of the RMS Titanic, only two years later (on 15 April 1912), revealing a shortage of lifeboats, shocked the society on both sides of the Atlantic. It was no longer just a question of assistance and salvage at sea, but the time to implement preventive safety actions. The

[56] Formally the Convention of Commerce Between His Majesty and The United States of America of 20 October 1818. London.

[57] International Court of Justice: History, (electronic format). Available at: *https://www.icj-cij.org/en/history (accessed on 15 July 2021).*

[58] [Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea] signed in Brussels, 23 September 1910, and entered into force on 18 January 1910.

Titanic sinking was the trigger for a safety-at-sea project, which finally saw the light of day in London, two years later. The *Convention Internationale Pour La Sauvegarde De La Vie Humaine En Mer (1914).*[59] The first of the series of Conventions for the Safety of Life at Sea (SOLAS**)** was born. However, the convention could not be implemented due to the outbreak of the First World War (WWI)

After the War, the Russian, Ottoman, Austro-Hungarian, and German empires disappeared, and new nations emerged. The interest turned again to territorial waters. "A new international organisation, the League of Nations, was established. One of the tasks of the League was the codification of the law of nations" (Koh, 2020, p. 183). A Committee of Experts for the Progressive Codification of International Law was established (April 1925) with the territorial sea as one of the 11 subjects for analysis. Nonetheless, after long talks and expositions of the different positions of the States, neither in the meetings, nor in the subsequent The Hague Conference for the Codification of International Law (1930), was it possible to reach an agreement (Grant, 2010; Koh, 2020). However, acceptance of the principle of freedom of navigation, territorial sovereignty over the territorial sea and the right of innocent passage began to grow after the Conference.

During the nine following years until the World War II (WWII), many States implemented their own local legislation claiming for them Contiguous Zones, with 12 miles as the most typical extent. In that decade, the 12-mile rule, taken as a general reference, even without consensus, was extended or modified in certain cases such as in the fight against smuggling (e.g., US Anti-Smuggling Act of 1935). In 1927 Russia had already claimed a 12-mile territorial sea, as did the majority of the "new States born between 1945 and 1960, as a result of the dissolution of the British, Dutch and French colonial empires" (Koh, 2020, p. 191).

The Covenant of the League of Nations[60] gave the responsibility for the establishment of a Permanent Court of International Justice (PCIJ) to the Council of the League (Art. 14). In the same year, the Netherlands Government proposed that the PCIJ would share its permanent seat with the Permanent Court of Arbitration in The Peace Palace. After the enactment of the Court's Rules and the different approaches considered, it opened on 30 January 1922

However, with the outbreak of the WWII, the Court became inactive. After the war, and with Article 33 of the new United Nations Charter in mind (entering

[59] [The International Convention for the Safety of Life at Sea] signed on 20 January 1914, and "Presented to both Houses of the Parliament by Command of His Majesty, February 1914" as reads the quotation from the front-page of Harrison and Sons "printers in ordinary to His Majesty" (electronic format). Available at:
https://archive.org/details/textofconvention00inte/page/n7/mode/2up (accessed on 15 March 2021).

[60] League of Nations, Covenant of the League of Nations, 28 April 1919. Société des Nations. Journal Officiel, Février, 1920.

into force on 24 October 1945), the re-establishment of a new international court was accorded. All judges of the PCIJ resigned on 31 January 1946, and the election of the first Members of the International Court of Justice (ICJ) took place on 6 February 1946. The ICJ was formally inaugurated on 18 February 1946 and resided in the same Peace Palace of The Hague.[61]

The USA acquired a hegemonic position after WWII. In 1948 two important proclamations were issued to get free from the three-mile constraint: Proclamation 2667 on Control over natural resources of the subsoil and seabed,[62] and Proclamation 2668 on Conservation areas (Brown, 1953). Very soon, this action was emulated by other States. The right to exploitation of oil and gas resources within their historic boundaries was adopted in the US Submerged Lands Resolution (1953).[63]

That war (WWII) brought a new international organisation, the United Nations (UN), "to take the place of the League of Nations […] The General Assembly of the United Nations established the International Law Commission" (Koh, 2020, p. 192), which included among subject matter «the high seas» and the «territorial waters.»

A plenipotentiary's conference convened by the General Assembly in 1957, and the First United Nations Conference on The Law of the Sea (UNCLOS I) opened in February 1958, in Geneva. The Commission recognized "that international practice is not uniform as regards the delimitation of the territorial sea."[64] A second conference on the Law of the Sea (UNCLOS II) took place in the same place the following March (1960) to try to agree on the maximum permissible breadth of the territorial sea. Again, "The amended Canada-US proposal fell one vote short for the required majority" (Koh, 2020, p. 198).

But in the years following WWII, and particularly during the 1950s and 1960s, after former colonies gained their independence, a new map of coastal states was drawn up, which in the wake of unilateral decisions such as the US in

[61] For a review of the rules of the International Court of Justice, see (Chandrasekhara Rao & Gautier, 2018).

[62] The term «continental shelf» appearing in this legal text was described in an accompanying press release as extending to the point where the waters reached a depth of 600 feet or 200 metres isobath (Koh, 2020, p. 189).

[63] For the legal problems on boundaries arising after this Resolution became an Act see (Shalowitz, 1954).

[64] The Convention on the High Seas entered into force on 30 September 1962. It is one of the four conventions resulting from UNCLOS. The problem of immigration was not an issue in those days and regulation was developed for seafarers in distress at sea. Following the boom of migrants in distress at sea, further additions were needed (2004 amendments to SOLAS, and the 1979 SAR). "Accompanying these norms there is a body of soft law, developed by the IMO in collaboration with other organisations such as UNHCR and ICS" providing well-advice to the shipmaster in rendering assistance (Attard, 2020, p. 284).
The other three derivations of UNCLOS I were the Convention on the Territorial Sea and Contiguous Zone, which entered into force on 10 September 1964; the Convention on the Continental Shelf, which entered into force on 10 June 1964; and the Convention on Fishing and Conservation of the Living Resources of the High Seas, which entered into force on 20 March 1966 (Koh, 2020, pp. 194–195).

1945 established various regulations concerning their territorial seas, with an importance in the UN General Assembly not to be dismissed.

In 1967 the USSR and the US came together “on the idea of recognising a 12-mile territorial sea provided that a high seas corridor was preserved in international straits” (Koh, 2020, p. 203). Also notable, in the same year (1967), Malta's representative to the General Assembly, Arvid Pardo, proposed a declaration of common heritage of mankind for the deep seabed beyond national jurisdiction, as a new edition of the concept of *Fundo Mare Liberum* rights. This positioning represented a renewed claim for equal rights “and distributive justice served as the rallying point for mainly developing states to push for a third Conference” [UNCLOS III] (Egede & Sutch, 2013, p. 309).

After almost a decade (1973 − 1982) of negotiations, on 30 April 1982 the United Nations Convention on The Law of The Sea (UNCLOS III), was approved at Montenegro Bay, Jamaica, coming into force on December 10 of the same year (1982).

Considered as much more than a treaty, even as a «constitution of the oceans,» it was defined as «an integral normative system, complete with a compulsory dispute settlement mechanism and its own (though non-exclusive) judicial forum» and represented the end of the old dispute on how far from land may a coastal State expand its jurisdiction versus the principle of freedom of the high water as a vast space impossible to subdue (Gavouneli, 2007). It replaced the four conventions adopted in Geneva (1958) on: Territorial Sea, Contiguous Zone, Conservation of the Living Resources of the High Seas, and High Seas.

Despite the active participation of the Reagan administration in the project, the 1982 Convention (UNCLOS III) was not ratified by the United States. The adoption of a public seabed beyond national jurisdiction (Part XI) was not welcomed and other States, such as the UK or Germany, also disagreed with this. There were also disagreements over technology transfer (Article 144) and production policies (Article 151). The revision policies (Article 155) and the absence of any guarantee of obtaining one of the 36 seats on the Council of the International Seabed Authority (ISA), resulting from the election by the General Assembly —in accordance with the rule set out in Article 161: composition, procedure, and voting— also played a role in the non-ratification.

Consultations began in 1990 to allow industrialised maritime states to join the Convention. To fulfil the demands, amendments to Part XI were accorded in 1994 (in the so-called New York agreement). After 1994, the United States recognised UNCLOS III as international law —coming finally into force on 16 November 1994, after the 60 ratifications and the following signed agreement— but the US has remained as the only major maritime state that failed to ratify the Convention (Egede & Sutch, 2013).

The final agreement (until now) relating to the Implementation of Part XI of the Convention came into force on 28 July 1996. A new agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks came into force on 11 December 2001.[65]

It must be pointed out that "The UNCLOS does not exhaust every aspect of international law of the sea and, as stated in its preamble, 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'" (Scovazzi, 2015, p. 403). However, and for the aspects covered in this dissertation it clarifies that the duty of rendering assistance to people in distress at sea is applicable in all circumstances provided that neither the rescue vessel nor its crew and cargo are endangered, (United Nations Office on Drugs and Crime, 2020, p. 10). UNCLOS III also establishes jurisdiction for the vessels in this regard.

The International Tribunal for The Law of The Sea (ITLOS)[66] started as an informal group and followed a parallel path to UNCLOS III (with meetings in Caracas 1974. Geneva, March and May 1975, New York, 1976, 1977, 1980, 1981, and Jamaica, 1982). The first meeting of the Preparatory Committee took place in Kingston on 15 March 1983. After UNCLOS III came into force on 16 November 1994, it was agreed that the first 21 judges would be elected in New York on 1 August 1996. This tribunal deals with claims between States.

The Inaugural Ceremony took place on 18 October 1996 in Hamburg, at the seat of the Tribunal. It consists of the following Chambers: Summary Procedure, Fisheries Disputes, Marine Environment Disputes and Maritime Delimitation Disputes. There is also a Seabed Disputes Chamber, where 11 judges resolve disputes relating to activities in the International Seabed Area.

In the meantime, as decades passed, various agreements (1929, 1948, and 1960) of the Convention for the Safety of Life at Sea (SOLAS) were signed, although the consolidated and lasting text had to wait until London, being agreed on 21 October 1974 and coming into force in 1980. Other binding and non-binding instruments adopted after 1982, not related to the scope of this thesis, such as the 1994 Implementing Agreement or the 1995 Fish Stocks Agreement, have been excluded from further comment.

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[65] A table recapitulating the status of the Convention and of the related Agreements, including the dates of signature and ratification or accession for all the States or entities (electronic format) is available at the UN site: *https://www.un.org/Depts/los/reference_files/UNCLOS%20Status%20table_ENG.pdf (accessed on 16 April 2021).* For a commented on abridged review of 20th century sea law see: (Ahmed, 2017).

[66] The information of ITLOS including the cases law in electronic format is available at: *https://www.itlos.org/ (accessed on 16 April 2021).*

CHAPTER TWO. CURRENT LEGAL FRAMEWORK FOR RESCUE OF PERSONS IN DISTRESS AT SEA

> The sea, the great unifier, is man's only hope. Now, as never before, the old phrase has a literal meaning: we are all in the same boat (Jacques Yves Cousteau, Oceanographer).

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The previous chapter has presented the process by which the long-standing customary usage of providing assistance at sea has, after a long period, become an endorsed and generally unquestioned international norm. This chapter will deal with the specific aspects of the current legal framework of the maritime rescue, closely linked to respect for the human rights of all persons (whether in need of rescue or not), and regardless of status, race, or circumstances, whether applicable on the high seas or in other seas under the jurisdiction of a coastal State.

At the basis of rescuing people in distress at sea is not only that customary tradition, but also (and probably the ultimate reason why this tradition has developed) the obligation not to kill or let people die, i.e., the respect for life, which is found almost without exception in all social groups on the planet (Howie, 1983; Kadish, 1976).

However, violence is ominously present in all societies together with "the known facts about crime and delinquency that had accumulated in the scientific literature in the preceding four decades" (Gottfredson & Hirschi, 2020, p. ix). It is just another example of the duality of good and evil that characterises the human being and that has been taken up by thinkers of many different cultural traditions since antiquity, permeating even art and law (Markesinis, 2007).

The rescue of people in distress at sea is not excluded from this duality. If on the one hand there is a concern for life and respect for people and their rights (expressed in recent decades by a growing body of doctrine and signed international agreements), on the other hand there is a reluctance to rescue migrants, for whom standard maritime rescue rules were not foreseen and which places a financial burden on the ship, delays commercial transit, and places the burden on States to provide those rescued with assistance in adequate conditions. This has led to criticism of the hypocrisy of salvage systems and the involvement of NGOs in rescues with compensatory intent (Cusumano, 2017, 2019).

Consequently, the reluctance to rescue irregular migrants' boats in distress at sea comes both from the people of the sea —who promoted the creation of rules to regulate rescue at sea focused on the occasional problem of a conventional ship in distress and not on a constant flux of pateras, cayucos or other types of small improvised maritime vehicle overloaded with migrants which results in delays and excess costs— and from the States that see how irregular migration disturbs the established rescue system, generating continuous economic expenditures. In the face of these positions, tragedy at sea, suffering and, not infrequently, death occurs.

Thus, one thing is the legal framework analysed below, and the other is the frequent attempts to evade obligations and escape commitments through return policies —often with dubious legal support— unjustified delays in the disembarkation of rescued migrants, or formulas for endorsing responsibility to other institutions or States. An old excuse, which has been the subject of commentary for more than a decade, is that while the obligation to render assistance to persons in distress at sea is clear, there is no comparable legally binding duty in the law of the sea to disembark these rescued persons (Coppens & Somers, 2010). A poor excuse since the rescuer ship cannot be a place of safety and has the right to continue its journey as soon as possible. Moreover, the place for disembarkation must be provided within a «reasonable time,»[67] as will be discussed in Chapter 5, Section 4.

The driving forces of today's maritime rescue are, on the one hand, the aforementioned rescue tradition and, on the other hand, the protection of individual rights, which may even extend to include protection against the State itself, particularly in the case of some minorities. However, the latter has a much more recent history than maritime salvage. The consideration of human rights, according to Harris and Sivakumaran[68] “in terms of the protection of human rights against State interference are very largely a post-1945 phenomenon” (Harris & Sivakumaran, 2015, p. 539).

Fortunately, the UN Charter[69] (Art. 1.3) established “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”, and the Art. 55(c) further reaffirms this point: “universal respect for, and observance of, human rights and fundamental freedoms for all without discrimination as to race, sex, language, or

[67] Guidelines on the Treatment of Persons Rescued at Sea. Resolution MSC 167(78) [MSC78/26/Add.2], adopted on 20 May 2004, 2.5, 2.6 reproducing new paragraph 1-1 of SOLAS regulation V/33, as adopted by Amendments to the International Convention for the Safety of Life At Sea, 1974 as amended. Resolution MSC153(78), and paragraph 3.1.9 of the Annex to the SAR Convention as adopted by Resolution MSC.155(78) (adopted on 20 May 2004) Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended, on the issue of reasonable time.

[68] This text with almost 1,000 pages and eight editions represents a golden standard reference for cases and material on international law.

[69] Charter of The United Nations and statute of the International Court of Justice, San Francisco 1945 (Into force on 24 October 1945), amended in 1963, 1965 and 1973.

religion." Respect for human rights and fundamental freedoms presides over a virtual plethora of treaties and agreements issued since then by the United Nations. The paramount importance of the Charter is that whereas prior to 1945 what happened within a country's borders was an exclusively internal matter, from that time onwards human rights, as we understand them today, began to be protected. The European regional counterpart is the European Convention on Human Rights (ECHR) and related legislation.[70] When the issue of migration is added to the rescue (see Chapter five), this appeal to human rights will become vitally important.

Rescue at sea has no geographical limits, it is applicable both on the high seas and in territorial waters, being currently supported by international human rights agreements and derived instruments. It is not limited by age, ideology, religion, race, or gender. The way this obligation is interpreted by the actors in terms of the rescue of irregular migrants in distress at sea is another question.

The aim of this chapter is to discuss the concept of a ship in distress, which currently has a precise legal definition, and then to review the obligation to provide assistance by ships and their associated rights. Finally, the obligations of States in ship salvage will be analysed, thus closing the maritime salvage framework from one side (ships) to the other (States).

2.1. The Legal Concept of Ship in Distress

A half-sunken small inflatable boat overloaded with irregular migrants (the so-called 'boat people'), and with no means of propulsion in hostile high seas probably offers little doubt of its distress situation. But the concept of distress, like many others in the salvage regulations, was not established when focusing on this particular situation. If a ship in distress has no one on board who requires rescue, it may be referred to as a ship in need of assistance.[71]

As advanced, the circumstance of irregular migrants in distress at sea was not taken into account when establishing the 1970s' regulations for rescue at sea (SOLAS, 1974 and SAR, 1979), because it was not a relevant issue at the time,

[70] The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR), Rome, 4 November 1950. Came into force on 21 September 1970. Amended by the provisions of Protocol No. 15 (CETS No. 213) as from its entry into force on 1 August 2021 and of Protocol No. 14 (CETS No. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5 paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added to by these Protocols were replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS No. 146) lost its purpose. Consolidated version (Strasburg 2 October 2013).

[71] IMO Assembly Resolution A.949(23) of 5 December 2003, Guidelines on places of refuge for ships in need of assistance, para 1.18.

although the label of 'boat people' goes back to the Indochinese crisis in the 1970s (Pugh, 2004). The added circumstance of migrant rescue will be dealt with in Chapter 5.The rule to provide assistance was established as an obligation linked to the assumption of the corresponding assent to be assisted. This raises a specific problem, the case of a watercraft in apparent distress, which does not wish to be rescued (e.g., because it wants to enter and be rescued later in the territorial waters of a certain State) and declares that it has no 'reasonable necessity' for assistance.

At what point does the obligation to render assistance arise? This question does not have a clearly defined answer either in the 1979 SAR Convention or in the 1974 SOLAS Convention. The first obvious circumstance is the conventional case of a ship declaring itself in distress, but what are the requirements for a ship to be considered legally in distress? The concept of distress has been the subject of controversy and debate in the courts over the years, with definitions and interpretations set in case law, as discussed in the following paragraphs.

The issue of distress is mentioned but not defined in UNCLOS III, but it has been clarified in the International Convention on Maritime Search and Rescue (SAR), 1979 as “a situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance.”[72] Thus, it requires the condition of imminent danger, but not necessarily a danger to the very existence of the persons concerned (Attard, 2020). The 'or' in the definition takes on meaning and is consistent with Attard's comments. As she pointed out, danger to persons is not an essential requirement, it would be sufficient if the ship itself were in danger, even if the persons were not jeopardised at that time.

This distinction between ship and people rescues stems from the ancient cargo salvage focus (commented on in Chapter 1). Cargo risk as cause of distress, has been invocated in some case law (Dockray, 2004),[73] and it is clarified in the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading.[74]

[72] International Convention on Maritime Search and Rescue (SAR 1979) (amended) as above, Annex, Chapter 1, Terms and Definitions, 1.13. Regulation 656/2014 includes further specifications in this respect for cases where the rescue is carried out by Frontex (see section 4.1).

[73] A key reference analysing virtually all significant case law relating to the carriage of goods by sea. The book includes an alphabetical list of cases (pp. xiii-xxxvii). As for the concept of ‘reasonable’ deviation, see Stag Line Ltd v. Foscolo, Mango, & Co (1932, House of Lords, AC 328). This point is important in the case of carriage of goods because of the associated liability. However, the shipowner or his/her master must fully assure seaworthiness by providing the means to do so, such as enough water, bunker, and provisions (*The Eleanor* case). The comments on Hague-Visby Rules are included in its Chapter 10 (pp. 151–192).

[74] First established in Brussels, 25 August 1924 (The Hague Rules) came into force on 2 June 1931, and amended on two protocols (1968 and 1979). Currently included as the Hague-Visby Rules effective since 24 February 1982 (electronic resource). Available at:
http://www.dutchcivillaw.com/legislation/haguevisbyrules.htm (accessed on 23 March 2023).

> Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom. (Art. IV- 4)

Note that the distress situation may be caused by structural or equipment failure, or in case of urgent need for refuelling, weather conditions, or other circumstances that pose a significant risk to crew and/or passengers. As set in the *Eleanor* case[75] by Sir William Scott "it must be an urgent distress; it must be something of grave necessity, such as is spoken in our books, where a ship is said to be driven by stress of weather" (p. 1068), but not for inadequate seaworthiness provision. The requirement of seaworthiness not only stems from ancient Common and Admiralty law, but also has implications for insurance and it is frequently reflected in contracts with recitals such as "must be of such a standard of fitness as an ordinary, careful and prudent owner would require of his ship, having regard to all the probable circumstances of the voyage".[76]

The following review of common law jurisprudence provides further insight into the concept of distress at sea, necessity, and force majeure.

- In the *Eleanor* (1809) case it was set that the necessity must be urgent— and mentioning the seaworthiness requirement— the situation not generated by the ship itself "by putting on board an insufficient quantity of water or of provisions for such a voyage" (p. 1068). This becomes an old requirement for distress to include an urgent necessity in its conceptualisation.

- The *New York* case[77] expanded distress to include the age-old concern for vessel and cargo: "The necessity must be urgent and proceed from such a state of things as may be supposed to produce on the mind of a skilful mariner, a well grounded [sic] apprehension of the loss of vessel and cargo, or of the lives of the crew" (p. 68). In other words, it is not valid for any distress, it must include a serious risk for the ship or the lives on board.

- In the *Diana case*[78] (1868) it was further re-established: "The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable doubt […] Any rule less stringent than this would open the door to all sorts of fraud" (pp. 360−1). A new stress has been put on the seriousness of the risk.

[75] *The Eleanor*, England and Wales High Court of Admiralty, 22 November 1809, 165 ER 1058. Also available in Edwards' Admiralty Reports (Little, Brown, 1853), 135, at pp. 159, 160 and 161. This legal case should not be confused with another U.S. Supreme Court maritime case with the same name, *The Eleanor,* 15 U.S. 2 Wheat. 345 345 (1817).

[76] For a monographic thesis on the legal aspects of seaworthiness, see A.H. Khassem thesis (electronic resource), available at: *https://discovery.ucl.ac.uk/id/eprint/6988/1/6988.pdf (accessed on 20 January 2022).*

[77] *The New York*, 16 U.S. 3 Wheat. 59 59 (1818).

[78] *The Diana*, 74 U.S. 7 Wall. 354 354 (1868) at pp. 360–361.

• *Phelps, James & Co. v. Hill*[79] was another illustrative case in which the *Llanduff City* was shipping a cargo of tin and iron plates from Swansea to New York. Although damaged by the storm the ship managed to reach Queenstown, but the owners ordered the ship to return to their own shipyard in Bristol for cheaper and quicker repairs. It was established in the process that the cargo could have been sold on or transferred to another ship. During the transit, the ship was hit by another vessel and sank. On the question whether the shipmaster was justified in deviating from his prescribed course, the Court of Appeal concluded that an agent is bound to conduct the business of his principal according to their instructions, and that the order to return to Bristol was not to be considered as 'unjustifiable deviation', as Bristol was the suitable port for the ship to be repaired. In his judgment the judge (J. Lopes) added: “A reasonable necessity implies the existence of such a state of things as, having regard to the interests of all concerned, would properly influence the decision of a reasonably competent and skilful master” (p. 614). In other words, that as long as the shipmaster did not object to or question the change of course, the circumstances of 'reasonable necessity' were not present, as that would have implied a different decision by the master. In the situation of distress following the collision, it could not be argued that the change of course played a role as it has been accepted by the master, who was aware of the damage to the vessel. In any case he would be liable for agreeing to sail in unseaworthy conditions. This case reinforces again the limits of what is a reasonable to consider a serious risk.

•In *May,* SS *v. The King*[80] a foreign fishing vessel seized within Canadian territorial waters, in violation of the Customs and Fisheries Protection Act Canadian, and claiming «stress for weather» the Supreme Court of Canada, considering the above jurisprudence concluded in same terms: “[...] unless the weather is such as to produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded [sic] bona fide apprehension [...] he will put in jeopardy his vessel and cargo” (p. 383). The case specifies when weather conditions are sufficiently severe to be considered a potential distress.

•Merk and *Djakimah v. The Queen*[81] provides additional jurisprudence for the case of ships in distress engaged in unlawful activities. The cargo *MV Frontier*[82] entered St. Helena on 22 December 1990 after having been declared in distress. The vessel was carrying a cargo of cannabis, and the shipmaster was

[79] *Phelps, James & Co v Hill* [1891]: 1 QB 605, CA (England and Wales).

[80] May SS. V. The King [1931] S.C.R. 374 [Supreme Court of Canada, 28.04.1931].

[81] *Merk and Djakimah v the Queen* [1991]: Supreme Court of St Helena, Case No 12.

[82] A cargo ship flying a Liberia flag of 148 m length and 10,811 GT; IMO 8614194; Call Sign A8K12. As for February 28, 2021, there has been no news of the vessel since 2018, it was either decommissioned or lost. It does not currently appear on the Lloyd's register. According to Devine the law of the ship was then Belgium or Holland and possession and transport of cannabis illegal according to this jurisdiction (Devine, 1996, p. 232).

convicted of importation and possession with intent to export drugs. The *MV Frontier* had sailed from the Maldives for Ghana but did not have fuel autonomy for the journey, as it has planned to meet another vessel off Walvis Bay, transfer the drugs and receive fuel. As the South African authorities were on tracking the ship, the meeting in Walvis Bay was cancelled. In order not to arouse suspicion for sailing in the Atlantic with bunker shortages, an engine problem was reported, and the *MV Frontier* was declared as a vessel in distress and, consequently, claimed to be outside the jurisdiction of the St Helena authorities. The Court concluded that it was not a vessel in distress. Firstly, it wasted some bunker near Walvis Bay looking for the refuelling ship and the place to leave the drugs, and secondly, it had sufficient fuel to sail, and dock at St Helena and consequently, the circumstance of distress was considered not to be present. The Court also reviewed the allegation of lack of jurisdiction, stating that this issue is a matter for the judge, and if the defendants allege lack of jurisdiction, the onus of proof is on their side.

But, of most interest, the Court stated that the case would have been different if the ship had been out of control off the coast of St Helena in real danger, i.e., not an intentionally created situation on the ship, instead a fortuitous situation in which fuel shortages were not relevant. According to the Court's statement, in the latter case, if the St. Helena authorities (upon finding that the ship had cannabis on board) refused entry, the ship would still have had a right, under international law, to enter St. Helena's port. This could have raised the question of whether the ship would then have immunity from jurisdiction. But the Court concluded that this reasoning cannot apply to the fuel shortages, which the ship must rely on for the voyage, or to any other intentionally self-inflicted distress. Under such circumstances “immunities are forfeited” (Devine, 1996, p. 231). A relevant aspect of the conclusions is that, despite its illegal activity, if the ship had been in danger, the Court recognised it would have had an international right of entry to port. In other words, the duty to render assistance extends even to persons or vessels engaged in criminal activities. What is notable in this case is that the benefits of a (valid) declaration of distress take precedence over any other criminal considerations that are not sufficient to deprive the ship in distress of assistance and eventual berthing.

The decisions taken in the cases described above together provide a very concrete framework for the terms of what is considered to be a ship in distress from a legal point of view. It is not possible to consider such a situation in the absence of the exceptional circumstances described above.

However, in the event of a possible allegation of distress and claim of immunity for vessels engaged in piracy or the slave trade, it must be considered that they are not free from interference even on the high seas, according to the right of access established by UNCLOS III, 1982, art. 110, let alone in territorial waters.

Salvage at sea has various legal consequences extending to the shipping and insurance companies, the ship itself, the cargo, as well as many other potential actors and factors. Therefore, the condition of *force majeure,* i.e., a «reasonable» or «well-grounded» necessity for immediate assistance is required. Note that in certain cases, such as in ship insurance, the domestic law of application, definitions and circumstances do not always coincide with the international law of the sea, as insurance is a private agreement between the parties.

The International Law Commission (ILC) has further stressed the issue: "force majeure caused by stress of weather, or a real threat to vessel, aircraft, platforms or other man-made structures at sea"[83] It should be noted, however, that the ILC is limited to State-to-State responsibility relations. Two aspects are relevant here, firstly that it is not restricted to weather and sea conditions, and secondly that it extends to any floating, anchored, or fixed manmade element. It may even extend to land, according to the SAR Convention as amended by Resolution MSC.155(78)[84]

> The notion of a person in distress at sea also includes persons in need of assistance who have found refuge on a coast in a remote location within an ocean area inaccessible to any rescue facility other than as provided for in the annex. (Added text to 2.1.1.)

This circumstance of *force majeure* grants two rights: firstly, the vessel may enter interior waters, and even enter a port of the coastal State; secondly, a certain immunity from the jurisdiction of the host State; basically, immunity from arrest and immunity from prosecution arising from the entry. The general idea behind this immunity is that the host State should not take advantage of the distressed ship's difficulties (Churchill & Lowe, 1999; Devine, 1996).[85]

The legal declaration of a vessel in distress, therefore, requires a number of conditions, notably *force majeure* not caused by negligence or lack of seaworthiness. The responsibility for salvage actions lies solely with the master of the ship, who may not be conditioned by the shipowner or any other agent. However, the principle of not leaving people stranded or dying at sea must prevail. Therefore, the consideration of a ship in distress must be done on a case-by-case basis, taking into account all circumstances, such as the number of passengers in relation to the size of the vessel, the provisions, the crew, passengers in distress

[83] State Responsibility: comment on Article 32.1 in the Report of the International Law Commission on the work of its 31st session, Geneva, 14 May–3 August ,1979. Disp. 673, p. 366 (electronic resource) available in several languages at *https://digitallibrary.un.org/record/4526?ln=es (accessed on 20 January 2022).*

[84] Resolution MSC.155(78), as above. Annex: amend to Chapter 2 (added text to 2.1.1).

[85] According to Devine, this immunity has a long tradition in agreements "The Mexican/American Commission under the Convention of 11 April 1839; The US/Brazil Commission under the Convention of 27 January 1849; Mixed Claims Commission under the UK/US Treaty of 8 February 1853; US/UK Claims under the Treaty of 8 May 1871); and in arbitration and case law (*The Enterprise*, Moore's arbitration, *The Creole*, *The Brig Ann*, *The Augusta*, *The Erie*, *The New York*, etc." (Devine, 1996, pp. 229–230).

or dead, pregnant women or children, weather conditions, etc. A final decision may not be an easy one.[86]

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2.2. Obligation of Ships to Render Assistance at Sea under International Law

The issue of maritime salvage has many facets. The obligations of coastal, SAR and flag States, those of the shipmaster in the last instance, and the jurisdictional aspects on the high seas, in territorial waters, or in the EEZ, as well as those specific to the salvage action itself or arising from human rights, and the safety of those rescued.

This section will discuss the general rules for determining jurisdiction on board and the respective responsibilities of ships when facing a situation of distress at sea, as part of the obligation assumed by the flag State signatory to international agreements, and the obligations of States.

Unfortunately, the establishment of jurisdiction, and especially the interpretation of the rules, is not always homogeneous. Chapter 7 will review aspects of jurisdiction at sea, and case law on controversial cases, including some relevant International Tribunal of the Law of the Sea (ITLOS) rulings.

2.2.1 The flag of the ship rule for the establishment of jurisdiction of rescue ships

On the high seas, rescued persons are subject to the laws of the flag State. According to UNCLOS III: “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas” (Art 92.1).

Thus, the first consideration regarding the jurisdiction of a vessel is the nationality of the ship (flag). The law of the flag has been applied for centuries, and it is applicable to all events which take place on the ship. The flag State exercises diplomatic protection on behalf of a vessel flying its flag (Churchill & Lowe, 1999). In other words, the law applicable to the ship is that of the flag State. “Every State shall [...] assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship” (Art. 94.2). In the *S.S. Lotus* case (*France v. Turkey*),[87] the Court stated:

> A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so [...] It follows that what occurs on board a vessel on the high

[86] The polemic issue of a ship in distress carrying dangerous goods requesting entry into a port will be dealt with next in this chapter.

[87] The case of *S.S. Lotus* (*France v. Turkey),* Series A, No. 10, Judgment 9 [Permanent Court of International Justice], of 7 September 1927.

> seas must be regarded as if it occurred on the territory of the State whose flag the ship flies (p. 23, para. 2).

In the case law of *Hirsi Jamaa and others v. Italy*,[88] The ECtHR, in addition to make a reference to the *Lotus* case, concluded:

> When the applicants boarded the Italian vessels on the high seas, they entered Italian territory, figuratively speaking, ipso facto benefiting from all the applicable obligations incumbent on a Contracting Party to the European Convention on Human Rights and the United Nations Convention relating to the Status of Refugees (§ 78).

According to the rule of the law of the flag, a ship has the nationality (and thus is subject to the laws) of the country whose flag is authorised to fly.[89] The nationality of a ship is given by each State "that shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag" (UNCLOS III, Art. 91).[90] Despite this Article, many States do not require a «genuine link» between the State and the vessel, leading to controversies in case of distress among the actors (Xernou, 2016, p. 36) and the issue of the flag of convenience.[91]

The law of the flag has also been recognised in US maritime (admiralty) jurisprudence prior to UNCLOS III. In the *Apollon* case,[92] a dispute about commercial tax payment, the Supreme Court established a recognition of the limited scope of the local jurisdiction, as reflected in the following paragraph: "The municipal laws of one nation do not extend in their operation beyond its own territory, except as regards its own citizens" (para.4). And, most importantly, the acceptance of the law of the flag "[t]here is no dispute as to the national [French] character of the ship" (para. 13).

The flag State has the obligation to comply with and enforce national and international laws and regulations: "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag" (UNCLOS III**,** Art. 94.1). The flag State "assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in

[88] *Hirsi Jamaa and others v. Italy* [GC], no. 27765/09, ECHR, 2012-II.

[89] This means not only flying the flag but also complying with flag Sate registration requirements, depending on the type of vessel freely fixed by the flag State (UNCLOS III, Art. 91).

[90] An extensive analysis on whether it is legally necessarily the flag to be flown on the high seas, versus a printed or affixed flag —in the hull, masts, wheelhouse, cabin, chimney or another deck structure or outboard (motor)— and whether alternative electronic identification devices such as Automatic Identification Systems (AIS) or a Global Positioning System (GPS) are sufficient means to identify the flag State can be found in a review by the Barry University School of Law (Dubner *&* Arias, 2017)(Dubner & Arias, 2017).

[91] For flag of convenience or stateless vessels see (Xernou, 2016, pp. 37–45). As stated in the *Muscat Dhows* case (Fr. v. Gr. Brit, Permanent Court of Arbitration, The Hague Arbitration Cases 64, 1905), France granted the Sultan of Muscat the right to fly the French flag and the Court of Arbitration concluded that 'it belongs to every sovereign to decide to whom he will accord the right to fly his flag' and the same was included in the 1958 Convention on the High Seas (UNCLOS I) (Art. 5), although with the limit of a genuine link between the State and the ship (Churchill & Lowe, 1999, pp. 205–206). The question of the 'genuine' link has been in debate for quite a time.

[92] *The Apollon*. 22 U.S. 9 Wheat. 362 362 (1824).

respect of administrative, technical[93] and social matters concerning the ship" (UNCLOS III, art. 94.3).). "This [...], entails that States actually implement appropriate domestic laws, regulations, and enforcement mechanisms in respect of their international obligations. A failure to do so may give rise to a presumption that due diligence has not been exercised" (Barnes, 2015, p. 324).

Nationality of the vessel "also indicates which State is responsible in international law for the vessel in cases where an act or omission of the vessel is attributable to the State" (Churchill & Lowe, 1999, p. 205). This is not a minor aspect, as it opens an avenue for claims in courts or tribunals that are restricted to State claims only (e.g., ITLOS).

As a general rule, although States, and even some courts, have episodically adopted different interests in approaches to the issue, including in these exceptional cases the so-called creeping jurisdiction, the universally accepted international rule for a ship on the high seas is that its only jurisdiction is that of the flag State. According to Honniball, the scope of flag State jurisdiction is limited to the high seas. "The increasing use of port state prescriptive jurisdiction, particularly those practices with extra-territorial effect, provides further evidence that this is the correct interpretation" (Honniball, 2016, p. 499).

As is usually the case, the flag State has signed international agreements, and they will be governed by those agreements, as well as by the International Covenant on Civil and Political Rights.[94] This legal text grants rights applicable to the immigrants on board, including the right of self-determination and to freely determine their political status (Art. 1.1); not to be deprived of its own means of subsistence (Art. 1.2); not to be subjected to torture or to cruel, inhuman and degrading treatment or punishment (Art. 7); and the right to liberty and security, without being subject to arbitrary arrest or detention (Art. 9); even "persons deprived of their liberty shall be treated with humanity and with respect to the inherent dignity of the human person" (Art.10).

Although the master represents the flag State authority on board, it is the master himself/herself who is responsible for the actions, not the flag State, without prejudice to a subsequent claim against the flag State in the event that there might be a legal basis for doing so.[95] Furthermore, the United Nations High

[93] Seaworthiness requirement is also included in SOLAS particularly after the International Ship and Port Facility Security (ISPS) Code amends (Morocco, 2005).

[94] International Covenant on Civil and Political Rights [ICCPR]. General Assembly resolution 2200A (XXI), of 16 December 1966.

[95] The shipmaster is an employee of the shipping company, and therefore a private actor, but can have public functions, particularly notary and civil registry functions on behalf of the flag State in certain circumstances, and register births, deaths, last wills, or celebrate marriages, i.e., acts that can subsequently be recorded on public registers and therefore have an *erga omnes* effect. In the Spanish Civil Code, the particular circumstances that allow a shipmaster or commander to celebrate marriages are set out in Art. 52.3.

Commissioner for Refugees (UNHCR)[96] underlines the fact that, as far as the hearing or the asylum application is concerned, the master has no power; that is sort out solely by governmental authorities and UNHCR. However, in the case of rescued persons, the shipmaster should indicate whether they are asylum-seekers, or potential refugees at risk of persecution or ill-treatment.

The question of whether entities enjoying legal personality such as the UN or NATO can own ships in order to develop their legal duties and fly their flag on them was extensively discussed by the International Law Commission,[97] under the consideration that the flag of the UN could not be assimilated to the flag of a State. The issue was already established in the first Convention on the High Seas (UNCLOS I) by reserving the granting of a flag only for States:[98]

> Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these Articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry. (UNCLOS I, Art. 6)[99]

Although this "do[es] not prejudice the questions of ships employed in official services of an international governmental organisation flying the flag of that organisation" (Churchill & Lowe, 1999). In practice, the UN flag has very rarely flown on a ship. One of these rare occasions was the use of the UN flag on ships carrying grain from Ukraine to Turkey under the agreement in the context of the Russian invasion of Ukraine. In such cases, they may never be flown in places reserved for the ship's national flag.[100] It is convenient to insist at this point that a ship cannot fly two flags, as this "may be assimilated to a ship without nationality" (UNCLOS III, Art. 92).

While on the high seas there is little doubt about jurisdiction, especially after the UNCLOS series, the issue of jurisdiction in supposedly territorial waters was the subject of previous open controversy, as illustrated in the following case law.

In the *Lotus* case (1927)[101] (like a similar one (*Franconia*),[102] two vessels where involved, one French-flagged (*SS Lotus*) and the other a Turkish steamer.

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[96] UNHCR Rescue at Sea a Guide to Principles and Practice as Applied to Refugees and Migrants, p. 11. (Electronic resource), available at: *https://www.unhcr.org/publications/brochures/450037d34/rescue-sea-guide-principles-practice-applied-migrants-refugees.html (accessed on 21 March 2023).* See also *the* Procedural Standards for Refugee Status Determination under UNHCR's Mandate (electronic resource), available at: *https://www.unhcr.org/4317223c9.pdf (accessed 20 December 2020)*.

[97] UN. Yearbook of the International Law Commission 1955. Volume I. Summary records of the seventh session. 2 May — 8 July 1955, pp. 224-7.

[98] Convention on the High Seas [UNCLOS I], Geneva United Nations, Treaty Series, vol. 450, p. 11, p. 82 of 29 April 1958. Entered into force on 30 September 1962.

[99] This restriction to only one State flag is repeated in UNCLOS III, Art. 92.

[100] In the case of Spanish ships, according to RD 2335/1980 of 10 October, the stern mast and the peak of the mainmast shall be reserved for the Spanish Flag. No other flag or ensign may be flown unless the national flag is flying, and its dimensions shall never exceed one third of the area of the national flag.

[101] SS Lotus case, *France v. Turkey*, as above.

The collision resulted in the drowning of eight Turkish nationals in the waters off northern Greece. When the *Lotus* arrived at Istanbul the master was arrested and prosecuted for murder. The controversy reached the Permanent Court of International Justice and set the so-called Lotus principles:

The Court clarified the distinction between prescriptive and enforcement jurisdiction. Regarding prescriptive jurisdiction "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction." The first *Lotus* principle (para. 45), established that one State cannot extend its jurisdiction outside its territory, but opens an exception to do so by virtue of a permissive rule derived from international custom or from a convention for enforcement. The second *Lotus* principle (paras. 46–47) established that a State will have the right to use its own jurisdiction within its own territory even if there is no specific rule of international law that gives it the exclusive authority to do so. In other words, when there are no rules of international law preventing it from doing so.

Finally, the Court concluded that if a foreign ship has committed an alleged infringement against a ship flying the national flag, outside territorial waters, the same principles should apply as in the case of the territories of two different States.

It must therefore be concluded that, in the absence of any rule of international law prohibiting the State to which the ship belongs from considering that the infringement has been committed in its territory, prosecution of the alleged offender is therefore possible.

This doctrine was applied until 1958, when the Geneva Convention on the High Seas (UNCLOS I)[103] established that "no State may validly subject the high seas to its sovereignty" (Art. 1). Finally, the UNCLOS III further clarified the new rule: "no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national" (Art. 97).

One more word is required about universal jurisdiction. Although it appears from UNCLOS III that States have agreed to limit their jurisdiction over the seas according to the territorial principle (territorial waters or vessels flying their flag), in the case of some specific crimes occurring at sea, e.g., piracy and maritime terrorism, States seem to prefer the principle of universal protection over the principle of territoriality (Fabris, 2017, p. 19). This relates to the consideration of these crimes as universally punishable crimes. UNCLOS III authorises, even "on

[102] There have been several *Franconia* cases. Here the reference is for the *Regina v. Keyn* case (13 November 1876. Court for Crown Cases Reserved 2 Law Reports [Exchequer Division] 63).

[103] 1958 Geneva Conventions, as above (UNCLOS I) not to be confused with the Convention and Protocol relating to the Status of Refugees (1951 Geneva Convention thereafter), Geneva, 28 July 1951, Treaty Series Protocol (189 U.N.T.S. 150) no. 2545 (Into force 22 April 1954), and General Assembly Resolution 2198 (XXI), of 16 December 1966, entry into force 4 October 1967.

the high seas, or in other place outside the jurisdiction of any State, [to] seize a pirate vessel […] taken by piracy and under the control of pirates and arrest the persons and seize the property on board" (Art. 105).

Regarding universal jurisdiction under the Spanish law, a legislative amendment[104] increased the scope of Spanish jurisdiction, extending it (with the limitations included in its Art. 5), on the one hand, to crimes that, having been committed outside national territory, and regardless of the nationality of the perpetrator, are susceptible to being investigated by Spanish jurisdiction and, on the other hand, defining the conditions that must be met for Spanish justice to have jurisdiction, adapting universal justice to the principle of subsidiarity and to the jurisprudence of the Constitution and the Supreme Court. On the other hand, the application of universal jurisdiction restricted the Spanish courts' capacity to act and generated various controversies, on the high seas and with regard to the archipelagic waters of the Canary Islands, with a conflict between the central and autonomous (regional) governments in this regard (Santos-Vara, 2014).

Focusing on the issue of the jurisdiction at sea establishes:

> CUATRO. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas:
> …
> d) Delitos de piratería, terrorismo, tráfico ilegal de drogas tóxicas, estupefacientes o sustancias psicotrópicas, trata de seres humanos, contra los derechos de los ciudadanos extranjeros y delitos contra la seguridad de la navegación marítima que se cometan en los espacios marinos, en los supuestos previstos en los tratados ratificados por España o en actos normativos de una Organización Internacional de la que España sea parte.
> ….
> e) Terrorismo, siempre que concurra alguno de los siguientes supuestos:
> …
> …. 7.º el delito haya sido cometido contra un buque o aeronave con pabellón español[105]

[104] Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal. [Organic Law 1/2014, of 13 March, amending Organic Law 6/1985, of 1 July, on the Judiciary, on universal justice.] «BOE» No 63, 14.03.2014, pp. 23026 – 23031.

[105] [FOUR. Likewise, Spanish jurisdiction will be competent to hear acts committed by Spaniards or foreigners outside the national territory that may be classified, according to Spanish law, as any of the following offences when the aforementioned conditions are met:

...

d) Crimes of piracy, terrorism, illegal trafficking in toxic drugs, narcotics or psychotropic substances, trafficking in human beings, against the rights of foreign citizens and crimes against the safety of maritime navigation committed in maritime areas, in the cases provided for in treaties ratified by Spain or in regulatory acts of an International Organisation to which Spain is a party.

....

e) Terrorism, provided that any of the following circumstances apply:

...

(e) 7.º the offence has been committed against a ship or aircraft flying the Spanish flag].

The Convention for the Suppression of Unlawful Acts[106] surging after the hijacking of the Italian vessel *Achille Lauro* by armed members of the Palestinian Liberation Organization, signed in 1988, further stressed the question and establishes that State Parties are obliged to apply their jurisdiction and enact penalties over those offences.

The following sections will discuss the obligation of ships to rescue and also the obligation of States, as well as the circumstance of rescue in territorial waters within the so-called SAR zones.

♦

2.2.2. Scope of the legal obligation of ships to render assistance in case of distress at sea

> The duty to render assistance exists throughout the ocean, be it in a territorial sea, in straits used for international navigation, in archipelagic water, in an exclusive economic zone or on the high seas (United Nations Office on Drugs and Crime, 2020, p. 10).

This section will concentrate only on marine vessels, i.e., usually ships, when they have the capability to perform a rescue operation, although this is not to say that a seaplane, a boat, or other small watercraft (even a jet-ski) cannot occasionally perform a rescue operation.

Does a vessel have an absolute obligation to provide assistance to persons in distress at sea? (Fife, 2003). The commercial charter is subject to private law, and these contracts do not usually specify any obligation to render assistance at sea. As discussed in the following paragraphs, sea rescue is a public law obligation incumbent on the flag State, of which the master, while retaining his/her private character, is a representative.

It is on the basis of this dual character of the master, representing the interests of the shipowner on the one hand, but also of the flag State on the other, that they has been allowed, over the centuries, to take actions that transcend the private sphere. This also implies that, in the event of a breach of its role as representative of the flag State, it is incumbent on the flag State to take appropriate punitive measures, regardless of how the case has been resolved in an international court, where the claim is usually against State not against one person. In other words, domestic and international avenues do not necessarily match.

[106] It includes two documents, the Convention, and the Protocol for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention). Adopted 10 March 1988 (Rome); Entry into force 1 March 1992 and the Reviewed 2005 Protocol (London): Adopted 14 October 2005; Entry into force 28 July 2010.

The obligation of rescue comes, firstly ─and in addition to the long-term uses at sea, and previous regulations as discussed in Chapter One─[107] from UNCLOS III, establishing that every State will require the shipmaster of any ship flying its flag to render assistance "without serious danger to the ship, the crew or the passengers" to any person in distress at sea "with all possible speed to the rescue" (Art. 98(1)). It could be argued that this obligation is covered by Part VIII, and therefore, only applies on the high seas. This possible narrow interpretation is ruled out as the obligation is also included in SOLAS[108] and SAR, making no exception on which waters are of application. According to SAR, this obligation is kept "regardless of the nationality or status of such a person or the circumstances in which that person is found [...] provide for their initial medical or other needs and deliver them to a place of safety."[109] Salvage obligation is also included in the fourth key international agreement for rescue, the International Convention on Salvage, 1989 (Arts. 8 and 10),[110] and in the IMO Guidelines.[111] Note that Art. 98 of UNCLOS III states that the duty extends to «any person» without any exclusion. Accordingly, irrespective of legal or irregular immigration status, alleged or confirmed criminal charges, including smuggling of persons and other cases, SAR operations have no territorial limits and extend also to the high seas. This is confirmed by the fact that SAR zones also include areas on the high seas.

As per Attard, both SOLAS and SAR refer to «assistance» rather than «rescue» but "[t]he obligation would still apply to rescue operations, which constitute the rendering of assistance" (Attard, 2020, p. 61). The covering of all kinds of survivors without distinction is further stressed in a 2002 IMO Resolution[112], i.e., regardless of nationality, status, or circumstances, including undocumented migrants, asylum seekers, refugees, and stowaways, all of whom should be treated in "accordance with relevant international agreements and long-standing humanitarian maritime traditions" (Request 1, para 3), an obligation

[107] The Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, (1910, Art 11), and the 1958 Geneva Convention on the High Seas (HSC) as above, Art. 12.1.

[108] SOLAS 1974, Chapter V (consolidated text as of 1 July 2002, as above), Regulation 10 (a). Note that Regulation 1 of Chapter V (safety of navigation; application) states: "unless otherwise expressly provided in this Chapter, applies *to all ships on all voyages*, except ships of war and ships solely navigating the Great Lakes of North America and their connecting and tributary waters."

[109] International Convention on Maritime Search and Rescue (**SAR**). Adoption: 27 April 1979. Entry into force: 22 June 1985. Amended by Resolution MSC 155(78) as above, Annex Ch. 2, para 2.1.10.

[110] International Convention on Salvage, London, 28 April 1989, in force since 14 July 1996. Reg No 33479, UNITS Vol No 1953. London on 28 April 1989, that replaced the Brussels Convention on Assistance and Salvage at Sea of 1910. As for Spanish ratification: Instrumento de Ratificación del Convenio Internacional sobre Salvamento Marítimo, 1989, hecho en Londres el 28 de abril de 1989. «BOE» núm. 57, de 8 de marzo de 2005, páginas 8071 − 8078 [Instrument of Ratification of the International Convention on Maritime Rescue, 1989, done at London on 28 April 1989. «BOE» No. 57 of 8 March 2005, pages 8071 to 8078.]

[111] Guidelines on the Treatment of Persons Rescued at Sea. Resolution MSC.167(78) as above.

[112] Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, IMO Resolution A22 Res.920 of 22 January 2002, of 29 November 2001.

further emphasised in Resolution A/RES/68/179.[113] Note that in all of these regulations the request is not directly addressed to the shipmaster, but to the coastal and flag States "that are required to ensure that shipmasters provide assistance" (Attard, 2020, p. 61).

Aside from intentional refusal to provide assistance, there may be other special circumstances where it could be unreasonable or unnecessary to provide assistance. This circumstance of failing to proceed must be entered in the logbook[114] A brochure with the detailed steps in case of finding migrants in distress at sea is available in several languages[115]

UNCLOS III, Art 98(1), established a key exclusion from the obligation to render assistance ─exemption repeated in other conventions─ in case the ship herself, the crew, or passengers may be seriously endangered.

According to IMO,[116] the ship's obligation is subsidiary and for as short a time as possible, as the primary obligation remains with the States through the MRCC: "The obligation of the master to render assistance should complement the corresponding obligation of IMO Member Governments" (Annex 1.2) This is consistent with the fact that it is the State that adhere to the treaties and not the ship trading companies. The obligation therefore derives from the State's commitment in the accession to the conventions. Notoriously, the shipmaster becomes the representative of the State *sic plenem potestatem ad hoc.* Consequently, for rescue procedures, the shipmaster has autonomy even over the owner, the charterer, or the company.[117]

However, "the acts and/or omissions of the vessel are not automatically attributable to the State, as the ship remains in private actor and the usual rules of attribution would apply" (Gavouneli, 2007, p. 34).[118] Such acts or omissions have two aspects: on the one hand, the determination of responsibility under domestic law, and on the other hand, the international responsibility of the flag State.

As for jurisdiction for the domestic issue, according to UNCLOS III, in any incident on the high seas involving responsibility of the master "no penal or

[113] Resolution adopted by the General Assembly on 18 December 2013 [on the report of the Third Committee (A/68/456/Add.2)]. Protection of migrants, A/RES/68/179, of 28 January 2014.

[114] SOLAS 1974 Chapter V (consolidated text as of 1 July 2002, as above), Regulation 33.1.

[115] The United Nations High Commissioner for Refugees (UNHCR) publication: Rescue at Sea a Guide to Principles and Practice as Applied to Refugees and Migrants (as above).
See also *the* Procedural Standards for Refugee Status Determination under UNHCR's as above and also, IMO. Resolution adopted by the General Assembly on 29 November 2001 [A 22/Res.920, 22 January 2002]: Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, and MSC.167(78) (as above).

[116] Guidelines on the Treatment of Persons Rescued at Sea. IMO Resolution MSC.167(78) as above, 1-Purpose, para 1.

[117] IMO, Resolution MSC. 78/26/Add.1, Adoption of Amendments to the International Convention for the Safety of Life at Sea (2004) Annex 3, Regulation 34-1.

[118] In this regard see the Resolution A/56/83, of the UN on Responsibility of States for Internationally Wrongful Acts, of 28 January 2002.

disciplinary proceedings may be instructed against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is national" (Art. 97.1).

In case of rescue in territorial waters, action by the coastal State through its MRCC should not be interpreted as undermining the jurisdiction of the flag State. According to a UN Protocol,[119] State party requires the express authorisation of the flag State "except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements" (Art. 8.5, para 2).

This obligation has some restrictions. Firstly, the regulation applies only to shipmasters flying the flag of a State that is part of these international treaties. As per Smith, for non-ratifying States it becomes only general Maritime Law, and thus it is not possible to legally enforce the general duty for rescue, which remains only as a moral duty (Smith, 1971, p. 148). Secondly, the warships and State-owned vessels have immunity and are excluded from the obligation.[120]

This is consistent with the idea that, unlike a shipmaster who acts as a subsidiary representative of the State (but still a private actor), the commander of a warship is vested with governmental authority and full standing of the flag State, without prejudice to disciplinary action that may be taken against him/her in case of failure to comply with his/her obligations or instructions issued by a superior hierarchy. It is therefore up to the commander of the armed vessel, who enjoys immunity, and who is vested with direct State authority, to decide whether or not to comply with the request and instructions of the MRCC. As per Fantinato, the norm is not self-executory, and requires flag States to implement domestic laws to impose duties and punishments on shipmasters flying their flags. In this way, the State can also extend the requirement to military personnel.[121]

It is common practice for governments to request warships to act in a manner consistent with this obligation (United Nations Office on Drugs and Crime, 2020, p. 10). This is in line with SOLAS encouraging warships and other ships owned or operated by a Contracting Government "to act in a manner consistent, so far as reasonable and practicable" (Chapter V, Regulation 1.2). It does not

[119] United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational organized Crime [Palermo Protocol] General Assembly Resolution A/55/25 of 15 November 2000.

[120] Convention for the Unification of Certain Rules of Law Relating to the Assistance and Salvage at Sea, 1901, Art. 14; UNCLOS III, Art. 32; SOLAS, Chapter V, Regulation 33; SAR, Art.10; International Convention on Salvage 1989 (as above), Art. 4.

[121] As in Italy, e.g., the Italian Penal Code (Art. 593) and the Italian Navigation Code (Art. 489) sets an obligation to provide assistance upon all ship masters while Art. 1113 of Navigation Code provides the related punishments for failing to do so. According to this provision, anyone failing to assist persons in distress at sea can be sentenced to 1 to 3 years imprisonment. Same punishment applies additionally for military personnel under the Italian Penal Military Code (Art. 113). "It is worth noting that for military personnel, both court proceedings would be initiated (civil and military)" [Marco Fantinato, PhD, Major (NATO OF-3) - Senior Training Officer]. Personal communication, 27 April 2021.

seem logical that, in peacetime, just because authority is delegated in one case and direct in the other, warships should be exempted from the duty to render assistance at sea.

However, it should also be taken into account that warships may be carrying out some manoeuvres or actions implying a restriction in their ability to manoeuvre according to COLREG[122] definitions (rule 3(g) ii, iv, v), which cannot reasonably be interrupted in a short time. This is particularly the cases for exercises involving the laying of mines, even simulated ones; also other military items which must be kept secret, but that have the potential to strike and cause damage to passing merchant ships or cause disturbance to navigation. In any case, such military training usually takes place in territorial waters, so there would not be a jurisdictional conflict either. Additionally, and according to the IMO "State-controlled vessels (such as coastguard vessels and warships) have direct obligations under international refugee law (notably, the obligation not to engage in or allow refoulement."[123]

In line with this responsibility, a Resolution of the Council of Europe,[124] recommended the IMO to amend the SOLAS Convention so that the exemptions for warships and troopships do not apply to search and rescue equipment, the transmission and reception of distress signals and communication aids during search and rescue operations.

Turning to the general case of rescue, manoeuvrability limitations may also occur in civil ships such as trawlers using fishing gear, offshore seismic survey ships, towing sonar devices, ships dredging, laying cables, or pipelines and similar circumstances involving limited or restricted ship mobility.[125] However they still are obliged, within their possibilities, to cooperate or facilitate the rescue, including keeping communication channels open, and to help within their possibilities.

Rescue actions must be carried out with «due diligence» according to UNCLOS III[126] and SOLAS,[127] but also, according to the amendments introduced to SAR Convention (1979),[128] causing the least inconvenience to the commercial

[122] IMO. International Navigation Rules. COLREG-1972 as above.

[123] Rescue at Sea: A Guide to Principles and Practice as Applied to Refugees and Migrants (as above), p. 14.

[124] Council of Europe: Parliamentary Assembly, Resolution 1999(2014) as above. It includes a recommendation to the IMO for amendment to International Convention for the Safety of Life at Sea (SOLAS) to (: "expressly provide that exemptions generally applying to ships of war and troopships do not apply to Search and Rescue equipment and devices essential to transmitting and receiving distress signals and for communicating during search and rescue operations" (8.3).

[125] Included in the «restricted manoeuvrability» definition as established in IMO: COLREG-1972, navigation rule 3(g).

[126] Art. 98 (1).

[127] Chapter V, Reg. 33.

[128] Resolution MSC.155(78) as above: "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

activity of the rescue vessel, “as such rescue activity entails delays and additional costs for the shipowner” (Guilfoyle & Papastavridis, 2014, p. 13).

It is important to highlight this right of the master to avoid delays in the business and its associated costs, as there seems to be a tendency to emphasise obligations but overlook rights. An additional MSC Resolution[129] reiterates the obligation of States to avoid delays, and financial burdens on rescue vessels, “Flag and coastal States should have effective arrangements in place for timely assistance to shipmasters in relieving them of persons recovered by ships at sea” (3.1, para. 4), under the instructions of the corresponding MRCC, and if it is not possible to establish contact, to try to contact another MRCC “or any other Government authority that may be able to assist” (5.1.2 and 5.1. 4), although the primary responsibility remains with the MRCC in the area.

Leaving aside the above-mentioned legal exemptions or manoeuvrability restrictions, the salvage procedure is generally clear: To rescue and attend, as far as possible, to the needs of persons in distress, following the manual International Aeronautical and Maritime Search and Rescue (IAMSAR).[130]

The obligation does not extend beyond providing the means available, taking into account the general principle of not endangering the ship, crew, or passengers. The MSC Resolution (167/78) states that migrants’ assistance on board is, thus, limited to the vessel possibilities and the shipmaster must “do everything possible, within the capabilities and limitations of the ship, to treat the survivors humanely and to meet their immediate needs” (5.1.2).

Note that the word «cargo» does not appear in Article 98(1) of UNCLOS III, which would open up a controversial possibility of dumping cargo in an extreme case where the number of rescued persons or other circumstances could endanger the integrity of the ship or its navigation, particularly in case of unfavourable weather conditions.

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with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea […].” Annex [new paragraph to SAR], 3.1.9.

[129] Guidelines on The Treatment of Persons Rescued at Sea, MSC.167(78) as above, Annex, 6.3.

[130] According to SOLAS Chapter V, Reg. 21: “All ships shall carry an up-to-date copy of Volume III of the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual.” The IAMSAR Manual Jointly published by IMO and the International Civil Aviation Organization (ICAO) comprises three volumes, each with specific search and rescue (SAR) system duties and can be used as a stand-alone document or in conjunction with the other two volumes as a means to attain a full view of the SAR system. Volume I on Organization and Management discusses the global SAR system concept, establishment and improvement of national and regional SAR systems and cooperation with neighbouring States to provide effective and economical SAR services [Ref. IMO: IMO960E]. Volume II, Mission Coordination, assists personnel who plan and coordinate SAR operations and exercises [Ref. IMO: IH961E, X-00037872]. Volume III, Mobile Facilities, is intended to be carried aboard rescue units, aircraft, and vessels to help with performance of a search, rescue, or on-scene co-ordinator function, and with aspects of SAR that pertain to their own emergencies [Ref. IMO: IK962S]. The 2022 edition incorporates amendments adopted by ICAO and approved by the IMO Maritime Safety Committee. The 2015 amendments enter into force on 1 July 2016. The Manual is obtainable on payment.

Faced with challenging situations such as migratory movements and smugglers' techniques, the shipmaster may be confronted with unforeseen circumstances in which there is not a *secundum legem* option. In such situations, and given the ancient custom of rescue and assistance at sea, and the principles of respect for human rights manifested in the spirit and purposes of the many rules described in this text, an action based on general principles (*praeter legem)* may be the only option.[131] Additional information on principles and guidelines issued by the Office of the High Commissioner on Human Rights (OHCHR) may be useful.[132] As mentioned, the shipmasters are authorised to take decisions even at odds with the shipowners enabling the shipmasters to adapt to extraordinary or unforeseeable circumstances or manoeuvrability difficulties.

Issues related not only to failure to comply with the rescue obligation, but involving hostile acts against the distressed vessel, or misrepresentation of data relating to the rescue, will be additionally dealt with later, in Chapter 6**,** which analyses the criminal aspects of smuggling of persons and their rescue in case of distress.

One situation that can be controversial is when a vessel at sea finds a boat with evidence of distress but the skipper refuses to be rescued. Although the shipmaster has autonomy even over the owner, the charterer, or the company,[133] it must be accepted that it is very difficult to peacefully move people who do not want to be moved.

The shipmaster is thus faced with the choice of either respecting the skipper's decision ─ allowing the boat in apparent distress to continue sailing, in accordance with the principle enshrined in UNCLOS III, Article 87(1.a), which is based on the long-standing custom of freedom of navigation, leaving the lives of the persons to their fate─ or acting in salvage in accordance with the legal rescue obligation of the ship discussed above, but never using force.

However, in a number of cases, the boat's demand to continue sailing, appealing to the jurisdiction of her flag State, is often less relevant, as many migrants' boats do not fly any flag or are flagless. In any case, as violence is not permitted, all that remains is to keep a cautious watch at a distance in case

[131] In case of a Spanish flag, such action by the shipmaster will be supported by Article 3.1 of the Spanish Civil Code: Las normas se interpretarán según el sentido propio de sus palabras, en relación con el contexto, los antecedentes históricos y legislativos, y la realidad social del tiempo en que han de ser aplicadas, atendiendo fundamentalmente al espíritu y finalidad de aquellas [The rules shall be interpreted according to their own meaning, in relation to the context, the historical and legislative background, and the social reality of the time in which they are to be applied, taking into account the spirit and purpose of the rules]. Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil. «Gaceta de Madrid» núm. 206, de 25/07/1889.

[132] UN Human Rights. Office of the High Commissioner. Recommended Principles and Guidelines on Human Rights at International Borders (electronic resource). Available at: *https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf (accessed on 7 May 2021).*

[133] IMO, Resolution MSC. 78/26/Add.1, Adoption of Amendments to the International Convention for the Safety of Life at Sea (2004) Annex 3, Regulation 34-1.

circumstances may change, always without compromising one's own vessel, and keeping contact with the MRCC as appropriate.

This circumstance could get worse in case of aggressiveness on the part of the persons on the vessel allegedly in distress. In this regard, it should be borne in mind, once more, that the fundamental condition established in UNCLOS III for a rescuer is not to endanger one's own safety: “insofar as he can do so without serious danger to the ship, crew or passengers” (Art. 98.1), so that in cases of armed hostility, removal seems clearly justified.

The rescue obligation is unrestricted. All air and waterborne crafts have a clearly regulated obligation to render assistance to persons in distress at sea (in the circumstances indicated, i.e., without seriously endangering the vessel itself, the crew or the passengers), regardless of the nationality of the persons rescued, their status, or the circumstances in which they find themselves, and even if the persons in distress are engaged in an illegal activity, or if they are stowaways.[134]

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2.3. State Rescue Obligations and Initiatives: Search and Rescue (SAR) and Maritime Rescue Coordination Centres (MRCCs)

It has been noted in the previous section that the responsibility for rescue at sea rests with the signatory States to the treaties therein (UNCLOS III, SOLAS, SAR, IMO), with the ship being only a delegated element in fulfilling this obligation.

Additionally, the States have the obligation to establish rescue procedures. The UNHCR summarised the legal corpus of legislation that directly or indirectly compels the States to establish these rescue procedures (1983, p.1).[135]

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[134] The procedure to follow in case of stowaways was set in the Convention on Facilitation of International Maritime Traffic (FAL), adopted on 9 April 1965 [IMO (092)/T764]. Also, in IMO Resolution A.871(20), adopted on 27 November 1997. Consolidated text of the FAL Convention, as amended, incorporating the 2005 amendments, Resolution FAL.8(32), adopted on 7 July 2005, entered into force on 1 November 2006, and the Resolution FAL.13(42), adopted on 8 June 2018: Revised Guidelines on the Prevention of Access by Stowaways, and the allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases (electronic resource), available at: *https://wwwcdn.imo.org/localresources/en/OurWork/Facilitation/PublishingImages/Pages/Default/RESOLUTION%20FAL.13(42).pdf (accessed on 24 March 2023).* Rescued stowaways should be treated with the same human rights principles as other rescued persons. See also UNHCR, 2011, Rescue at Sea, Stowaways and Maritime Interception, (electronic resource) available at: *https://www.unhcr.org/4ee1d32b9.pdf (accessed on 24 March 2023).*

[135] UNHCR, 1983, p. 1: UNCLOS III (Art. 98.2); 1979 SAR (Chap.2 1.1.); 1974 SOLAS (Regulations 5 & 7); Convention on Facilitation of International Maritime Traffic, 1965 (as above), in particular Section 6.C, Standards 6.8-6.10; International Convention on Salvage 1989, as above, Art. 11; UN Resolution A.773(18) on enhancement of safety of life at sea by the prevention and suppression of unsafe practices associated with alien smuggling by ships; UN Resolution A.871(20) on Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases; UN Resolution A.867(20) on Combating unsafe practices associated with the trafficking or transport of migrants by sea; IMO Global SAR Plan. SAR.8/Circ.1 and addenda; United Nations Convention Relating to the Status of Refugees, 1951 and its 1967 Protocol (189 U.N.T.S. 150); UN Convention Against Transnational Organized Crime, 2000 and its Protocols; Protocol against the smuggling of migrants by land, sea and air; and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Resolution on the Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea,

Although this list provided by UNHCR —and often referred to verbatim in many texts— is very informative, it seems to include two errors: 1965 FAL Convention, initially, did not include a sixth section, or better say it was section 4 (public health issues) that became section 6 after the amendment to include the new sections 4 (Stowaways) and 5 (Arrival, stay and departure of cargo and other Articles) added by a 1992 amendment and entered into force on 1 September 1993. Also, the International Convention on Salvage[136] was adopted on 28 April 1989, not in 1983 (and entered into force on 14 July 1996). But of utmost importance, the establishment of a search and rescue system is not just optional for signatory nations. The International Convention on Maritime Search and Rescue (SAR)[137] regulated the net of coordination centres and sub-centres. A word on the question of the role of supranational organisations (e.g., the EU), is needed. Rescue responsibility lies with the States, not with supranational organisations, although it is true that Chapter 2 (coordination) and Chapter 3 (cooperation) of the SAR Convention promote join actions between States. These collaborative actions often concern the issue of the prompt release of rescued persons, as part of inalienable human rights. This is supported by an extensive jurisprudence of international courts and tribunals.[138]

The Parties are obliged to establish their respective Maritime Rescue Coordination Centres (MRCCs) and to attend a geographic area called the Search and Rescue Region of Responsibility (SRR), designated by the IMO.[139] RCC operations are freely organised by the States and may include military or civil personnel (typically police officers). A centre operated by a mixed combination of military and civilian personnel is called a Joint Rescue Coordination Centre (JRCC). The geographical area of seawater, under the responsibility of a State, may be covered by Maritime Rescue Sub-Centres (MRSCs) subordinated to an MRCC. There may be mutual regional arrangements for cooperation with

A.920(22), 22 January 2002; IMO Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, MSC/Circ.896/Rev.1.

[136] International Convention on Salvage (1989 Salvage Convention), as above.

[137] SAR 1979, as above, Art.2.3.

[138] "*Camouco" (Panama v. France), Prompt Release, Judgment, ITLOS Reports 2000, p.10*; Corfu Channel, *United Kingdom v. Albania*, Judgment, Compensation, (1949) ICJ Rep 244, ICGJ 201 (ICJ 1949), 15th December 1949, United Nations [UN]; International Court of Justice [ICJ]; M*/T "San Padre Pio" (Switzerland v. Nigeria), Provisional Measures, Order of 29 May 2019, ITLOS Reports 2018–2019, p. 369*; *"Monte Confurco" (Seychelles v. France), Prompt Release, Judgment, ITLOS Reports 2000, p.8; "Juno Trader" (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release, Judgment, ITLOS Reports 2004, p. 17*; "*Hoshinmaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005-2007, p. 18*; "*Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation), Order of 25 October 2013, ITLOS Reports 2013, p. 224*; the Case Concerning the Detention of Three Ukrainian Naval Vessels (*Ukraine v. Russian Federation*) (Provisional Measures, Order of 25 May 2019), ITLOS Reports 2019; *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, p. 4; Hirsi Jamaa case, as above*; *MIV "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. I0;* etc.

[139] Or the ICAO (International Civil Aviation Organization) for the case.

neighbouring States.[140] Thus, the operational procedures and organisation are quite flexible for the Parties.

However, and following the guidelines[141] the Governments must provide to MRCC with "sufficient guidance and authority to fulfil their duties" (6.1), and to ensure that they operate "with the standards and procedures in the IAMSAR Manual. Volume III of this manual is required to have on board of every ship operating under the signatory State flag" (6.2). According to this guideline, the States need to develop effective operating plans, including international agreements if appropriate, to respond to all types of SAR situations, including incidents outside the SAR region and coordination in case another MRCC "better situated to handle the case accept[s] responsibility" (6.5). This transfer is therefore not automatic. Acceptance implies, according to the SAR, that entry into the territorial sea or territory of another Party, even if only to determine the position of the casualty and rescue survivors, requires a request, giving full details of the intended mission, to that Party's rescue coordination centre, and approval.[142] The Manual insisted, once more, that the ship should be relieved «as soon as practicable» (6.3).

Conflicts may arise when actions extend beyond the assigned area, requiring the agreement or authorisation of the other Party, as that Party is not likely to live up to its duty in all cases. State action has also been the subject of controversy regarding the provision of refuge to a ship in distress, particularly if it is carrying toxic or polluting goods. Today, communication systems are in place to help taking decisions, including the denial of the right of entry of certain ships in distress into inland waters; in other words, in practice, entry may not be automatically granted. In the not infrequent case of a cargo carrying toxic or radioactive products, or an oil tanker with a risk of spillage and, in general, a vessel carrying dangerous goods, which may cause environmental impact, or result in damage to health (Devine, 1996; Noyes, 2007; Xernou, 2016) entry authorisation may be waived. Thus, in practice, this right does not appear to be absolute, according to Resolution MSC 167(78);[143]

> Nevertheless, the right of the ship in distress to enter a port involves a balancing of the nature and immediacy of the threat to the ship's safety against the risks to the port that such entry may pose. Thus, a coastal State might refuse access to its ports where the ship poses a serious and unacceptable safety, environmental, health or security threat to that coastal State after the safety of persons onboard is assured. (Appendix, 6).

This is exemplified in *The Castor* case.[144] In December 2000 the Cypriot flagged oil tanker M/S *The Castor* —in transit from Constanza, (Romania) to

[140] According to UNCLOS III, Art. 98.2 and the aforementioned mentioned chapters 2 and 3 of the SAR Convention.

[141] The Guidelines on the Treatment of Persons Rescued at Sea MSC.167(78), as above.

[142] SAR, Chapter 3.3.1.

[143] Resolution MSC 167(78) as above.

[144] The "Castor" case and Its Ramifications. 01 March 2001. [Press release by the rescuer company], available at: *http://www.tsavliris.com/news_details.php?record=1 (accessed on 01 August 2021).*

Lagos, Nigeria— declared herself in distress 25 miles off the coast of Morocco, after spotting a crack running across its main deck. The vessel carried about 30,000 Tons of unleaded gasoline, and the weather conditions were rough. Neither Morocco nor later Spain would accept the ship as a safe haven and, after a lengthy transfer and rescue of personnel, the ship was finally returned to her owners in the eastern Mediterranean. The operation involved a $6 million litigation ($1 million per week). The IMO Secretary-General William O'Neil stated “for the international community not to have some form of structured arrangements in place to cope with a ship in distress like *The Castor* is clearly not satisfactory and is a matter which we must address” (Xernou, 2016, p. 11).

This point is also fairly well illustrated in the case of the oil tanker MV *Prestige* spill and the refusal of the port authorities to authorise her entry into A Coruña, a catastrophe with billion-euro economic consequences (Andrade et al., 2004; Garcia, 2003). It is not intended to argue here that port entry would have solved the problem; it is merely mentioned to highlight that, even in these circumstances of extreme danger, the authorities may give preference to their own interests rather than those of the vessel in distress.

After a series of similar cases (*The Erika (1999), The Castor (2000) The Tampa (2001),* and *The Prestige (2002)* of dissension between a ship's request for refuge and the refusal of the coastal State; this issue gave rise to a wide legal debate.[145]

In November 2003, the IMO Assembly adopted two resolutions addressing the issue of havens for ships in distress. Resolution A.949(23)[146] recognises that, when a ship has suffered a casualty, the best way to avoid damage or pollution from progressive deterioration is to transfer its cargo and fuel, ideally in a place of refuge. It also recognises that such action may endanger the coastal State, both economically and environmentally, and local authorities and populations may strongly oppose the operation.[147]

It therefore leaves the granting of access of such vessels to a place of refuge to the coastal State authorities whose decision should take into account the balance between the interests of the ship concerned and those of the environment.

The second adoption was Resolution A.950(3)[148] recommending that all coastal States establish a Maritime Assistance Service (MAS), with reporting and situational awareness functions including those relating to ships that are not fully

[145] For a monographic review on the issue of haven for ships see: (Sánchez-Ramos, 2017).

[146] Resolution A.949(23), as above.

[147] Supported on relevant provisions including: UNCLOS III, Articles 194, 195, 198, 199, 211, 221, 225; Salvage Convention, Article 9; and FAL convention, as above, Article V(2).

[148] IMO. Resolution adopted on 5 December 2003, on Maritime Assistance Services (MAS), A 23/Res.950, 26 February 2004.

in distress technically but require exchanges with the coastal State or possible coordinated action.

As a result of the debates, some questions were further clarified, and SOLAS and SAR were amended accordingly, including:

• The addition of a new paragraph in Chapter 2 (Organization and coordination) relating to definition of persons in distress.

• New paragraphs in Chapter 3 (Cooperation between States) relating to assistance to the master in delivering persons rescued at sea to a place of safety. The assistance must be through States coordination and cooperation, thus relieving the shipmaster of the responsibility to provide follow-up care to the survivors.

• A new paragraph in Chapter 4 (Operating procedures) relating to rescue co-ordination centres initiating the process of identifying the most appropriate places for disembarking persons found in distress at sea.

Thus, the legal framework for State obligations to provide assistance to persons in distress at sea is well established, with an obligation for signatory Parties to maintain an operational rescue system with the capacity to deal with any situation, including collaboration or coordination with other parties. It is not a supranational framework, but better coordination of actions by use of supranational facilities or instruments is not excluded. Another question is whether, for reasons of self-interest, States try to avoid their obligations mainly on the basis of legal interpretations or loopholes, or in the above-mentioned cases where the ship's cargo has the potential to pollute the coastal State. But even in these cases, the rescue of persons has not been questioned.

A relevant State obligation is human rights protection, in accordance with the Universal Declaration of Human Rights (UDHR)[149] requirement: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (Art. 5), replicated in Art. 3 of the European Convention on Human Rights (ECHR).[150]

There may also be the derivative consequence of a migrants' boat forced to go to a place where their lives could be at risk. In addition to the violation of the right to life, the failure of States to rescue people in distress at sea could also constitute torture and/or cruel, inhuman, or degrading treatment. Such a breach is committed not only if a person is purposely harassed, but also when he or she is placed in a situation that caused their death.

In relation to this human rights issue, it is difficult to accept a legal possibility of «effective control» on the high seas without at least the exercise of

[149] The Universal Declaration of Human Rights UN Resolution 217 (A) of the General Assembly, Paris, 10 December 1948.

[150] ECHR (see above).

ius possessionis —a jurisdiction that can be only *de facto*, according to the principle of *ex injuria jus non oritur* and the freedom of the high seas declared in international law— an exercise that has occasionally included the use of coercive measures from an armed patrol ship. Such an action must be considered, *mutatis mutandis*, a temporary territorial conquest similar to that in a war (Korman, 1993), in breach of UNCLOS III, Art. 87.1(a), freedom of navigation on the high seas; Art. 88, use of the high seas for peaceful purposes; and Art. 89, right to free navigation. Note that the recurse of the exceptions in Arts. 105 (piracy), and Art. 110 cannot be applied here since the right to visit contemplated in this Art. 110.1.b refers to the engagement in slave trade, not to migrant smuggling. Again, UNCLOS III is clear in this regard, in addition to the peaceful uses of the high seas' requirement (Art. 87) it clearly establishes that: "No State may validly purport to subject any part of the high seas to its sovereignty" (Art. 88).

Moreover, a decision of the coastguard patrol commander to chase away the suspected migrants without providing assistance implies an assumption that none of the people on the boat is entitled to refugee status, which a naval officer has no authority to decide.[151]

The breach in human rights is exemplified in the following case law. In *Sonko v. Spain,*[152] the complaint was lodged by the sister of the deceased, Mr. Lauding Sonko, one of the four African migrants who tried to swim into the North African city of Ceuta, belonging to Spain. They were picked up by a Spanish Guardia Civil patrol boat and subsequently taken to Moroccan waters, where they were forced to jump. It was claimed that Mr. Sonko could not swim and drowned trying to reach the shore.

In *LCB v. the United Kingdom*[153] the Court postulated that fulfilment with Article 2[154] requires States "not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction" (para. 36).

This doctrine was further confirmed in *Osman v. the United Kingdom.*[155] The positive measures which States are required to adopt to protect the right to life have been addressed by the ECtHR in other cases such as *Mahmut Kaya v Turkey;*[156] *Kiliç v Turkey;*[157] or *Öneryildiz v Turkey.*[158]

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[151] This is in the competence of specialised State authorities within the appropriate institutions, after reviewing the petition among other procedures. UNHCR, Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea, 18 March 2002, para. 22.

[152] *Sonko v. Spain*, UN Doc CAT/C/47/D/368/2008 (20 February 2012).

[153] *LCB v. the United Kingdom,* no. 14/1997/798/1001, ECHR 1998-VI.

[154] It refers to Art 2 of the Human Rights Act of 1988 setting out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. The Human Rights Act came into force in the UK in October 2000.

[155] *Osman v. the United Kingdom,* no. 87/1997/871/1083, ECHR 1998-X.

[156] *Mahmut Kaya v Turkey,* no. 225535/93, ECHR, 2000-III.

A further State obligation is to ensure the right of the rescuer ship to proceed on its course as soon as possible. A right reinforced in the amendments of SOLAS and SAR by Resolution MSC 167/78: "The purpose of these amendments and the current guidelines is to help ensure that persons in distress are assisted, while minimizing the inconvenience to assisting ships and ensuring the continued integrity of SAR services" (2.3). The States, through the due diligence of their SAR services must fulfil this requirement. It has been, once more, reinforced in this MSC Resolution 167/78: "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" (6.13).

The salvage procedures are included in the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR).[159] According to Resolution MSC 167/78 "Governments should ensure that their RCCs and rescue units are operating in accordance with the standards and procedures in the IAMSAR Manual and that all ships operating under their flag have on board Volume III of the IAMSAR Manual" (6.2). The government to which the SAR region was assigned remains accountable even if the first MRCC contacted does not belong to that State (or Region) and must take the responsibility immediately after receiving the information.

States have a positive duty not only to prevent unlawful deprivation of life, but also to protect life[160] by conducting SAR operations at sea, regardless of the person, and this may extend beyond territorial waters if necessary. The obligation is not one of results but of due diligence (best efforts). In a negligent action in this sense, a civil lawsuit seeking financial compensation would not be sufficient and would have the potential to be brought before the human rights committee in the form of a criminal offence.

In relation to persons in distress at sea, States have an obligation to render assistance and to establish and maintain a competent maritime rescue coordination centre (MRCC) in their assigned IMO areas, and to respect human rights throughout the procedure. The use of «extended» or «creeping» jurisdiction to the high seas, denying assistance and promoting the diversion of a ship in distress, with the aim of avoiding entry into territorial waters, even if supported by a coastal State court, is not sustainable under international law, and is in breach of human rights obligations. This issue will be further expanded in this text (Chapter 7), including case law.

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[157] *Kiliç v Turkey,* no. 22492/93, ECHR 2000-III.

[158] *Öneryildiz v Turkey* [GC]*,* no. 48939/99, ECHR, 2004-XI.

[159] The IAMSAR Manual (as above).

[160] HDHR (Art. 5); UN Charter (Art. 1.3); EU Charter (Art. 6); ECHR (Art. 2); ICCP (Art 6); etc.

CHAPTER THREE. MARITIME RESCUE OFF THE EUROPEAN COASTS WITH FOCUS ON THE MEDITERRANEAN SEA

Rescues in or near territorial waters of the European States are usually related to the irregular migration process and ─as in movements to other developed areas of the world─ are conditioned by two circumstances: firstly, the frequent involvement in this process of migrant smuggling with criminals exposing migrants to great vulnerability and risk to their lives; and secondly, the perceived migratory pressure on social protection systems, and the consequent pressing consumption of economic resources. In the case of Europe, the pressure is given either by irregular border crossing or ─and by what is, by far, the main flow─ the legal entry into the EU, with subsequent irregular permanence, raising the political dilemma of how to face this challenge (Carrera & Guild, 2016). Since the ultimate responsibility for rescue lies with Member States, not with the European institutions, there is a trade-off between respecting human rights and saving lives, and the pressure that constant flows of migrants exert on the ports of disembarkation and related facilities.

The pressure from migrants has three main consequences: the first one is that it can be reacted to by slowing down the granting of asylum, as has already happened in the USA, Australia or EU countries themselves; the second one is an attempt by EU Member States to protect their own interests by concentrating the burden and responsibility on frontline Mediterranean countries; and the third is the development of barrier policies even at the expense of human rights, of which the persecution of rescue NGOs is a good example under the so-called call effect excuse (Abrisketa-Uriarte, 2020). This chapter deals with the more specific aspects of rescue on European coasts. The phenomenon of migration in rescues with a broader view and not restricted to the European framework will be discussed in Chapter 5.

Barrier policies often established by some States “challenge the stability of the established rules regulating the shipmaster's duty to render assistance” (Attard, 2020, p. 283). The main question is not the formidable body or rules and soft law instruments (UN, IMO, Council of Europe, EU)[161] insisting on respect for

[161] Due to the similarity of the names of the institutions, which in some texts appear rather confusing, for the purposes of this thesis, the Council of Europe (not an EU institution) refers to the Strasburg institution of 46 members, with Marija Pejčinović Burić as General Secretary. As for the EU, the European Council refers to the Concilium of presidents, presided by Charles Michel, and the Council of

human rights, and providing details on place of safety, disembarkation procedures, etc., but the reluctance of accepting migrants by some States is at odds with the legal obligation. Worse still, is the approach of blocking the entry of the most vulnerable people, those who enter by sea, at the risk of their lives, when this entry represents a tiny part of the problem of migratory pressure in Europe.

The fact that this chapter primarily focuses on the Mediterranean Sea is justified because it has been defined as the world's most lethal migratory route, and because some aspects discussed in this chapter, such as rescue by non-governmental vessels, are essentially unique to Mediterranean waters. It would be unattainable to analyse in a single work the different elements developed in relation to migration, and it would also blur the focus of this thesis, which is centred on maritime rescue. For this reason, the institutions, programmes, plans, regulations, soft law, and other elements that constitute the legal framework applicable to those rescued once on board are mentioned mainly in relation to the process of completing the rescue with disembarkation in a place of safety.

The first section of the chapter is devoted to the Council of Europe (CoE). This review seems timely, especially since the European Court of Human Rights[162] is under the Council of Europe. The second section, with different subsections, addresses the EU framework, including some preliminary comments on disembarkation barriers, the Action Plan for Central Mediterranean, the Common European Asylum System, and the Action Plans against smuggling, from the perspective of rescue at sea.

Section three deals with another issue that was not unanimously accepted, the outsourcing, and the Regional Disembarkation Platforms (RDPs). The fourth and final section reviews the social protection programmes applicable once the immigrant has landed in the EU. The sole aim of this section is to show that, once on land, those rescued are not totally helpless. There are support programmes that differ from State to State showing that, despite reluctance and barriers to disembarkation in many cases, once disembarkation has taken place, there is still solidarity in European hearts. Again, the section is only a snapshot of such solidarity and takes Spain as an example.

There will be still two topics pending to be reviewed, a broader and more comprehensive view of disembarkation with related return policies and the issue of creeping jurisdiction. As these issues are not particularly different for Europe than for other regions, they will be dealt with in Sections 5.4 and 7.3 respectively.

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the EU, with its 10 configurations, refers to the ministers or State secretaries' council with a six-month rotatory presidency. The EU *Commission*, presided over by Ursula von der Leyen, is usually not confused with any of the different councils.

[162] In this text ECHR refers to the European Convention of Human Rights *except* when the acronym is included in a reference of a sentence where, following the citation recommendation (see Appendix AIV-3), ECHR refers to the European Court, elsewhere the acronym used for the court is ECtHR.

Rescues off the coasts of the EU Member States open up a debate that continues in today's society between the two aspects mentioned above. On the one hand, respect for human rights with the obligation to rescue, as required by international agreements, and on the other, the positions of States, especially those suffering the most intense migratory pressure to protect themselves from the overflow of assistance and economic support capacities. However, if we look at the heart of the matter, we see that racist and xenophobic motivations are present. The different reception of Ukrainian migrants is a good example of this.

It must be recognised that UNCLOS III does not encompass a special concern for human rights, because the legal interests that are the object of the norm are different. Moreover, both rights have been codified from two different structures: the law of the sea has an inter-State (horizontal) focus and uses a State rights language, while human rights in international and national treaties descend from the State to the people under its jurisdiction (vertical), using the language of individual rights (Abrisketa-Uriarte, 2020). However, the fact that UNCLOS III does not contain detailed human rights aspects does not mean that it should be read in isolation from any other international agreements or conventions.

3.1 Concern About Maritime Rescues at Council of Europe level

Starting with a broader view, i.e., the CoE, it cannot be said that it has remained blind to the human drama of immigration by sea. Concern has been expressed on several occasions about the continuing loss of life off their coasts. According to a Report[163] “In 2011, at least 1,500 persons lost their lives attempting to cross the Mediterranean Sea” (point 1). This document analyses the tragedy of 72 people who left Tripoli on 26 March 2011, washed up on the shores of Libya after 15 days with only 10 survivors, and the distress calls appear to have been ignored by a number of air and watercrafts. Another Resolution of the CoE[164] further reviewed additional cases of sea casualties including the loss of 400 lives near Lampedusa in October 2013, and the shipwreck in May 2014 with dozens of deaths and hundreds missing, emphasising the zero tolerance towards lives lost at sea, and the obligation to “adopt clear, binding and enforceable common standards with regard to search and rescue operations, including disembarkation, fully consistent with international maritime law and international human rights and refugee law obligations” (5.1.1.).

Moreover, the detailed description of the tragedy mentioned points out that the rules were not followed, since there were several (both air and water) crafts with potential capacity to act in rescue of the rubber dingy in distress, which finally

[163] Resolution of the Parliamentary Assembly of the Council of Europe 1872 (2012), Lives lost in the Mediterranean Sea: Who is responsible? Doc. 12895, 5 April 2012.

[164] Resolution of the Parliamentary Assembly of the Council of Europe 1999 (2014). The “left-to-die boat”: actions and reactions. Doc. 13532, 24 June 2014.

resulted in 62 deaths. This legal text indicates that "the Libyan authorities were responsible for what was a *de facto* expulsion of the sub-Saharan passengers and they failed to maintain responsibility for their search and rescue (SAR)" (point 6). Also, two warships under NATO operation were at a short distance (11 miles and 37 miles away) and, what is even worse, two MRCCs (Rome and Malta), were aware of the boat in distress, with Rome first to relay the situation, thus "greater responsibility to ensure the boat's rescue" (point 13.1). Also, the resolution reports a "lack of communication and understanding between the Rome MRCC and NATO" (point 13.9).

This document [1872(2012)] of the CoE brings forward (once more), the different interpretations of what constitutes a ship in distress, and the disagreement between Malta and Italy on which would be the nearest safe port, and suggests a harmonised interpretation of the international marine law (13.4.2) and a strengthening of the legislation to criminalise private shipmasters "who fail to comply with their duty under the law of the sea" (13.4.4).

The recommendations proposed by that Resolution include very specific requirements addressed to NATO. There is also one point of particular legal interest: A proposal for a substitute or replacement action, in order to "[f]ill the vacuum of responsibility for SAR zones left by a State which cannot or does not exercise its responsibility for search and rescue, as was the case for Libya" by amending International Maritime Search and Rescue Convention (SAR Convention) if required (13.1). The subsequent creation of an SAR area for Malta went a long way towards solving this problem. In terms of new developments related to European sea borders in recent years, Libya has also declared a SAR of its own, according to the communiqué to the International Maritime Organization (IMO) of December 2017.

One possible avenue for the shipmaster or his/her flag State, in case of disagreement with the MRCC, is to obtain protection from a questionable order by applying for interim measures from the ECtHR, an institution under the CoE, as was done in the *Sea-Watch 3* case.[165]

With constant barriers and delays in disembarkation, the ECtHR is repeatedly requested for interim measures that guarantee the protection of human rights.[166] The question of the scope of the State protection under Art.3 of the

[165] *Sea-Watch eV* (interim measures) nos. 5504/19 and 5604/19, 29 January 2019 [ECHR 043]. Details of the *Sea Watch* case will be commented on next. In any case, with regard to the interim measures mentioned here, the ECtHR decided not to order the Italian Government, under Article 39 of the ECHR Rules of Procedure, to take interim measures but merely instructed the Italian authorities to continue to provide all necessary assistance to vulnerable persons still on board the vessel. This ECtHR ruling is not to be confused with the request for a preliminary ruling from *Sea Watch* concerning the terms of application of a European directive brought before the CJEU discussed below.

[166] Those referring to risk to life or risk of torture, inhuman or degrading treatment or punishment linked to asylum seekers include: *F.H. v. Sweden* (no. 32621/06); *Y.P. and L.P. v. France* (no. 32476/06); *M.A. v. Switzerland* (no. 52589/13); *W.H. v. Sweden* (no. 49341/10); etc. The ECtHR has published a

ECHR, and the prohibition of inhuman or degrading treatment has been the object of a ECtHR systematic jurisprudential search in a review of 22 cases law, under the perspective of the concept of freedom as non-domination (i.e., not being subjected to arbitrary interferences) (Slingenberg, 2019). For the author, elements of domination (i.e., coercion, dependency, and insufficient control) are present in the Court's reasoning in all cases on migrants' living conditions and can provide a theoretical explanation for the different judgements.

The issue of ECtHR approach to protection of human rights has also been analysed by Giuffré, exposing her criticism of the «self-effacing» role assumed by the ECtHR in the cases in which it has been required to set interim measures to make effective the protection of the human rights of the rescued. For the author, the error comes from placing the condition of the migrant before that of the rescued, when it should be the opposite. She criticises the ECtHR for not given a clear, uniform and forceful response, not creating a standard of precautionary well-defined measures, respectful of human rights, given that a prolonged confinement at sea could cause immediate, serious and irreparable damage to the rescued (Giuffré, 2023).

This ambivalence on the part of the ECtHR gives rise frequently to policies of port closures and delays or denials of a place of safety under the assumption that the duty to protect life is exhausted as soon as the State authorities guarantee emergency care to the most vulnerable migrants, proceeding in this way, in some cases, to the evacuation of pregnant women, the very sick and minors only.

Aside the ECtHR, the question of pullbacks to unsafe Libyan ports in breach of the principle of non-refoulement (discussed in Section 5.5) was denounced by Amnesty International and the Commissioner of Human Rights of the CoE.[167]

All in all, the European Court of Human Rights in Strasbourg constitutes a basic pillar for the defence of the rights of migrants in transit and applies not only to the restricted space of the EU, but extends to 46 countries, covering the whole of Europe (Russia left the organisation as a consequence of the political and military distancing with the West).

Throughout the text, a wealth of case law from this Court will confirm its key role in the rescue at sea and related legal issues. As will also be discussed, the approach to the legal problems of rescue at sea is not only a legal issue, with its

relation of all interim measures up to December 2022, with links to full text for each case law (electronic resource), available at: *https://www.echr.coe.int/documents/d/echr/fs_interim_measures_eng#:~:text=The%20Court%20grants%20requests%20for,Rule%2039%20to%20applicants2 (accessed on 15 June 2023).*

[167] Commissioner for Human Rights. Council of Europe. Recommendation, 24 May 2019. Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean (electronic resource), available at: *https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87 (accessed on 16 March 2023).*

avenues and courts, but also a question of lack of political will to develop the existing rules.

In other words, the final attitude taken will depend as much on political as legal action. The problem is not the lack of avenues, but the lack of will (Xernou, 2016). But while recognising the insurmountable contribution of the CoE and the Strasbourg Court (ECtHR) on human rights, with the advantage of being binding on all signatory States, including Turkey, the rest of the chapter will focus primarily on the EU framework.

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3.2. The EU Approach to the Rescue at Sea

3.2.1. Disembarkation barriers and the EU Action Plan for the Central Mediterranean

Moving to the EU institutions, and focusing on the key problem, i.e., irregular migration, travelling to an EU Member State for purely economic reasons and in search of better living conditions must be distinguished from forced migration due to special circumstances such as persecution, war, etc., which may merit EU protection. In the first category, returns are legally permitted. Another issue is the effectiveness and speed of such returns, given that, as will be seen in the statistics presented in Chapter 8, a high percentage do not materialise. In the second category, return is not legally possible.

Following the stepwise sequence of the rescue process, as has been done throughout this thesis, the EU Action Plan for the Central Mediterranean (The Action Plan thereafter} is presented with a focus on a key question, disembarkation in EU Member States.[168] Logically, other aspects covered in the following sections feed into the plan. Barriers to disembarkation present an emerging element of controversy in EU Member States' migration policy.

There are discrepancies in Member States between those furthest away from the problem and the southern European countries, particularly Italy, mainly with far-right governments, which are much more reluctant to address the problem of immigration and the obligation to provide diligent disembarkation.

Note that each Member State's obligation of prompt disembarkation derives from signed international agreements and does not depend on whether the vessel with the rescued persons is governmental or NGO, without prejudice to actions that may subsequently be taken against the NGO vessel in case of non-compliance with the rules as commented on in Chapter 4. The principle of respect for human rights and compliance with international agreements must always prevail.

[168] The general issue of disembarkation will be addressed in Chapter 5, section 5. The following comments refer only to some specific barriers to disembarkation on European Mediterranean coasts.

The place of disembarkation is decided separately for each Joint Operation at Sea. In the case of operations involving more than one State, with disembarkation established in a third country, this could involve negotiations that will presumably cause some delays.[169] It cannot be said that a landing in a third State could not occur in Frontex operations, but it would in any case be a one-off and exceptional occurrence.

The approach has not been kept uniform over the years. On 18 October 2013, Italy launched Operation *Mare Nostrum*, an air and sea action, which extended into nearby international waters, and focused on identifying and rescuing vessels in distress at sea. The operation, which covered 43,000 km^2, was applauded by the IMO and rescued 150,000 people in a humanitarian action focused on saving as many migrants as possible.[170] Italy took over the reception of migrants and their social and economic protection at a cost of nine million euros per month. The departures from Libya increased substantially including small *pateras* assuming that Italian ships would look after them once they passed the limit of the Libyan territorial waters.

Italy requested EU financial support and that was rejected on 1 November 2014. Operation *Mare Nostrum* was then suspended, due to lack of EU support, and amid political criticism within the country (Italy) on the grounds (conveniently echoed by the media) that the operation acted as a magnet for irregular migrants (Abrisketa-Uriarte, 2020; Panebianco, 2016). The EU launched Operation *Triton*, coordinated by Frontex, with a focus on security and containment, up to 30 miles instead of 75, and with a reduction in the means employed. The 'barrier' policies underlying this operation prompted NGOs to launch search and rescue programmes of their own (Öner & Cirino, 2023).

The Member State discrepancies were made clear in a 2022 Declaration[171] of the countries «of first entry into Europe» (Italy, Malta, Greece, Cyprus), in which they rejected that these countries of first entry are the only possible landing places for irregular immigrants, especially considering that in many cases they arrive in non-governmental vessels that act autonomously and outside the competent State authorities, asking the European Commission and the Presidency of the EU to take the necessary steps to initiate this discussion.

This prompted the Commissioner for Home Affairs to present the EU Plan for the Central Mediterranean on 21 November 2022,[172] and soon after

[169] As in the case of *J.H.A. v. Spain,* CAT/C/41/D/323/2007, UN Committee Against Torture (CAT), 21 November 2008.

[170] Ministero della Difesa, Italia, Marina militare: Mare Nostrum Operation (electronic resource), available at: *https://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx (accessed on 26 April 2023).*

[171] The untitled document (electronic resource) is available at: *https://www.interno.gov.it/sites/default/files/2022-11/joint_statement.pdf (accessed on 10 April 2023).*

[172] European Commission: EU action plan for the Central Mediterranean. 21 November 2022. Available at: *https://home-affairs.ec.europa.eu/eu-action-plan-central-mediterranean_en (last access on 15 April 2023).*

(November 25) it was endorsed by the extraordinary Justice and Home Affairs (JHA) Council.[173] The Plan includes 20 measures articulated around three pillars.

Pillar I (measures 1 to 13) focuses on cooperation with partner countries and international organisations, strengthening the capacities of Tunisia, Egypt, and Libya to ensure "more effective border and migration management […] in full respect of fundamental rights […]" (I.3). A surprising pairing, considering that previous cooperation with Libya has shown evidence of a lack of respect for the human rights of those who have been returned there.

At least, four notable weaknesses in this pillar I may be considered: (i) it does not clarify the necessary funding; (ii) it does not focus on the need for Member States to have specific legislation in place, to clarify the constant discrepancies on whom, where, and when to disembark; (iii) there is hardly any mention of legal immigration, by far the most frequent in percentage; and (iv) it appears to seek to «bounce» the problem to the southern Mediterranean countries, with the not hidden intention that they act as a brake on the outflow of migrants by prioritising blocking migration even at the expense in terms of respect for human rights. Pillar I also insists on the fight against smuggling of migrants (I.4) and return policies, while intensifying legal channels of access to the EU. For better coordination, it is launching a specific Team Europe initiative[174] on the Central Mediterranean before the end of 2022 (I.1).

Pillar II (measures 14 to 17) is devoted to a more coordinated approach on search and rescue between Member States (II.14), there are calls to ensure closer coordination with UNHCR and with IOM (II.16). UNHCR issued on 1 December of 2022, a document reviewing the Legal Considerations on the Roles and Responsibilities of States in Relation to Rescue at Sea, Non-refoulement, and Access to Asylum.[175] There are two important points of clarification in this document; the first one is the need to assess by fair and efficient procedures on dry land, the request of asylum, and the second, the specific prohibition ─once more─ of pushback even for seaworthy vessels:

> Even if boats subject to such pushbacks are apparently seaworthy and in good condition, with all necessary supplies, and the safety of passengers and crew

[173] Presidency Summary of The Extraordinary Home Affairs Council on the situation along all migratory routes and a joint way forward. Brussels 25 November 2022 (electronic resource) available at: *https://www.consilium.europa.eu/media/60347/fin-pres-summary-migration.pdf (accessed on 10 April 2023).*

[174] European Commission. Team Europe Initiatives (electronic resource), available at: *https://international-partnerships.ec.europa.eu/policies/team-europe-initiatives_en (accessed on 11 April 2023).*

[175] UNHCR. Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum (electronic resource). Available at: *https://www.refworld.org/docid/6389bfc84.html*
This document complements and should be read in conjunction with UNHCR, General legal considerations: search-and-rescue operations involving refugees and migrants at sea [November 2017 Legal Considerations] (electronic resource), available at *www.refworld.org/docid/5a2e9efd4.html (last access 11 April 2023).*

> does not appear to be immediately at risk, States conducting them may be in breach of their non-refoulement and other obligations if they fail to inquire into the possible protection needs of those affected or deny them an effective opportunity to have their claims to international protection fairly assessed. People who are rescued at sea and may have possible international protection needs cannot be summarily turned back, including particularly where to do so would deny them a fair opportunity to seek asylum (para. 3.7).

Pillar III (measures 18 to 20) relates to reinforcing the implementation of the Voluntary Solidarity Mechanism (agreed on 22 June 2022) and the Joint Roadmap. This project seems to follow the unfortunate and controversial experience of the 2015 emergency relocation schemes set up by two Council Decisions.[176] The plan was to relocate 160,000 asylum seekers in a period of 24 months but by 2 February 2017, only a total of 11,966 had been relocated.[177]

A thorough review of the Action Plan defined it as "'a waste of time' or as a document 'recycling old mistakes,' the document adds to the pile of pacifying political declarations filling the gap of the stagnating law-making machinery" (Frasca & Gatta, 2023, Conclusion, para. 2).

It seems clear that soft laws[178] and goodwill arguments alone will not be able to eliminate the deterioration of the rule of law at the EU's external borders with deterrent attitudes such as hot returns, «half-closed» ports, and prolonged retentions on board the rescue vessels, attitudes that represent a growing danger faced by migrants crossing the Mediterranean.

The principle of solidarity is well established, and not as an option (Frasca & Gatta, 2020); it is a legal obligation under Arts. 67(2) and 80 of the Treaty on the Functioning of the European Union (TFEU)[179] and has been ascertained on the relocation mechanism unsuccessfully challenged by Hungary and Slovakia.[180]

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[176] Council of the European Union, Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece', OJ L 239, 15.9.2015, p. 146–156; and Council of the European Union, Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L248, 24.9.2015, p. 80-94, amended by Council of the European Union, Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 268, 1.10.2016, p. 82–84.

[177] According to the data in the report: Directorate General for internal policies policy department c: citizens' rights and constitutional affairs civil liberties, justice and home affairs (2017). Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece. Study for the LIBE Committee, (electronic resource). Available at: *http://aei.pitt.edu/85022/1/pe_583_132_en_All(1).pdf (accessed on 15 June 2023).*

[178] As for the rules and principles applicable to the adoption of non-legally binding agreements by the EU. see the comment on the Judgement of 23 March 2004, *French Republic v Commission of the European Communities*, C-233/02, EU:C:2004:173, by (García-Andrade, 2022).

[179] Consolidated version of the Treaty on the Functioning of the European Union [After **Lisbon** Treaty] OJ C 326/47, 26.10.2012, p. 47–390.

[180] Judgement of the Court [GC] of 6 September 2017, *Slovak Republic & Hungary v the Council*, C-643/15 & C-647/15, EU:C:2017:631.

Also it has been reiterated by the Advocate General Sharpston in her Opinion on this case.[181]

The EU's global response to migratory flows has been defined in a monographic analysis on peace and international security, coordinated by El Houdaïgui and Del Valle as with “a certain strategic perspective, albeit weighed down by an excess of eurocentrism and a security perception that does not take third countries’ interests into balanced account” (Del Valle Gálvez et al., 2019, p. 117).

According to these doctrinally well-founded positions, Member States have an obligation to protect both the right to life and the right not to be subjected to inhuman and degrading treatment for all persons on board. Member States are obliged to diligent provision of a place of safety and consequently to facilitate disembarkation. The respect of human rights “is a State obligation which prevails over ministerial directives and decrees closing ports to vessels transporting people saved at sea” (Giuffré, 2023, p. 9).

Legislation with the force of law is urgently needed to put an end to the arguments and excuses that are often used, although it is not so much a question of legislation as of will. In the meantime, soft international agreements may prove to be of some help: “the use of non-binding agreements allows also to avoid the complications arising from the conclusion of mixed agreements” (Santos Vara, 2019). Although not binding, “[t]he fact that an agreement is not binding under international law does not imply that it is deprived of legal effects in the EU legal order” (Santos Vara, 2019).

As for State activities on the high seas, in 2010, the ECtHR remarked that “the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law*”* and insisted on the issue of “the rights and guarantees protected” by the European Convention on Human Rights.[182]

3.2.2. Rescue and asylum policy

What can those rescued near European shores expect from the EU asylum system? For rescued as for other people asking for EU protection, the Common European Asylum System (CEAS) was launched to provide fairer, quicker, and better- asylum decisions to those seeking international protection. However, the system is far from achieving those goals.

With a germ of the idea already in mind as early as the 1993 Maastricht Treaty, it was not included in the Amsterdam Treaty of 1997, but the asylum policy began to develop after 1999 when the European Council in Tampere agreed that

[181] Opinion Of Advocate General, delivered on 31 October 2019, *European Commission v Republic of Poland, Hungary, and Czech Republic*, C-715/17, C-718/17 & C719/17,§1−§154 EU:C:2019:917.

[182] *Medvedyev and others v. France* [GC, Winner case], no. 3394/03, §81, ECHR 2010-III.

the EU would assume competences in matters of asylum.[183] The idea under the CEAS is the establishment of a common legal and cooperation framework to ensure that asylum seekers are treated equally irrespective of the State to which they apply.[184] As the EU, an area of freedom of movement, migration and asylum approach needed to be uniform regardless of the country. The EU considers asylum as a fundamental international right.[185]

The CEAS was consolidated in the first comprehensive asylum policy plan adopted in 2008[186] under the warrant of the TFEU,[187] with current regulation based on Directives 2011/95,[188] 2013/32[189] and the Regulation 604/2013 (Dublin III).[190] The CEAS included a uniform status, common procedures, criteria for determining which Member State is responsible for processing the application, standards, and cooperation procedures with third countries. Previous to the new asylum plan there was already the possibility of requesting temporary protection, after a 2001 Directive was adopted as a consequence of the massive exodus from the war in Kosovo.[191]

[183] It took shape through subsequent regulations and directives (Directive 2003/9/EC, Directive 2004/83/EC, Directive 2005/85/EC, and the different Dublin regulations. The second generation of rules (2011-2013) aimed at harmonizing and deepening the CEAS are those currently in force (Abrisketa-Uriarte, 2020).

[184] European Commission. Migratory and Home Affairs. Common European Asylum System (electronic resource), available at: *https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en (accessed on 28 August 2021).*

[185] At least in theory, in consonance with the Convention relating to the Status of Refugees as above (1951 Geneva Convention). The Convention was drafted and signed by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951, convened pursuant to General Assembly resolution 429 (V) of 14 December 1950. The Convention was adopted on 28 July 1951; in accordance with Article 43, it entered into force on 22 April 1954. The Protocol was adopted on 31 January 1967; it entered into force on 4 October 1967 in accordance with its article VIII. These instruments have been defined by the UNHCR as the only global legal instruments explicitly covering the most important aspects of a refugee's life.

[186] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 17 June 2008 – Policy Plan on Asylum: An integrated approach to protection across the EU [COM (2008) 360 final] (unpublished in the Official Journal, electronic resource), available at: *https://eur-lex.europa.eu/EN/legal-content/summary/policy-plan-on-asylum.html (accessed on 2 April 2023).*

[187] Art. 78.2 of TFEU. Consolidated version of the Treaty on the Functioning of the European (as above)

[188] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. OJ L 212, 7.8.2001, p. 12–23.

[189] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [repealing Directive 2005/85/EC]. OJ L 180, 29.6.2013, p. 60–95.

[190] Regulation (EU) No 604/2013 as above.

[191] Council Directive 2001/55/EC of 20 July 2001 as above.

A further step towards a future migration and asylum project was taken in 2015 with the Ten-point action pact.[192] The growing Mediterranean migration problem extending over the previous two decades was addressed in a joint meeting of foreign and home affairs ministers, chaired by High Representative/Vice-President Federica Mogherini, and promoted by the Commissioner for Migration, Home Affairs and Citizenship, Avramopoulos. It was held in Luxembourg on 20 April 2015, and it included 10 immediate measures to be taken in response to the critical situation. They are presented here almost verbatim. The initiative was fully endorsed by foreign and home affairs ministers:

1/ Reinforce the Joint Operations in the Mediterranean, namely *Triton* and *Poseidon*, by increasing the financial resources and the number of assets. That allows to extend their operational area, allowing to intervene further, within the mandate of Frontex.

2/ A systematic effort to capture and destroy vessels used by the smugglers. The positive results obtained with the *Atalanta* operation should inspire to similar operations against smugglers in the Mediterranean.

3/ EUROPOL [European Union Agency for Law Enforcement Cooperation], Frontex, EASO [European Asylum Support Office] and EUROJUST [European Union Agency for Criminal Justice Cooperation] will meet regularly and work closely to gather information on smugglers modus operandi, to trace their funds and to assist in their investigation.

4/ EASO to deploy teams in Italy and Greece for joint processing of asylum applications.

5/ Member States to ensure fingerprinting of all migrants.

6/ Consider options for an emergency relocation mechanism.

7/ An EU wide voluntary pilot project on resettlement, offering a number of places to persons in need of protection.

8/ Establish a new return programme for rapid return of irregular migrants coordinated by Frontex from frontline Member States.

9/ Engagement with countries surrounding Libya through a joined effort between the Commission and the EEAS [European External Action Service]; initiatives in Niger have to be stepped up.

10/ Deploy Immigration Liaison Officers (ILO) in key third countries, to gather intelligence on migratory flows and strengthen the role of the EU Delegations.

There are two relevant weaknesses of this initiative: firstly, the duality of migration policy driven by the fear of the call effect, and secondly, delegating action to the Member States, knowing the reluctance in some cases.

[192] Joint Foreign and Home Affairs Council: Ten-point action plan on migration [press release, electronic resource] Available at: *https://ec.europa.eu/commission/presscorner/detail/it/IP_15_4813 (accessed on 15 June 2023).*

In April 2015, the Council decided to increase Frontex's budget by 26.8 million euros to intensify search and rescue operations at the external borders, but only five months later, the possibility of returning this appropriation was raised due to the inaction of Member States (Xernou, 2016).

The European asylum system can be analysed as governed by six legislative instruments and one agency.

1/ The Asylum Procedures Directive[193] setting out the conditions for fair, quick, and quality asylum decisions and provide particular protection to those with special needs (particularly unaccompanied minors and victims of torture).

Changes include the right to submit clarifications both after the asylum interview and before the final decision, and the recognition that applicants who are considered particularly vulnerable need special procedural guarantees. Included is the right of asylum seekers to a personal interview in which they can explain the circumstances in which they left their country (Art. 25). In addition, the applicant has the right to object to asylum decisions. But it is difficult to establish whether applicants have obtained the necessary information to present the circumstances relevant to the asylum decision (Art. 12), and the Directive's ability to set clear standards for EU asylum procedures has been subject to criticism (Schittenhelm, 2019; Velluti, 2014).

In practice, applicants face diverse and contradictory procedures between and even within Member States' asylum systems. In 2016, out of 70 open infringement procedures involving violations of the CEAS tools, 26 concerned violations of the Asylum Procedures Directive;[194] “to avoid implementation gaps in the provision of resources, quality controls and appropriate working environments for decision-making on the ground remains critical” (Schittenhelm, 2019, p. 239).

2/ The Reception Conditions Directive[195] promotes common standards for reception for asylum seekers across the EU (such as housing, food and clothing and access to health care, education, or employment under certain conditions). The Directive reduces incentives for abuse and increases the possibility for asylum seekers to be self-reliant.

The increase in the number of arrivals in Europe has put pressure on some Member States to shirk their obligations, tending to limit access to rights and

[193] Directive 2013/32/EU as above. There is an ongoing project (as of June 2023) to better safeguard and harmonise the procedural guarantees granted during asylum procedures and further protect the applicant's rights.

[194] European Commission (16.02.2016). Managing the Refugee Crisis. Balancing Responsibility and Solidarity on Migration and Asylum (electronic resource) available at: *https://home-affairs.ec.europa.eu/sites/default/files/what-we-do/policies/european-agenda-migration/background-information/docs/balancing_responsibility_and_solidarity_on_migration_and_asylum_20160210_en.pdf (accessed on 15 March 2017).*

[195] Directive 2013/33/EU as above.

services. While the Directive still provides the possibility for Member States to reduce or withdraw material reception conditions and to grant less favourable treatment to applicants for international protection compared to nationals where «duly justified», this can potentially lead Member States to grant unacceptably low levels of material reception conditions that may fall below the adequate standard of living as required by the Directive itself. This directive, as linked to Dublin III rules, will probably require a joint amendment (Velluti, 2014).[196]

3/ The Qualification Directive[197] clarifies the grounds on which international protection can be granted, contributing to more robust and uniform decisions and facilitates access to rights and integration measures for beneficiaries of protection.

It is recognised that the percentages and types of protection status granted continue to vary considerably across the EU, as highlighted by Eurostat data (e.g., for the third quarter of 2016, data showed that recognition rates for asylum seekers from Afghanistan varied from 97% in Italy to 0% in Bulgaria). The data also show differences between the types of protection status granted.

There appear to be considerable differences between Member States' policies regarding access to rights and the duration of residence permits granted, as revealed by the European Parliamentary Research Service (EPRS).[198] The current provisions on the cessation of refugee or subsidiary protection status are not systematically used in practice, which means that Member States do not always ensure that international protection is granted only for as long as there is a risk of persecution or serious harm and, finally, some of the rules in the current Directive are optional in nature and therefore leave Member States a wide margin of discretion. A proposal to amend the Directive is in process,[199]

4/ The Dublin Regulation is intended to determine the State responsible for examining asylum applications.[200] The Regulation stipulates that EU citizens are not eligible for the procedure, as it is limited to third country nationals only.

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[196] Velluti's text includes a comparative analysis of selected ECtHR and CJEU asylum cases and examines the constitutional relationship between the two European Courts and how it impacts on the human rights of asylum-seekers and on the future of the EU asylum framework.

[197] Directive 2011/95/EU as above.

[198] European Parliamentary Research Service (2015) Work and social welfare for asylum-seekers and refugees (electronic resource) available at: *https://repositori.uji.es/xmlui/bitstream/handle/10234/187031/Work_social_welfare..._2016_EN.pdf?sequence=1&isAllowed=y (accessed on 25 May 2023).*

[199] Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. COM/2016/0466 final - 2016/0223 (COD).

[200] DUBLIN I (15 June 1990), DUBLIN II (18 February 2003, and Council Regulation (EC) No 343/2003, are no longer in force. Repealed by DUBLIN III Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless

Dublin III Regulation does not solve the domestic limitations of the States and their structural differences. Dublin III has been defined as a machine for the production of exceptions and infractions:

> *El Reglamento de Dublín representa el mayor escollo porque establece una jerarquía de criterios para la determinación del Estado responsable […] y el criterio del primer país de llegada es uno de los que más se aplica conforme a dicho reglamento […] en el caso de entradas irregulares, obliga al Estado miembro a través del cual entró el solicitante a examinar su petición.*[201]

As early as 2016 a proposal for a new Dublin IV was envisaged, but according to Hruschka, the proposal was more a continuity rather than the needed reform "neither the main practical questions (concerning transfers) nor the main legal questions are successfully addressed by the proposed changes" (Hruschka, 2016, para. 33).

Dublin III is also very limited politically to achieve concentration formulas among the Member States. Furthermore, it does not resolve that the applicants evade the application of the Regulation and move through the Member States in search of better protection programmes; the processes are very slow and uncoordinated between them (Abrisketa-Uriarte, 2020) The New Pact proposes to replace it with a Regulation on asylum and migration management.[202]

A reform of the Dublin III Regulation is unavoidable. The default rule that the first Member State with which an application is lodged takes charge of migrants means that States with borders assume a greater responsibility than those without. In some Member States the entry and presence of significant numbers of foreign nationals has been unwelcome. Hungary is a clear example, where the issue was even raised in a referendum, creating a dispute between the EU and Hungary. In summer 2015, the Hungarian government built a four-metre-

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person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180, 29.6.2013, p. 31–59.
For the whereabouts of the last proposals, and the activity regarding Dublin Regulation see: Parliament of Europe. Legislative Train Schedule (electronic resource) available at:
https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-revision-of-the-dublin-regulation (accessed on 15 January 2021).

[201] [The Dublin Regulation represents the major stumbling block because it establishes a hierarchy of criteria for the determination of the responsible State [...] and the criterion of first country of arrival is one of the most commonly applied criteria under this regulation […] in the case of irregular entries, obliges the Member State through which the applicant entered to examine his or her application] (Abrisketa-Uriarte, 2020, p. 25).

[202] Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM/2020/614 final (electronic resource). Available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A614%3AFIN (accessed on 5 April 2023).

high wall along the 175 km border with Serbia. It has even been argued that country-specific idiosyncrasies are being lost due to these flows, and a "variable geometry" has been proposed, whereby instead of establishing a single system for all member states, a small group of states could develop different forms of solidarity while others would be left out of the system (Vignon, 2019).

5/ The Eurodac Regulation[203] strengthens the role of the Member State responsible under the Dublin Regulation and helps to ensure that asylum applications (and benefits) are made in a single country. The register of potential asylum seekers and places of entry is made in a Eurodac biometric database, into which, Member States must enter the data and fingerprints of applicants. Access is granted for other purposes related to serious criminal activity, under strictly limited circumstances, to prevent, detect or investigate serious offences such as murder and terrorism, although some data protection issues relating to this database, which is shared between Member States with different legal frameworks, are not fully harmonised (Boehm, 2012).

6/ The Return Directive[204] sets out the return of third country nationals who are not granted a residence or the right to free movement as defined in Article 2(5) of the Schengen Borders Code. It is notable that Member States may decide not to apply this Directive, according to its Article 2, to persons subject to a refusal of entry (Article 13 of the Schengen Borders Code), or who are apprehended or intercepted in connection with irregular crossing by land, sea or air, and who have not subsequently obtained an authorisation or right to stay; and to those subject to return as a criminal sanction, or who are the subject of extradition procedures.

This Directive has been criticised from the outset, including by the UN High Commissioner for Human Rights:[205] “One principal concern relates to the detention regime pending removal procedures for irregular immigrants. The Directive envisages detention periods of up to 18 months, which appear to be excessive.” According to Kilpatrick, “the key aim of the changes is to restrict

[203] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180, 29.6.2013, p. 1–30.

[204] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348, 24.12.2008, p. 98–107.

[205] UN Human Rights Office of the High Commissioner [Press release], 18 July 2008]. UN experts express concern about proposed EU Return Directive (electronic resource, available at: *https://www.ohchr.org/en/press-releases/2009/10/un-experts-express-concern-about-proposed-eu-return-directive (accessed on 25 May 2023).*

individual rights in the name of improving the functioning of the EU's deportation system" (Kilpatrick, 2019).

What becomes apparent from this formidable array of legal instruments is that there is a lack of harmonisation between the various Member States and also that many existing differences appear to be motivated more by political reasons more than by respect for human rights. Therefore, the European Commission pushed for some changes including the creation of an agency for asylum and seven new pieces of legislation.

The European Union Agency for Asylum (EUAA) came along with the development of the CEAS. The creation of the European Asylum Support Office (EASO) was first considered in 2004 at The Hague, proposed by the European Commission in 2009, and the European Parliament and the Council approved its creation in 2010.[206] Negotiations for an Agency for Asylum began with a proposal of the Commission as early as 4 May 2016. After successful negotiations, the European Parliament and Council adopted the regulation of the Agency on 15 December 2021, which entered into force on 19 January 2022. It was a key initiative under the New Pact on Migration and Asylum. This Regulation establishing the EUAA,[207] repealed the EASO Regulation commented on above.

The stated pillar idea of the new agency (EUAA) is to provide operational and technical assistance to Member States in the assessment of applications for international protection across Europe; to "contribute to ensuring the efficient and uniform application of Union law on asylum in the Member States" (Art. 1.1); and to "improve the functioning of the CEAS" (Art. 2, para. 2), ensuring that asylum decisions can be taken quickly, fairly and with the same quality in all Member States.

The unprecedented increase of migrant arrivals in 2015 highlighted some weaknesses of the EU asylum system, and the European Commission proposed in 2016 a series of seven pieces of legislation. Five out of the seven proposals received broad political agreement:

1/ The already mentioned setting-up of a fully-fledged EUAA.

2/ A proposal to reform Eurodac[208] to store more personal data, such as names, dates of birth, nationalities, identity data or travel documents and facial images of individuals. The increased information in the system will allow authorities to easily identify a third country national, without having to request the

[206] Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office. OJ L 132, 29.5.2010, p. 11–28. No longer in force, Date of end of validity: 18/01/2022; Repealed by Regulation (EU) 2021/2303.

[207] Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468, 30.12.2021, p. 1–54.

[208] Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data… (as above).

information from another Member State separately, as was previously the case. Law enforcement authorities and Europol will continue to be able to consult Eurodac to prevent, detect or investigate serious crime or terrorism.

Recording of personal data is not the only information registered. As part of the Commission's Integrated Maritime Policy, there has been an increase in the control of maritime activity as a result of sharing "information, assets and expertise through collaboration" with the European Maritime Safety Agency (EMSA). Increased control measures were implemented, including a comprehensive database to record the entry of migrants. Such activities require "careful management and use of user access rights" not to say about sharing of information "data security becomes paramount during these activities"(Lieutcheu Tientcheu, 2021, p. 1).

3/ The mentioned review of the Reception Conditions Directive to develop contingency plans to ensure sufficient reception capacity at all times, including those periods of increased pressure, to prevent asylum seekers from moving from one State to another. They will be provided with full reception conditions only in the Member State responsible for their asylum application.

Member States will be able to allocate them to a geographical area within their territory, assign them a place of residence and impose reporting obligations to discourage them from absconding. Asylum seekers with well-founded claims will be granted the right to work no later than six months after their application is registered. Minors will receive education within two months after their asylum request is lodged. Unaccompanied minors will immediately receive assistance and will be appointed a representative no later than 15 days after an asylum application is made.[209]

4/ A new qualification regulation under the idea to replace this Directive (2011/95/EU) with a regulation, with the aim of achieving greater convergence and harmonization in decision-making in matters of asylum. The regulation would change the current optional rules that provide common criteria for recognising asylum seekers to mandatory rules, clarifying, and further specifying the content of international protection, regarding the duration of residence permits and rights and establishing rules designed to prevent unauthorised movement.

The new regulation will introduce stricter rules that will penalise unauthorised movements and will reinforce integration incentives for beneficiaries of international protection, and will clarify the criteria for granting international protection, by making it mandatory for Member States to apply the internal protection alternative as part of the evaluation of the application for international

[209] European Commission. Migration and Home Affairs. Common European Asylum System (electronic resource) available at: *https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en (accessed on 1 April 2023*).

protection. It will also clarify the rights and obligations of the beneficiary of international protection.

5/ The EU Resettlement Framework. An EU Resettlement Framework to implement a unified procedure for resettlement across the EU, although each Member State retains the ability to decide how many subjects to resettle each year.

Additionally, in 2018 the Commission also proposed a recast of the Return Directive in response to existing obstacles to an effective return policy. The recast aims to reduce the risk of absconding, assist voluntary returns, ensure proper monitoring of national procedures, and streamline administrative and judicial return procedures. In 2019, the Council reached a partial general approach on the text, except on the border procedure for returns. In the European Parliament, work continues on reaching a negotiating mandate.

Since no political agreement was reached by Member States on the reform of the CEAS, in September 2020, the Commission proposed a New Pact on Migration and Asylum (New Pact).[210] The following sections will focus on this New Pact and the EU action plans against migrant smuggling.[211]

The 2020 New Pact declares the need to "build a system that manages and normalises migration for the long term, and which is fully grounded in European values and international law" (para. 1), but the actions derived from it do not seem to go in that direction of values and law.

The first observation is that rescue of «boat» migrants in the Mediterranean should not be decontextualised from the key problem that motivates it, forced migration in mostly precarious conditions, and the search for a better life if not asylum. However, it does not seem to be at the core of recent EU normative developments to address the root and source problem and, as will be seen below, the actions that seem to prevail are aimed at reducing migratory flows even at the expense of a reduction in human rights, despite the expressions of that need to act accordingly to the international legal framework.

The New Pact while recognising the specificities of search and rescue in the EU legal framework for migration and asylum (section 4.3) not only fails to provide a basis for eliminating the structural factors that push migrants to risk taking the precarious and uncertain sea route, but also fails to improve the SAR response, and basically emphasises effective migration management. In other words, the focus is not to save lives, although some of the measures can certainly contribute to this, but not as a priority (Moreno-Lax, 2022).

[210] Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions on a New Pact on Migration and Asylum. COM/2020/609 final 23/9/2020.

[211] For a collaborative work with authoritative analysis and criticism see (Thym, 2022).

The Pact is limited to recognising that it would require a comprehensive approach, collective responsibility, solidarity, and the consideration that in addition to the legally binding obligation there is a moral duty, which is a key element of border management and a shared responsibility between the EU and its member States focused on saving lives by pre-empting arrivals.

The New Pact foresees three main lines of action: firstly, increased control and monitoring of journeys and landings, with a requirement for Frontex to increase its operational and technical support within EU competence; secondly, seeking the cooperation of third countries of origin and transit improving their interdiction capabilities, again, no mention is included on the human rights implications of such collaboration; and thirdly, increased criminalisation of smugglers, traffickers, and collaborators.

The securitisation and enforcement positioning are evident in the New Pact with the proposal of "a pre-entry screening applicable to all third-country nationals who cross the external border without authorisation"[212] and the expansion of the Eurodac database,[213] together with the requirement of up-to-date full interoperable IT systems.

In addition, the document includes a plan for the swift and full implementation of the new European Border and Coast Guard Regulation and adds the requirement of "a major reinforcement of the EU's ability to respond to different situations at the external borders. A standing corps with a capacity of 10,000 staff remains essential for the necessary capability to react quickly and sufficiently."[214] More on these coordination, securitisation and information actions will be presented in the following paragraphs on the plans against the smuggling of migrants.

The New Pact's priority is clear: to stop dangerous and irregular crossings, with an eminently dissuasive and coercive approach, in line with the strategy of the last decades, which included avoidance of contact with potential «boat migrants» and their routes, disembarkation restrictions if not dubious legal immediate refoulement, port closures and persecution and obstruction of civil society solidarity actions (Carrera et al., 2023).[215] Unsurprisingly, in contrast to the increased budget for Frontex, there has been a marked decrease in SAR capacity by coastal EU Member States since the last decade (Moreno-Lax, 2022).

[212] The New Pact, (as above), Doc 1, 2.4, para 2.

[213] Amended proposal for a Regulation on the establishment of 'Eurodac', COM/2020/614.

[214] The New Pact, (as above), Doc 1. 4.1, para 5.

[215] Two soft-law instruments are aligned with this vision. The recommendation on how to deal with private owned vessels engaged on rescue activities: Commission Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, C/2020/6468, OJ L 317, 1.10.2020, p. 23–25, and the Communication from the Commission of the guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence (C(2020) 6470 final, 23.9. 2020.

A previous antecedent of this restrictive attitude and compulsory tone is found in the Malta Joint Declaration of 23 September 2019,[216] which followed an informal meeting of the interior ministers of Italy, Malta, France and Germany, a declaration whose aim was to provide a proposal to be discussed at the Justice and Home Affairs (JHA) Council meeting of 7 and 8 October 2019.

The approach is a «pick and choose» in asylum policies that raises serious doubts about compliance with the Treaties and EU principles and establishes a constrictive policy on rescue action by civilian vessels (Carrera & Cortinovis, 2019). It is particularly worrying that the New Pact proposes, as an example to be considered, collaboration with Libya[217] despite the widespread evidence of unlawful conducts and acts of violence perpetrated by Libyan coastguards.

We are currently in an intermediate model of State and EU responsibilities. The centralisation of the migration management process, with the attribution of powers to the European Asylum Agency, would be an innovative alternative that would make the mechanism for determining the State responsible for the asylum process unnecessary and would reduce the rigidity of the system. Although possible, the process will not be easy since one requirement would be the reform of the TFEU (Abrisketa-Uriarte, 2020).

While acknowledging the special pressure to which the coastal States of the EU are subjected, the signature by the interior ministers of Italy, Malta, France, and Germany, in the aforementioned Malta Joint Declaration of 21 September 2019 ─to manage the disembarkation of migrants rescued at sea─ is nothing more than a political agreement taken in the opposite direction to the integration of common policies and rules in the EU.

Two latter elements must be included. Firstly, the conviction of the ministers in charge of migration at the 2022 meeting[218] that reforms are needed to improve the solidarity of the Plan, particularly in relation to maritime rescue:

> [R]elocations should primarily benefit Member States confronted with disembarkations following search and rescue operations in the Mediterranean and Western Atlantic route and also apply to other situations to take into account Cyprus' current situation or possible evolutions in the Greek islands (para 9).

This was repeated in the Declaration of Solidarity[219] signed by 21 Member States and the following press release.[220] Secondly, this political agreement that

[216] Joint Declaration of Intent on a Controlled Emergency Procedure ─Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism─. Malta, 23 of September 2019 (electronic resource) available at:
https://www.statewatch.org/media/documents/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf (accessed on 16 March 2023).

[217] "Further innovative partnerships could building [sic] on the positive example of the AU-EU-UN Taskforce on Libya," New pact, as above, 6.1, para 4.

[218] First step in the gradual implementation of the European Pact on Migration and Asylum: modus operandi of a voluntary solidarity mechanism, 9360/22 ADD1, 7 June 2022.

has made it possible for Member States to adopt, for the first time, a common position within the Council on the proposals for the Control Regulation and Eurodac, two major legislative initiatives included in the New Pact.

The effectiveness of SAR activities in the Mediterranean will ultimately depend on the EU being able to adopt and implement a truly effective asylum system that respects human rights and, of course, the reinforcement of the obligation of solidarity between Member States. These concepts of respect for human rights and solidarity are at the core of the treaties and agreements that have allowed the EU to develop.

3.2.3. The impact of the Action Plans against the smuggling of migrants on rescue.

As for smuggling, and although the general criminal aspects related to the rescue of migrants will be dealt with in Chapter 6, the EU's specific plans launched by the Council and the Commission for combating migrant smuggling (mainly by sea) should at least be set out here.

In 2015 the (first) Action Plan against the Smuggling of Migrants 2015−2020 was initiated, including the establishment of a list of suspect vessels and the pursuit of smugglers on the basis of their internet advertisements. The operation in the Southern Mediterranean (EUNAVFOR MED, operation *Sophia)* was also authorised at the time.[221]

In 2015, the ministers of Justice and Home Affairs invited Europol to accelerate the establishment of the European Migrant Smuggling Centre (EMSC) launched during the 2nd Europol and Interpol Operational Forum on Countering Migrant Smuggling Networks (The Hague 22−23 February 2015) in order to strengthen its capacity to assist Member States in better preventing and combating migrant smuggling. Once started, the Joint Operational Team (JOT) Mare actions were successfully implemented, which included the use of the information provided by the European Border Surveillance System (EUROSUR).

This system faces the legal difficulty of custom reinforcement beyond the contiguous zone and into the EEZ, as they are subject to the principle of exclusive jurisdiction of the corresponding State “in practice, the consent of the flag State or

[219] French Presidency of the European Council of the European Union: First step in the gradual implementation of the European Pact on Migration and Asylum: modus operandi of a voluntary solidarity mechanism [Solidarity Declaration] (electronic resource). 22 June 2022, available at: *https://home-affairs.ec.europa.eu/system/files/2023-05/Declaration%20on%20solidarity_en.pdf*

[220] European Commission: Migration and Asylum: Commission welcomes today's progress in the Council on the New Pact on Migration and Asylum [press release 22 June 2022] (electronic resource). *Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3970 (accessed on 15 June 2023).*

[221] By the no longer in force Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), repealed by Council Decision (CFSP) 2020/471 of 31 March 2020 repealing Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) [ST/5868/2020/INIT], OJ L 101, 1.4.2020, p. 3–3.

the coastal State is given in advance by means of a bilateral agreement […]" (Vrancken & Tsamenyi, 2017, pp. 140–147).

The EU, the Facilitators Package[222] adopted in 2002 set up the offences related to unauthorised entry, transit or residence and established the related criminal sanctions requiring all Member States to sanction anyone who intentionally assists a third-country national to enter, transit through an EU State or facilitate residence status for financial gain.

However, already the first comprehensive evaluation of the Package (Refit Evaluation), carried out in 2017 by the European Commission, recognised the existence of problems, in particular the "lack of legal certainty and/or lack of adequate communication between authorities and actors on the ground," (7-paragraph 9), and concluded that its effectiveness in achieving its objectives remained partial. As a follow-up, a consultation process was launched.

In 2018, the European Parliament adopted the guidelines for Member States to prevent humanitarian assistance being criminalised[223] and a call upon the Commission "to adopt guidelines for Member States specifying which forms of facilitation should not be criminalised, in order to ensure clarity and uniformity in the implementation of the current acquis […]" (Point 7). After a consultation process, it was not considered needed to repeal the Facilitation Directive of 2002 but to provide a guideline on interpreting it, without prejudging the competence of the final interpretation of the Court of Justice of the EU.[224]

Further, the renewed (second) EU Action Plan Against Migrant Smuggling (2021−2025) was set up,[225] linked to the New Pact on Migration and Asylum. Analysing the wording of this Action Plan it seems to be built on the following main pillars of action: (1) reinforced cooperation with partner countries and international organisations; (2) implementing the legal frameworks and sanctioning smugglers active within and outside the EU; (3) preventing exploitation and ensuring the

[222] Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of penal framework to prevent the facilitation of unauthorized entry, transit and residence OJ L 328, 5.12.2002, p. 1–3. [Document 32002F0946].
See also
- Commission Staff Working Document Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), SWD (2017) 117 final (electronic resource), *available at: https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD(2017)0117_EN.pdf*
- Communication from the Commission: Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence OJ C 323, 1.10.2020, p 1−6.

[223] European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised 2018/2769(RSP). OJ C 118, 8.4.2020, p. 130–132.

[224] Communication from the Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01. [C/2020/6470], OJ C 323, 1.10.2020, p. 1–6.

[225] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of The Regions: a renewed EU action plan against migrant smuggling (2021-2025) 29 September 2021, COM (2021) 591 final.

protection of migrants; (4) reinforcing cooperation and supporting the work of law enforcement and the judiciary to respond to new challenges; and (5) improving the knowledge on smugglers' *modi operandi*.

As seen, strengthened cooperation is present in two out of the five pillars, with a continuous emphasis on the multidisciplinary approach, the enhancement of partnerships including cooperation with EU agencies (in particular Frontex, European Asylum Support Office [EASO] and the EU Agency for Law Enforcement Cooperation [Europol]), and a call to intensify the use of specialised services provided by the Europol's European Migrant Smuggling Centre and of the Information Clearing House, consolidating the use of the Secure Information Exchange Network Application (SIENA).

A key tool to implement the action against smuggling, according to the Action Plan, is the European Multidisciplinary Platform Against Organised Crime (EMPACT), setting up cooperation among national and European actors. It calls for the support of the Internal Security Fund, the Asylum, Migration and Integration Fund, and the EMPACT envelope of Europol's budget, among others relevant envelopes.

The partnership emphasis is extended to request the implementation of actions with the Neighbourhood, Development, and International Cooperation Instrument – Global Europe (NDICI) and the Instrument for Pre-Accession Assistance III and the Border Management and Visa Instrument. Out of the EUR 79.5 billion of NDICI budget, indicatively, 10% will be dedicated to actions directly targeting specific challenges related to migration and forced displacement, including anti-smuggling according to the new Action Plan (3.1.1. para. 10). Also, the promotion of regional and international cooperation with organisations such as United Nations Office on Drugs and Crime (UNODC) or Interpol, and the European network of immigration liaison officers (ILO network) will continue supporting capacity building and operational exchanges.

The declared strategy in the New Action Plan is to "follow a multidisciplinary and integrated approach across relevant EU crime priorities for the cycle, embedded within national and EU strategies and actions" (3.3.1, para. 4).

Although the document does not specifically provide for sanctions, it replicates the UN Smuggling of Migrants Protocol ─which obliges States Parties to criminalise the smuggling of migrants and other forms of activity that support the smuggling of migrants while migrants should not be subject to criminal prosecution for having been smuggled─ and proposes to sanction migrant smugglers, through the transposition of UN sanctions and, where appropriate, through recourse to the EU Global Human Rights Sanctions Regime (3.1.1, key actions, para. 4 &. 5).

One of the things that is striking when reading the document on the renewed EU Action Plan Against Migrant Smuggling is that there is hardly any mention of crimes related to regular entries ─the main inflow of migrants who then

remain in an irregular situation– i.e., criminal actions related to document or visa forgery, particularly when the document itself acknowledges that document forgery is also problematic in the EU.

This Action Plan focuses, once again, on the minority of migrants who enter irregularly (mostly by sea) and provides some key information in this regard: 85 to 90% of irregular migrant entrances that reach the EU make use of smugglers. According to this Action Plan as for prices "investigations of migrant smuggling cases have shown that prices of smuggling services can generally EUR 20 000 per individual"[226], quite an amount for those coming from underdeveloped countries. According to Europol, about 50% of the smugglers are also involved in other criminal activities, such as trafficking in human beings, drug trafficking, excise fraud, firearms trafficking and money laundering.

The Action Plan also stresses the fight against digital crime. The e-Evidence package[227] is an ongoing initiative to provide national law enforcement and judicial authorities with the tools for efficient investigation and prosecution of crimes where e-evidence is involved (digital smuggling). Digital visas as planned in the New Pact on Migration and Asylum, and the use of artificial intelligence[228] represent advances in this regard. The Action Plan recognised that better support to Member States tackling identity and document fraud, including through training on awareness for consular staff, is crucial for dismantling these networks. This is one of the few mentions that apply to regular entries in the document.

As for the impact on those rescued at sea, the New Action Plan evidences a clear commitment to making progress on these mentioned aspects of information, coordination, and shared action, but appears to maintain the emphasis on the constrictive policies of the New Pact on Migration and Asylum rather than on saving lives.

The accent on securitisation is cloaked in the excuse of deterring irregular migration and protecting the rights of irregular migrant workers, emphasising the

[226] New Action Plan, Point 1, para 6. There is very probably an error in printing. According to Frontex the cost of smuggler services ranged (2018) from 500€ for short crossing from Algeciras to Spain up to 3,000€, with an average of EUR 1,800 ($2.185). See: Border Security Report: Prices for people smuggling on Central and Western Mediterranean routes, 23 June 2020 (electronic resource) available at:
https://www.border-security-report.com/prices-for-people-smuggling-on-central-and-western-mediterranean-routes/ (accessed on 28 March 2023).

[227] Proposal for a Regulation of The European Parliament and of The Council on European Production and Preservation Orders for electronic evidence in criminal matters COM/2018/225 final 2018/0108 (COD), 17.4.2018, and Proposal for a Directive of The European Parliament and of The Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings COM/2018/226 final - 2018/0107 (COD), 17.4.2018.

[228] Proposal for a Regulation of The European Parliament and of The Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts. COM/2021/206 final. 21.4.221.

effective implementation of the Employer Sanctions Directive.[229] Rigid enforcement of this Directive will undermine migrants' sources of income in the informal economy and is likely to increase crime out of necessity.

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3.3. Rescues and Outsourcing, Temporary and Regional Disembarkation Platforms (RDPs)

The 2015–16 refugee crisis represented a significant human drama in Europe, leaving shocking episodes and images such as the 71 dead bodies found inside a refrigerated truck in Austria, or the image of the three-year-old Syrian boy, Aylan Kurdi, whose body was washed up on a Turkish beach after a failed attempt to reach Greece.

Afterwards, the United Nations High Commissioner for Refugees (UNHCR) called for coordinated action, promoting the entry and relocation of those found to have a valid protection claim, repatriation of those found not to be in need of international protection but with respect of their human rights, and argued that "more effective international cooperation is required to crack down on smugglers, including those operating inside the EU, but in ways that allow for the victims to be protected."[230] The issue of outsourcing accelerated and rose up the agendas. However, "how to externalise the controversial asylum process and how to reduce the flow or arrival of illegal immigrants" remains an issue (Künnecke, 2019, para. 5), as do political convictions on migration between countries.

On the issue of offshoring the migrant problem, agreements have been signed, between EU Member States and third countries, e.g., with Turkey and Libya, in the latter case with Italy providing patrol boats and training for personnel in charge of border control, with more or less tacit agreements on the return of migrants to those third countries, with the intention of dissuading smuggling mafias (see below the Open Arm case). A similar reasoning could be put forward with the EU-Turkey Statement of 2016.[231] Pragmatism cannot run counter to the general principles of EU and international law or violate the principles and values of the EU and international agreements to which it subscribes.

Additionally, both the monitoring bodies and the International Covenant on Economic, Social and Cultural Rights already commented on, and the Revised European Social Charter (Revised ESC)[232] at the European regional level, which

[229] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. OJ L 168, 30.6.2009, p. 24–32.

[230] UNHCR chief issued key guidelines for dealing with Europe's refugee crisis [Press release, 4 September 2015] (electronic resource) available at: *https://www.unhcr.org/55e9793b6.html (accessed on 8 May 2021).* For the EU hotspots approach (electronic resource) see: *https://ec.europa.eu/home-affairs/orphan-pages/glossary/hotspot-approach_en (accessed on 11 September 2021).*

[231] European Parliament. Legislative Train Schedule. The EU Turkey Statement & Action Plan (2016). Electronic resource, available at: *https://www.europarl.europa.eu/legislative-train/carriage/eu-turkey-statement-action-plan/report?sid=7101 (accessed on 15 June 2023).*

[232] European Social Charter (Revised), 03.V.1996. ETS 163. OJ C364/1, 18.12.20, p. 1-22.

have also held "in their quasi-judicial practice, that a minimum core of socio-economic rights must be guaranteed to all persons under the jurisdiction of a State" (Wessels, 2023, para. 9).

On the same issue, the idea of the so-called “Regional Disembarkation Platforms (RDPs)”[233] emerged and was presented as a way to save lives at sea and reduce the business of human trafficking. However, the establishment of RDPs outside the EU itself opened legal challenges. The main controversial legal issues, according to Arndt Künnecke’s report, are:

> 1/ Under what legal framework are these centres (outside the EU) established?
>
> 2/ Can the EU exercise sovereign powers over them “i.e., apply asylum procedures on its own authority”?
>
> 3/ For those migrants admitted to the EU, which mechanisms of compensation and distribution will be applied?
>
> 4/ How is the compliance with international law and human rights assured in the cases of those refused entry to the EU? (Künnecke, 2019, para. 7).

The first question clearly seems to be related to the need to conclude an international treaty, basically under the Vienna Convention (VCLTIO).[234] But who will conclude the agreement? As per Article 47 of the Treaty on the European Union (TEU):[235] “The Union shall have legal personality” and, consequently, the ability to conclude international conventions, but the responsibilities for rescue remain with the Member States. Thus, the EU cannot conclude international conventions on SAR, but it can conclude agreements on asylum in which it exercises shared competence with the Member States.

Setting RDPs in a non-European host State (third Party) will require acceptance of the obligation in writing —such State will surely invoke Articles 34 and 35 of the VCLTIO to negotiate some form of compensation, when not requesting the Member State with which the agreement is signed to bear the total cost of the operation— but note that the “acceptance by the third organization of such an obligation shall be governed by the rules of that organization” (Art. 35). Under these conditions, it seems not to be a major legal inconvenience for the agreement. It must be taken into account that as per that soft law instrument,

[233] European Council Meeting EUCO 9/18, (CO EUR 9). Brussels on 28 June 2018 (electronic resource) available at: *https://www.consilium.europa.eu/media/35936/28-euco-final-conclusions-en.pdf (accessed on 23 April 2023).*

[234] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLTIO), 21 March of 1986, complementing The Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969.

[235] Treaty on European Union (consolidated version), [Treaty of Maastricht], OJ C 326, 26.10.2012, p. 13–390.

transferring saved migrants to transit controlled centres is only possible on a voluntary basis.[236]

The underlying idea of this decision on the possibility of establishing disembarkation centres for irregular migrants outside the EU was to break the smugglers' plans by setting a place where migrants could remain while screening for the validity of their protection claims took place; so that only legitimate refugees will be authorised to enter the EU, in close cooperation with relevant third countries as well as UNHCR and the International Organization for Migration (IOM). Such platforms should operate by distinguishing individual situations, in full respect of international law and without creating a pull factor (point 5).

But placing migrants in RDPs raises many legal issues, not only in terms of their establishment, but also in relation to the applicable law and, in particular, police and territorial defence responsibility, income and basic services to be provided such as, education and literacy programmes, the availability of translation and interpretation services to enable legal application for international protection and victim assistance, work and leisure activities, health care, including disease transmission (e.g., Covid-19 screening, prevention, treatment, and isolation), guardianship of unaccompanied minors, visits to the third country territory (e.g., for buying supplies or medicaments), regimen of visits, and much more.

What happens if a migrant does not voluntarily agree to be transferred to an RDP? How will the repatriation of persons not eligible for refugee status be resolved? What kind of coercive measures can be used to force those who are ineligible as refugees to return to their country of origin?

One relevant case in regard of outsourcing of migrants in a third State is the *J.H.A. v. Spain (Marine I)* case.[237] On 31 January 2007 the *CV Marine I,* capsized in international waters with 369 immigrants from various countries on board. The corresponding MRCC was Senegal. On 4 February, the Spanish flagged vessel *Luz del Mar* reached the *Marine I* and towed it towards the Mauritanian coast. A negotiation between Spain, Mauritania, and Senegal regarding the fate of the *Marine I* took place (note that Mauritania is not a signatory part of SAR convention). The final agreement between these States established that the port of disembarkation would be Nouadhibou in Mauritania, but with the migrants under Spanish control, who then followed different destinations.

The complainant J.H.A. —A Spanish citizen, and a member of an NGO for human rights— who acknowledged not been empowered to act on anyone's behalf before the Committee (CAT), alleged that Spain has violated the

[236] European Council Meeting EUCO 9/18 (as above), point 6.

[237] *J.H.A. v. Spain*, as above.

Convention Against Torture[238] among other international regulations, while Spain declared that the living conditions were not as described by the complainant and that the rescued persons were treated in accordance with international standards. Finally, the Committee considered that the complainant lacked competence to act on behalf of the alleged victims:

> The Committee would point out that, in accordance with subparagraph (a) of rule 107 of its rules of procedure, the individual designated to submit a complaint under article 22 of the Convention is the victim himself/herself, his/her relatives or designated representatives or others on his or her behalf when it appears that the victim is unable personally to submit the complaint, and when appropriate authorization is submitted to the Committee (recital 8.3).

Therefore, lacking the complainant of *locus standi* (recital 8.4), there was no need to address the remaining issues.

A very relevant element of this case refers to jurisdiction. For the Committee it corresponded to the Spanish State: "that the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control" (Recital 8.2),[239] and added: "This interpretation of the concept of jurisdiction is applicable in respect not only of article 2, but of all provisions of the Convention, including article 22" (Recital 8.2).

Spain exercised, by virtue of a diplomatic agreement concluded with Mauritania, *de facto* constant control over the alleged victims during their detention in Nouadhibou. Accordingly, the Committee considered the alleged victims to be subject to Spanish jurisdiction. The issue of extraterritoriality will be expanded on in section 7.3.

If the RDP is considered as an extension of the jurisdiction of one assigned Member State, then there could be a potential collision of jurisdictions as the application to a certain Member State must take into consideration some migrant preferences such as presence of family members or other relations of the applicant.[240] RDP or any outsourcing arrangement cannot violate the peremptory norms of general international law (*ius cogens*). Consequently, fundamental principles —such as protection against genocide, piracy, slavery, violence, torture, or refoulement— must also be upheld in the territory of the third party, with no legal room for an agreement to the contrary.[241] The principle of non-refoulement is a peremptory norm under international law.

Under current rules, an asylum application cannot be made generically to the EU but must be made to a particular Member State, and there is a regulation

[238] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Resolution of General Assembly 39/46 of 10 December 1984. Into force since 26 June 1987.

[239] The Committee provides a reference here: UN Human Rights. Office of the High Commissioner. General comments and recommendations. CAT/C/GC/2: General comment No. 2 (2007) on the implementation of article 2 by States parties of 24 January 2008.

[240] Regulation (EU) No 604/2013 (Dublin III) (as above), Chapter III, Art. 7.3

[241] VCLTIO (as above), Art 53

which established the criteria and mechanisms for determining the Member State responsible for examining an application for international protection.[242] "Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III"[243] How this right matches in the case of transit-controlled centres, particularly RDPs?

If each person remaining in RDPs is considered, to all legal effects, bounded to the different Member States where they are applying, then migrants will be subject to different regulations and rights within the same RDP, given that even within the EU there are differences in the provision of basic services such as health care, subsistence allowances, civil and criminal procedures, etc. It is important to note that the EU is not a 'one-stop shop' for the provision of basic services.

Another point, often unclear, concerns the practicalities of legal proceedings (transfer of the accused, appearance, representation, pleadings, appeals, etc.) before the relevant courts in the event of civil or criminal litigation related to an alleged event occurring within the RDP.

Also not easy to solve, once the migrant arrived at the RDP, is the identification procedure, in particular for undocumented, people fearful of reprisals against their families, or for stateless persons. The provision of temporary identification is a key element, although frequently not an easy task far from the Member State information and communication technologies. There is a need to "best attend to the 'five broad needs of victims', respect and recognition, assistance, protection, access to justice and compensation. This also enables police and prosecution authorities to better investigate and punish traffickers"[244]

Distance-creation strategies are linked to concepts such as «rulification», deterrence, militarisation and extraterritoriality (Moreno-Lax & Lemberg-Pedersen, 2019) denounced by the UN Special Rapporteurs and others, "which implicitly or explicitly tolerate [and perpetuate] the risk of migrants death as part of an effective control of entry."[245]

The Commission has cooled down the RDP projects, following internal criticism and the rejection of its introduction by Algeria, Morocco, and Tunisia (2018) (Abderrahim, 2019; Fantinato, 2019).

Unless a single unifying EU regulation is developed for all applicants, regardless of the State to which they apply, including the legal framework for civil

[242] Regulation (EU) No 604/2013 (Dublin III) (as above), Chapter III, Art. 3.1.

[243] Directive 2013/32/EU, Art. 9 (as above).

[244] Communication From the Commission to the European Parliament, The Council, The European Economic, Social Committee and the Committee of The Regions, Brussels, 19.6.2012 COM(2012) 286 final, 2.1, p. 6.

[245] Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions [A/HRC/38/44], Agnès Callamard, UN Doc A/72/335 (2018), para 10.

disputes, criminal, entry and exit procedures, mobility criteria, basic services offered and all other abovementioned procedures, the development of the RDPs will create a situation of legal inequality and insecurity that threatens its very existence. Effective development will require the amendment of many established rules, some of them mentioned above. It is to be hoped that joint operations on the territory of third States will not become simply another instrument to externalise the management of European borders, outside European standards (Santos Vara, 2018a).

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3.4. European Social Protection Programmes after Disembarkation. The Case of Spain

What is the fate of those rescued at sea once disembarked in a Member State? International protection measures, established in the Geneva Convention of 1951[246] and later expanded with its own regulations in the EU,[247] arose from the idea of protecting people fleeing persecution or serious harm in their countries of origin. They are not focused primarily on migrants who move for economic reasons. This does not mean that migrants for economic reasons, in an irregular situation, do not have any right to social protection.

The CoE instrument on migrants' protection is the ECHR and the key element is the interpretation of its Art. 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment," as analysed in case law by the ECtHR.

In this respect, a very revealing case is the judgment of the Strasbourg Court in favour of the applicants in *Ilias and Ahmed v. Hungary*,[248] concerning the short-term confinement (September 2015) of asylum seekers in a land border transit zone. They were later transferred to an allegedly safe third country (Serbia), without examining their asylum claims, in breach of Arts.3, (since Hungary did not assess the risk of ill-treatment for the applicants in Serbia), 5-I, and 5-IV. The Court observed that between January 2013 and July 2015 Serbia was not considered a safe third country by Hungary (§ 120).

Another illustrative ECtHR case law is *M.S.S. v. Belgium and Greece,*[249] a complaint against Belgium in breach of Arts. 3 and 13, by sending him to Greece and exposing him to risks of not having a fair asylum request procedure. The Court of Justice stated that the Belgian authorities failed to verify whether the applicant would have guarantees that the Greek authorities would seriously examine his asylum application, in accordance with the ECHR obligation.

[246] Convention and Protocol Relating to the Status of Refugees (1951 Geneva Convention) as above.

[247] Charter of Fundamental Rights of the European Union, as above.

[248] *Ilias and Ahmed v. Hungary* [GC], no 47287/15, ECHR 2017-III.

[249] *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 216-222, ECHR 2011-I.

The ECtHR stated that protection must be extended to those who are totally dependent on State support and find themselves in a situation of severe deprivation in the face of official indifference, mirroring the EU Reception Directive.

> The Court attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, mutatis mutandis, Oršuš and Others v. Croatia [GC], no. 15766/03, § 147, ECHR 2010). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the [1951] Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive (§ 251).

As for the provision of remedies the Court went further by establishing that State responsibility may arise [under Art. 3] where an applicant is in circumstances wholly dependent on State support and faced with a "situation of serious deprivation or want incompatible with human dignity"[250]

The relationship between equality and vulnerability in relation to refugees and asylum seekers in the ECtHR in 10 years following the *M.S.S*. case was reviewed by Krivenko, concluding that, the deployment of the language of vulnerability results in the positioning of refugees and asylum seekers as passive recipients of benevolence, rather than as active rights claimants. It is needed to enhance the principles of substantive equality, "as they are known in international human rights law, including such aspects of substantive equality as structural discrimination and intersectionality" (Krivenko, 2022, p. 192).

The argument that violation of assistance is not applicable when carried out by a State cannot be invoked. ECHR Art. 3 must be read in conjunction with Art. 13: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Moreover, the ECtHR clarifies[251] "[T]he «effectiveness» of a «remedy» within the meaning of this Art. 13 does not depend on the certainty of a favourable outcome for the applicant" (§ 289), and also establishes:

> In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its *exercise must not be unjustifiably hindered by the acts or omissions of the authorities* of the respondent State (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 112, ECHR 1999-IV). (§ 290)

It has been maintained that the State's responsibility enshrined under ECHR Art. 3 refers only, as commented on above, to the case of applicants who are totally dependent on State support, but this would not be the circumstance if a benefit is claimed, legal proceedings are initiated against the refusal of stay, or in those cases where voluntary abandonment is in process (Wessels, 2023). Therefore, under this interpretation, the scope of protection would be rather

[250] *Budina v. Russia* (dec.), no. 45603/05, § 253, ECHR 2009-VI.

[251] *M.S.S. v. Belgium and Greece (as above).*

limited. However, the author herself acknowledges that, although the ECHR does not explicitly establish a right to human dignity, such a right is generally accepted by the Court as deriving from Art. 3 (para. 8).

As for the EU, in addition to accession to the ECHR,[252] the Charter of the Fundamental Rights[253] establishes in its Art.1: “Human dignity is inviolable. It must be respected and protected.” Acts based on the Dublin Regulation cannot go against human rights, opening the door to amendments (Mallia, 2011). Then, would a migrant lose his or her protection rights if he or she were to move, willingly or otherwise, to another Member State?

The underlying argument is that if the asylum seeker decides to move, he or she loses social assistance entitlements. Refusal of assistance has also been used to force the return to third countries of people with an order to abandon the EU but who refuse to leave. These movement reluctancies have been described as «obstinacy of migratory movements» (Wessels, 2023).

The timing of the question arises as in some cases social and economic exclusion have been used in Europe as a deterrent to control migration, including cases of asylum seekers, in what has been called «planned destitution» (Wessels, 2023). It has been developed mainly to prevent the internal movement of asylum seekers, in the so-called «secondary movements», which some asylum seekers make.

The question is, therefore: do such «planned destitution» policies have a legal basis in the EU? In other words, what is the legal basis for the social protection of persons in an irregular situation, whether as asylum seekers or for economic reasons, who move to another State? Is Europe managing properly migration movements inside the EU? (Georgi, 2019).

Reductions to or withdraws from reception conditions for other reasons than those foreseen in Art. 20[254] are contrary to the Reception Directive, and onward movements are not punishable. This was confirmed by the CJEU, which again pointed out that a Member State is obliged to provide protection measures even to an asylum seeker who ends up in another State, either by its own decision or under the Dublin Regulation. It clarifies that the obligation only “ceases when that same applicant is actually transferred by the requesting Member State, and the

[252] Institutional aspects of accession by the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2009/2241(INI)) OJ C 161E , 31.5.2011, p. 72–78.

[253] Charter of Fundamental Rights of the European Union (as above).

[254] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1–10. [no longer in force; repealed by Regulation (EU) No 604/2013].

financial burden of granting those minimum conditions is to be assumed by that requesting Member State, which is subject to that obligation."[255]

Another case that opened a dialogue between the two European courts (ECtHR and CJEU) was the *Tarakhel* case,[256] questioning the compatibility of the Dublin III Regulation with the standards of the ECHR.[257] An Afghan asylum seeker family assigned to a reception centre in Italy stated that the centre was inadequate, due to slow procedures, insufficient reception places and inadequate facilities. They moved to Austria and then fled to Switzerland. Both Austria and Switzerland tried to return them to Italy. The complaint was brought as a violation of Arts. 3 and 8 of the ECHR. The ECtHR referred to the «systemic deficiencies» invoked by the CJEU in the *N.S.* case[258] requiring a case-by-case assessment, ruling that the risk of being housed in an inadequate facility would constitute a violation of Art. 3 of the ECHR.

In the same vein, in the *Jawo* case[259] the CJEU responded to a preliminary ruling on the compatibility of the CFREU with the transfer of an asylum seeker to the Member State responsible for processing his claim (under Dublin III). Mr. Jawo, a Gambian national, entered Italy by sea where he applied for asylum. He then moved to Germany where he again applied for asylum. This second application was rejected on the grounds that he had previously applied for asylum in Italy. Italy had granted him protection, but the refugee had difficulties in meeting his basic needs and argued that his return to Italy was inadmissible because of deficiencies in the asylum procedure in this country, contrary to Art. 3 on the right to the integrity of the person (CFREU). The German Administrative Court asked, as a preliminary question, whether the living conditions in Italy, and the risk of being subjected to treatment contrary to Art. 4 of the CFREU, must be taken into account when examining whether the application for return to Italy was permissible. The CJEU decided against the transfer back to Italy due to the extreme poverty risk:

> Article 4 of the Charter of Fundamental Rights must be interpreted as not precluding such a transfer of an applicant for international protection, *unless* the court hearing an action challenging the transfer decision finds, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, that that risk is real for that applicant, on account of the fact that, should he be transferred, he would find himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty. (Rule 3, para. 2)

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[255] Judgement of 27 September 2012 [Chamber four], *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, C-179/11, EU:C:212:594, paragraph Rule 2 (final).

[256] *Tarakhel v. Switzerland* [GC] no. 29217/12, ECHR 2014-XI.

[257] See also on admissibility *A.M.E. v. The Netherlands* (dec.) [Section III] no. 51428/10, ECHR 2015-I.

[258] Judgement of 21 December 2011, *N. S. v. Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, EU:C:2011:865.

[259] Judgement of 19 March 2019 [GC]. *Abubacarr Jawo v. Bundesrepublik Deutschland*, C-163/17, EU:C:2019:218.

It was the first time that the CJEU took into account the circumstances of the asylum seeker after the transfer had taken place, by adding a new form of argument: taking into account the particular level of severity (Abrisketa-Uriarte, 2020).

The case law reflects the fact that EU reception and asylum policies remain dysfunctional and lack harmonisation. Secondary movements, slow processes, and lack of coordination are highlighted as major problems. Admittedly, centralisation and harmonisation of migration management will not be easy and may even require reform of the TFEU, but the establishment of a common method in the EU whereby states ensure the examination of asylum applications and share responsibility for this is essential. Whether it could be needed to establish a federal-type EU rescue agency in the model of the European Central Bank is an issue open to political debate (Vignon, 2019).

The second aspect to discuss after the «where» is the «what». It may be stated that Europe (both at CoE and EU level), echoing UN international agreements, has established the right to human dignity, and the prohibition of inhumane treatment. Consequently, particularly for those irregular migrants, whether asylum seekers or not, who are in dire need, unable to secure any other form of income or assistance, EU Member States must provide at least a basic level of protection that prevents them from reaching a situation of personal degradation.

These support actions are based on jurisprudence and soft law, depend on Member States. Actions by national, regional, or local governments, complemented by the actions of NGOs, and to a large extent are linked directly or indirectly to the Common European Asylum Policy. The following lines use Spain as an example for this support actions review.

Following the EU legal framework, it is possible to obtain three different possibilities for protection. The first is temporary protection, established in 2001 by a Directive,[260] which was not activated until 4 March 2022 due to the war in Ukraine, and implemented by a Council Decision.[261] It is intended to respond to mass influxes of people in situations of exceptional emergencies and forced displacement. The Directive provides for two main ways of ending temporary protection. Firstly, when the situation in the country of origin allows for a safe return with due respect for human rights and fundamental freedoms and the non-refoulement obligations of the Member States; secondly, the Council may terminate the temporary protection regime at any time. In any case, the temporary protection regime must be terminated when the three-year period is reached.

[260] Council Directive 2001/55/EC of 20 July 2001, as above.

[261] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, ST/6846/2022/INIT, OJ L 71, 4.3.2022, p. 1–6.

In Spain, it can be requested at CREADE (Reception, Attention and Referral Centres) or at police stations. Residence and work permit, health care, access to education and social assistance are provided. The application is resolved within 24 hours.

International protection applies in cases of persecution on the grounds included in the 1951 Geneva Convention and in the 2009 Spanish Asylum Law.[262] The Protocol Relating to the Status of Refugees defines them as persons who are at risk of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion in their country of origin. Refugee status can be requested from the Spanish authorities at Spanish borders (airport, port, or land border), or at Police Stations. If granted, it is permanent and allows access to work (after six months of application), health care, access to education and to the reception system if necessary.

For persons who do not qualify as refugees, there is still another form of international protection called «subsidiary».[263] Directive 2004/83/EC[264] defined the minimum standards for qualifying for subsidiary protection status. It was repealed by Directive 2011/95/EU,[265] providing uniform European States for persons eligible for subsidiary protection and the content of the protection granted. In addition, subsidiary protection status may be withdrawn from persons where the circumstances that gave rise to the protection status have ceased to exist or have changed so that the person is no longer at risk of suffering serious harm.[266]

Even within a single State such as Spain, programmes differ among the different regions (Comunidades Autónomas, CCAA). At a central level, the Spanish Law on Foreigners[267] requires legal residence in Spain as a requirement for access to the catalogue of Social Security benefits and Social Services, of the

[262] Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria [Law regulating the right to asylum and subsidiary protection] «BOE» no 263, 31/10/2009. Ref. BOE-A-2009-17242.

[263] UNHCR. Temporary Protection, T.I.E. and Reception Centers (electronic resource), available at: *https://help.unhcr.org/spain/en/ucrania-proteccion-en-espana/ (accessed on 27 May 2023).*

[264] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. OJ L 304, 30.9.2004, p. 12–23. No longer in force, Date of end of validity: 21/12/2013; Repealed by Council Directive 2011/95/EU (as above).

[265] Directive 2011/95/EU (as above).

[266] Serious harm is defined in Directive 2011/95/EU (Art. 15) and consists of:
"(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

[267] Art. 14: Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social [Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration]. «BOE» no. 10, 12/1/2000. Ref.: BOE-A-2000-544. See also: Real Decreto 220/2022, de 29 de marzo, por el que se aprueba el Reglamento por el que se regula el sistema de acogida en materia de protección internacional. [Royal Decree 220/2022 of 29 March, approving the regulations governing the reception system for international protection] «BOE» no. 76, of 30/03/2022. Ref: BOE-A-2022-4978.

central government. As a national programme, legal resident foreigners can access the benefits under the same conditions as if they were Spanish throughout the national territory. The same legal residence requirement applies for housing benefit. There is no social assistance aimed at foreigners simply because they are migrants, and from which Spanish nationals may be excluded. For those with legal residence, according to data from the 2015 report, foreigners accounted for 15.17% of users of social services and 9.7% of unemployment benefits (Ruiz, 2019). There is also a State programme, which receives Next Generation EU funds and possible participation of the regions (CCAA), for the development of Reception Centres for International Protection (Centros de acogida de protección internacional (CAPI)].

All (including irregular migrants) are entitled to basic social services and benefits regardless of their administrative status, additionally provided by municipalities and CCAA for social emergency situations. In addition, if they are registered with the municipality, they can receive health care and schooling and, in some CCAA, access to canteen grants or school materials. They can also receive aid from organisations such as Caritas or the Red Cross, which attend to people in situations of vulnerability, regardless of their administrative situation.

In addition, irregular migrants ─just like Spaniards─ can benefit from the minimum living income (renta mínima vital),[268] under the conditions established by each region. One of the main difficulties, apart from the fact that in many cases registration with the municipality is required, is to have a bank account where they can receive the income, quite a limiting factor as in many cases they do not have a valid identity document to open the account. There may be additional requirements, e.g., in Ceuta, Melilla, and 10 of the 17 CCAA effective proof of residence (usually a minimum of 12 months) is required. Registration as a jobseeker is required in 10 of the CCAA.

The risk of poverty or social exclusion occurred (2021) according to the EU strategy 2020 classification in Spain in 28.3% of women and 27.0% of men as set out in the AROPE report published by the National Institute of Statistics (INE).[269] Only 8% receive direct or indirect aid. Among them, the percentage of foreigners receiving this benefit has remained stable over the years at around 25%.[270]

[268] Established for 2023 in 565.37 euros.

[269] Riesgo de pobreza y/o exclusión social (estrategia Europa 2020), indicador AROPE [Risk of poverty and/or social exclusion (Europe 2020 strategy), AROPE indicator]. INE (electronic resource), available at:
https://www.ine.es/ss/Satellite?L=es_ES&c=INESeccion_C&cid=1259941637944&p=1254735110672&pagename=ProductosYServicios/PYSLayout (accessed on 1 April 2023).

[270] Ministerio de Derechos Sociales y Agenda 2030. Informe de rentas Mínimas de Inserción [Report on Minimum Welfare Income] (electronic resource), available at:
https://www.mdsocialesa2030.gob.es/derechos-sociales/servicios-sociales/rentas-minimas.htm (accessed on 1 April 2023).

Spain enshrines the rights established by the 1951 Geneva Convention in the law regulating the right to asylum and subsidiary protection.[271] Its Art. 3 establishes the status of refugee, and Art. 4 the subsidiary protection. Applications can be submitted in Spain, at the border, or at the Immigration Detention Centres (Centros de Internamiento de Extranjeros, CIE). According to Art. 16.2, applicants for international protection shall have the right to free health care and legal assistance, free processing of the procedure, and the right to an interpreter. It is notorious that the application and its subsequent processing ─including the interview, which, except in duly justified exceptional cases must be carried out in person─ cannot be submitted in the country of origin, or in another nearby Spanish consulate. However, the health, legal and interpreter protection difficulties that would arise if the application were accepted abroad are understandable. This international protection can be granted, both to migrants who have entered regularly and to those who entered irregularly when the required conditions were met.

The Spanish government has a reception and integration support programme for asylum seekers with limited financial resources to meet their needs and those of their families. This reception programme is managed by the Ministry of Inclusion with the collaboration of specialised NGOs. It is divided into several phases, with a maximum duration of 18 months, extendable to 24 months for cases considered vulnerable. During this time, the migrant is provided with accommodation anywhere in Spain where a place is available. The support programme includes social care, psychological support, help with training and language classes or support in the search for employment.[272]

For refugees, the Spanish government offers an economic allowance for a period of six months, which can be extended for an equal period of time. According to data from a report as of January 2019, the amounts of this financial assistance are as follows (some items are not compatible with each other): Basic needs per person €347.60/month. Housing rent per individual up to €376/month. Purchase of clothing up to €181.7 per person maximum two grants per year (Ruiz, 2019).

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[271] Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria [Law regulating the right to asylum and subsidiary protection] (as above).

[272] UNHCR-ACNUR. Ayuda. España. Acceso al sistema de acogida e integración [Help. Spain. Access to the reception and integration system] (electronic resource). Available at: *https://help.unhcr.org/spain/acceso-sistema-acogida/ (accessed on 1 April 2023).*
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CHAPTER FOUR. OTHER ACTORS IN THE DISEMBARKATION ON EUROPEAN SHORES. THE ROLE OF Frontex AND NGOS.

This chapter, closely related to the Mediterranean Sea and to the previous one, reviews two maritime rescue actors, which despite not having statutory SAR functions, in practice carry out a considerable number of rescue actions. On the one hand the increasing participation of Frontex ─primarily a border surveillance agency─ in the rescue of migrants, and on the other hand, the controversial issue of independent non-State-owned vessels' involvement in rescues.

With regard to this second point, some extreme political positions will be discussed, such as the case of Italy, as well as the general approach taken by the EU in this respect, always bearing in mind that SAR is an exclusive competence of the Member States.

4.1.The Increasing Role of Frontex in Reducing the Flow of Boat-migrants

Competencies in migration and asylum policy were transferred to the EU through the Amsterdam Treaty, which allowed the Council to act within the framework of the EU, leaving aside the previous intergovernmental scenario. The innovations introduced by the Amsterdam Treaty led to the establishment (2004) of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union Frontex (from *Frontières Extérieures*), the external borders agency for the EU.[273]

[273] The functioning of Frontex has been set out in a successive series of repelled regulations (list updated up to 1 April 2023):

- Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004, p. 1–11. [No longer in force].
- Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers. OJ L 199, 31.7.2007, p. 30–39. [No longer in force].
- Council Decision (EU) 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. OJ L 111, 4.5.2010, p. 20–26. [No longer in force].
- Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management

The current 2019 Regulation,[274] while giving more powers to the agency, does not substantially change the previous Frontex framework, including the duty to "contributing to ensuring the protection and saving the lives of migrants" (Art. 19.1), all these actions, including return policy "with the respect for fundamental rights, general principles of Union law and international law" (Art 48.1).

It must be stressed that Frontex is a border control agency and has no explicit mandate to engage in SAR activities, although it is obviously affected by the phenomenon of mixed migration. Note that the New Pact on Migration and Asylum enhances the role of Frontex in migration reduction rather than in human rights. The European Commission gives a relevant role to Frontex in migration control by stating that it "[i]t should be a priority for Frontex to become the operational arm of EU return policy."[275]

The role of Frontex in search and rescue operations has been the subject of debate as to whether this introduces essential new elements into the Schengen Borders Code. According to Santos Vara and Sánchez Tabernero, although situations of search and rescue may arise during border surveillance operations carried out in the context of operations coordinated by Frontex, the obligations for search and rescue at sea were considered not to be incumbent on Frontex (Santos-Vara & Sánchez-Tabernero, 2016).

The rules for surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex of the Member States of the EU have been included in the Regulation[276] including provisions related to rescue. Note that at least nominally "Measures taken for the purpose of a sea operation

of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 304, 22.11.2011, p. 1–17. [No longer in force].

• Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) OJ L 295, 6.11.2013, p. 11–26. [No longer in force].

• Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. OJ L 189, 27.6.2014, p. 93–107.

• Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification). OJ L 77, 23.3.2016, p. 1–52 [in force].

• Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. OJ L 251, 16.9.2016, p. 1–76. [No longer in force].

• Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, PE/33/2019/REV/1. *OJ L 295, 14.11.2019, p. 1–131* [in force].

[274] Regulation (EU) 2019/1896 (as above).

[275] Communication from the Commission on the New Pact on Migration and Asylum, COM(2020), 609 final, Brussels, 23.9.2020, 2.5, para 4.

[276] Regulation (EU) No 656/2014 (as above).

shall be conducted in a way that, in all instances, ensures the safety of the persons intercepted or rescued, the safety of the participating units or that of third parties."[277]

The issue was problematic even during the negotiation of that Regulation, at which point six Member States with Mediterranean coastlines argued that including rescue and disembarkation would be an encroachment on the exclusive competence of Member States (Esteve-García, 2015). It was clarified that rescue remains State responsibility except in the case of rescues by Frontex where, exceptionally, shared management between the EU and the coastal State could occur.

Rescues by Frontex involve a clear interaction between border control and rescue operations, i.e., an interaction between Frontex and SAR. However, this does not mean Frontex will «become a SAR body», although "most of Frontex operations end up becoming search and rescue operations" (Santos-Vara & Sánchez-Tabernero, 2016, p. 70).

To what point such rescue actions could be extended to third countries is an open question, since although the possibility is contained in the Regulation [656/2014], recitals include words such as «work towards,» «may,» «shall,» «should be.» Except in case of agreement between the two States verified by the Commission (Art. 20), there seems to be no clear legal framework for launching rescues in waters not belonging to a Member State.[278]

The legal scope of the frequent implication of Frontex, during sea border surveillance operations, in SAR activities has given rise to internal EU debate. There has even been a dispute between the Parliament and the Council on procedural and competence aspects that ended up in the Court of Justice of the European Union (CJEU), resulting in the repealing of Council Decision 2010/ 252.[279]

As a border control agency, Frontex has capabilities in relation to migrant smuggling. In the territorial seas, Frontex operation of stopping and searching vessels if «reasonable grounds to suspect» smuggling of migrants by sea is based in its Operation Plan.[280] A notable element of the plan is that the custom of seizing the ship and apprehending the people on board is an option (Art. 6.2.a), but there is an alternative option: "ordering the vessel to alter its course outside

[277] Regulation (EU) No 656/2014 as above, Art.3 (Chapter II).

[278] Notwithstanding the EU Regulation 656/2014 establishes that "Cooperation with neighbouring third countries is crucial to prevent unauthorised border crossings, to counter cross-border criminality and to avoid loss of life at sea" (point 5).

[279] As a consequence of the sentence of the Judgment of the Court of Justice of 05 September 2012, *European Parliament v Council of the European Union*, C-355/10, EU:C:2012:516; it was repealed by Regulation 656/2014.

[280] The operation plan has been recapitulated in EU Regulation 656/2014.

of or towards a destination other than the territorial sea or the contiguous zone, including escorting the vessel" (Art. 6.2.b) to ensure compliance with the order.

Consideration could also be given to chasing away the smugglers' boat and leaving the migrants to their own devices. Such an action has been subject to wide criticism. According to Basilien-Gainche when the actions of external border control put migrants at a distance "[...] they are put far away from the obligations [...] which European States have a responsibility to implement [...]. As they are far away from our eyes, they remain far away from their rights" (Basilien-Gainche, 2015, p. 113).

The question of the collision of EU rules and regulations —in particular at this point relating to Frontex due to its external action— with international conventions such as MARPOL, SAR or UNCLOS has been raised. It should be noted that UNCLOS is binding on the EU, and that once the then European Economic Community ratified UNCLOS III,[281] the CJEU could declare provisions of European law contrary to UNCLOS null and void (Xernou, 2016).

However, such a declaration has serious limitations as set up in the *Intertanko* case law,[282] where the conditions for harmonisation of rules based on international agreements with those issued by the European Union were clarified. In this case law the CJEU established that it is settled on jurisprudence that Community[283] law must be exercised with respect for international law, including the provisions of international conventions "in so far as they codify customary rules of general international law" (§ 51), and adds that the Community "must be bound by such rules." Moreover, "those agreements have primacy over secondary Community legislation" (§ 42). Addressing the concrete question of collision of EU rules and international conventions the CJEU established two conditions: firstly:

> It follows that the validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with such rules of international law. Where that invalidity is pleaded before a national court, the Court of Justice thus reviews, pursuant to Article 234 EC [[284]], the validity of the Community measure concerned in the light of all the rules of international law, subject to two conditions.

[281] Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof. OJ L 179, 23.6.1998, p. 1–2.

[282] Judgment of 3 June 2008 [GC], *the Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and others v Secretary of State for Transport*, C-308/06, EU:C:2008:312.

[283] All references to the «Community» (European Economic Community) in this case law should now be read as referring to the European Union.

[284] It refers to the Treaty Establishing the European Community [Rome Treaty 1957] (Consolidated version 2002). OJ C 325/01, 24.12.2002, p. 33–184.

> First, the Community must be bound by those rules (see Joined Cases 21/72 to 24/72 International Fruit Company and Others [1972] ECR 1219, paragraph 7).

Following the reasoning of the CJEU, this is not the case for the Marpol Convention, which has been signed by the States but not by the EU, neither has it taken over such competences from the Member States, nor does the Convention include customary rules. The EU is, therefore, not bound by Marpol Convention (§47− §51).

Regarding UNCLOS III, the Convention was indeed concluded by the former Community[285] so that following the CJEU in this case law "the provisions of that Convention accordingly form an integral part of the Community legal order," and the Court provided jurisprudence in support of this affirmation (§53).

It is important to point out in this regard that the CJEU set out, after a long legal reasoning, that "UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State" (Recital 64).

But the CJEU laid down a second condition, emphasising the secondary nature of EU law:

> […] the Court can examine the validity of Community legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise (see to this effect, in particular, Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 39). (*Intertanko* case, §45).

It was based on this second condition that the CJEU disentangled the *Intertanko* case from UNCLOS III in stating that "It follows that the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a Community measure in the light of that Convention" (§65).

As for a legal binding between SAR and the EU, the European Commission reiterated it would have no role in the coordination of SAR operations or in the determination of a place of safety for disembarkation of assisted persons: "Providing assistance to any persons found in distress at sea is a legal obligation of EU countries" (para.1).[286]

According to the Regulation [656/2014], a number of aspects must be considered for the final decision of establishing the situation of distress, including «lack of seaworthiness»; «likelihood that the vessel will not reach its final destination»; «necessary supplies»; «qualified crew and command»; «safety,

[285] Council Decision 98/392/EC, as above.

[286] European Commission. Migration and Home Affairs. Search and rescue (electronic resource) available at: *https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/search-and-rescue_en (accessed on 19 April 2023).*

navigation and communication equipment»; «persons in urgent need of assistance»; «deceased, pregnant or minors on board»; or «weather conditions and marine forecasts.» Therefore, as to whether a ship is considered to be in distress in Frontex rescue operations, it does not depend only on a decision taken by the ship alleged to be in distress. Another question is how to proceed in case of discrepancy.

The option of «forcing» a rescue despite the refusal of the boat may result in unintended consequences, as in a Frontex operation near Malta in April 2015, where smugglers fired shots at the Frontex vessel to retrieve their boat once the migrants had been rescued. Although it appears that the shots were fired into the air, with the aim of allowing them to retrieve the empty boat —probably due to the shortage of vessels for smuggling activity— it illustrates that vessels do not always welcome being rescued, with the risk this may pose to rescue vessels, particularly those not carrying weapons (Smith, 2017).

What is the procedure in case a boat refuses to accept rescue? As for Frontex, and following Art. 9.2 (h) of the Regulation 656/2014 in a case where “the persons on board refuse to accept assistance, the participating unit shall inform the responsible Coordination Centre and follow its instruction”, and requests the participating unit to continue providing care by “surveying the vessel and by taking any measure necessary for the safety of the persons concerned” avoiding any action that might aggravate the situation or increase the chances of injury or loss of life.” What the Regulation foresees here is the option of remote surveillance and the possibility to act in case circumstances might change and salvage would then be accepted.

A lesson can be learned (*mutatis mutandis*) from this. If even a Frontex patrol boat, which is governmental and usually weaponed, is not authorised to act directly but has to wait for instructions from the MRCC and follow the supposed distressed ship from a distance, much less a civil ship involved in a SAR operation expected to get permission from the MRCC to act directly against the wish of the boat skipper.

The action of a merchant ship, in general, and particularly in such a situation, will depend on the instructions given by the MRCC. In the meantime, action would essentially be limited to preventing further aggravation of the situation and contributing, within the possibilities available, to the safety of persons on the vessel, in particular those who have fallen or been thrown into the water.

Regulation 656/2014 applies “[…] in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union” (Art. 1). This implies that it is even applicable in nearby

international waters, but only in operations coordinated by Frontex, not when the member States implement actions individually.

As for disembarkation, it is regulated as part of the established rules for the surveillance of the external sea borders and Frontex coast guard duties included in Regulation 656/2014. Note that "This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties" (Art. 15), emphasising the fundamental rights respect and the provision of assistance independently of race, religion, nationality, or status, "or the circumstances in which the person is found" (Art. 9.1).

Regulation 656/2014 establishes several modalities for disembarkation in case of interception in the territorial sea or the contiguous zone: "disembarkation shall take place in the coastal Member State" but in case of interception on the high seas, "disembarkation may take place in the third country from which the vessel is assumed to have departed. If that is not possible, disembarkation shall take place in the host Member state" (Art. 10).

This was the result of the CJEU amendment of some aspects of disembarkation.[287] The previous priorities for disembarkation ─in the third country from which the vessel carrying the persons has departed, or in a third country through whose territorial waters the vessel has passed, or in the search and rescue region through which the vessel has passed─ have been replaced by a single recommended priority for disembarkation: the third country from which the vessel is presumed to have departed. If this is not possible, disembarkation shall take place in the host Member State. "On European level, the place of disembarkation is decided separately for every Joint Operation at Sea" (Xernou, 2016, p. 14).

Note that this is only a recommendation. It is required in coordination with the MRCC to identify a place of safety and ensure that disembarkation of the rescued persons is carried out rapidly and effectively.[288] To conclude, disembarkation in the host Member State is not the only possibility. However, the possibility of disembarkation in a third country in a rescue operation coordinated by Frontex seems, in any case, exceptional in practice. It would be required to assess the general situation in that third country and use all means to identify the intercepted or rescued persons, to assess their personal circumstances, inform the rescued of the plan to hand them over to a third country, and give them an opportunity to express any reasons for believing that such disembarkation would pose them risk and would be in violation of the principle of non-refoulement (Art. 4.3, para. 1).

[287] *European Parliament v Council of the European Union*, C-355/10, EU:C:2012:516 as above.

[288] As stated in Art. 10.1.c of Regulation (EU) No 656/2014 (as above).

Additionally, Frontex operational plans shall provide shore-based medical staff, interpreters, legal advisers, and include in each participating unit at least one person with basic first aid training (Art. 4.3, para. 2). Compliance with these requirements, that are mandatory for EU States under this regulation, may be difficult to be provided, verified, or enforced in a third country not subject to European regulations.

Frontex activities may include Joint Sea Operations (e.g., *Poseidon, Nautilus, Hera I, II, III, Triton, Mare Nostrum, Themis,* etc). The Rapid Border Intervention Teams (RABITs) was a mechanism for situations of massive influx of migrants at the external borders of the EU established in 2007.[289]

It also deserves mentioning the European Union Naval Force in the Mediterranean (EU NAVFOR MED) operation *Sophia*, a European Union military operation commanded by the Italian Rear Admiral Fabio Agostini, established in the aftermath of the Libyan migrant shipwreck crisis in April 2015 with the aim of neutralising the Mediterranean refugee smuggling routes. The mission was progressively scaled down until 2019. On 31 March 2020, the new EUNAVFOR MED Operation *Irini* was launched, and Operation *Sophia* ceased its activities definitively.

New paradoxes emerged with Operation *Sophia*, where Libyan coastguards were equipped and trained to stop migrants leaving Libyan territorial waters, while the new Italian government began to refuse to allow rescued migrants to disembark in its ports. Germany suspended its participation and this paradoxically turned Operation *Sophia* into a naval operation without naval means (Abrisketa-Uriarte, 2020).

For Cusumano, these operations have been defined as a bridge between the humanitarian rhetoric of EU missions and operational conduct focused on practice, mainly on curbing irregular migration, as a form of organised hypocrisy. The dissociation between discourse and action allowed EUNAVFOR MED operations to give the appearance of conciliation between the will of EU governments to reduce migrant arrivals and the normative imperative to act against the loss of life at sea (Cusumano, 2019).

How to ensure safety and fairness of migrant rescues by Frontex is a matter open to debate, given that the Area of Freedom, Security and Justice (AFSJ) itself has undergone a process of agencification, as has been the case with many other EU policies. “The activities performed by Frontex, Europol and the EASO go beyond mere coordination, as they have assumed relevant operational activities which may have negative implications for fundamental rights […] and could lead to fundamental human rights breaches” (Santos Vara, 2018b, p. 454).

[289] By Art.1(1) of Regulation (EC) No 863/2007 (no longer in force).

Increase of control over the agencies is still an ongoing issue.[290] The process of agencification in the management of borders is made possible by the joint efforts of Member States to integrate the management of external borders, even though the primary competence for borders lies with the States (Santos Vara, 2018a).

Another relevant and related feature of Frontex's action, alongside that of agencification, is securitisation. Since the World Trade Center attacks (11/9/2001), there has been a global increase in securitisation policies, i.e., the use of «extraordinary means» or ignoring rules that otherwise would bind, and Europe has not been an exception.[291] The risk of developing securitisation policies and related procedures in Frontex actions ─under the argument of the fight against terrorism and trafficking in human beings─ is embodied in its very definition, including the possibility of violation of rules that may have a potential impact on human rights.[292]

Looking at its origins, this prominent EU focus of increasing the effectiveness of border control dates back at least to the EU Council meeting in Laeken shortly after the 11 September attacks: “The European Council asks the Council and the Commission to work out arrangements for cooperation between services responsible for external border control”[293] “[T]he responses to 9/11 issued by the key EU institutions made clear ‘securitizing’ links between terrorism security, migration and borders, Frontex was not the outcome of that securitization, but rather of its failure” (Neal, 2009, pp. 1–2).

The European policy in particular and the Area of Freedom, Security and Justice in general, have been defined as “still and always giants with feet of clay” (Basilien-Gainche, 2012, p. 378) for its negative message of immigration seen as a regrettable unstoppable flow, with a barely concealed racist connotation ─as evidenced by the different reception of migrants from Ukraine─ and not as a potentially profitable reality for Europe's ageing society.

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[290] For more on this issue see: The revised European Border and Coast Guard Regulation and its fundamental rights implications Opinion of the European Union Agency for Fundamental Rights (2018) (electronic resource), available at:
https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-opinion-ebcg-05-2018_en.pdf (accessed on 25 November 2022).
See also Directorate-General for Internal Policies. Policy Department. Citizens’ rights and constitutional affairs (2011) (electronic resource):
https://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_/02_study_fundamental_rights_en.pdf (accessed on 25 November 2022).

[291] For detailed analysis of the European Union's policies on counter-terrorism see (Wensink et al., 2017).

[292] For a review of securitisation and risk at the EU border see the work by Neal (2009) from the University of Edinburgh.

[293] Presidency Conclusions European Council Meeting in Laeken 14 and 15 December 2001 (42) (electronic resource, available at *https://www.consilium.europa.eu/media/20950/68827.pdf (accessed on 15 March 2023).*

In Frontex rescue actions, it seems that the most efficient fulfilment of the missions entrusted to the Agency has taken precedence over the democratic control of its activities, and respect for human rights, a fact that has not been adequately addressed in successive reforms and has not been well developed in practice. The operational activities carried out by Frontex in recent years have drawn harsh criticism in terms of democratic accountability (Santos Vara, 2018b).

The agency status gives Frontex all the means to keep its activities, plans and experiences secret and blurred, something described as a failure of the European migration system: "While Frontex reaches out for establishing migration control in third countries, the human rights seem to be left behind on European territory" (Dünnwal, 2011).[294]

Considering the high likelihood that the process will continue, the adoption of an instrument determining, inter alia, the possible responsibilities of the agencies involved in case of human rights violations should not be further delayed (Santos Vara, 2018a).

More recent procedures established by Frontex may represent an advance in respect for human rights, since a Regulation provides victims, additionally, with an administrative mechanism at their disposal.[295] "The fundamental rights officer should be responsible for handling complaints received by the Agency in accordance with the right to good administration" (recital 104).

It is important to emphasise, once more, that all these aspects included in Regulation 656/2014 are limited to operations coordinated by Frontex, not to rescues that States may carry out under the SAR Convention or other services. Regulation 656/2014/EU does not restrict or limit the responsibility of States in the exercise of their surveillance and rescue or salvage function but may perhaps exert an assimilation effect on national operations by containing and codifying rules of international maritime law, European jurisprudence, and the principle of non-refoulement (Esteve-García, 2015).

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4.2. Rescues at Sea by Independent non-State Vessels. A Recurrent Occurrence affecting the EU Member States with a Divided Vision

Private vessels, usually from NGOs, engaged in rescue and recovery of distressed persons at sea, is one of the hottest political issues in current EU maritime policy and law. Consequently, this section is not devoted to those vessels that occasionally, and on their planned voyage, provide rescue services in accordance with international law, but to non-governmental ships who are systematically engaged in moving along regular migratory routes in active search

[294] A rather surprising comment, as in 2011 there were still no coordinated Frontex operations with third countries. For more on this issue see (Klepp, 2010).

[295] Regulation (EU) 2019/1896 (as above).

of migrant boats in distress, in repeated rescue actions, outside of State organisation.

The question is approached from three different perspectives. On the one hand, the general framework of the EU. As mentioned, the EU has no direct competence in rescue –not even Frontex, although finally many of its actions end in a rescue. Secondly, the position of Member States that do not have the pressing problem of receiving migrants constantly, and which basically do not wish to have much involvement in the problem, and finally, the countries of first disembarkation, especially along the Central Mediterranean route, which directly support the pressure of migratory waves.

Starting with the first perspective, i.e., that of the EU, and among other soft law documents, the guidance in case of unauthorised entry, transit, and residence establishes: "Criminalisation of non-governmental organisations or any other non-state actors that carry out search and rescue operations while complying with the relevant legal framework amounts to a breach of international law, and therefore is not permitted by EU law." [296]

Moreover, answering to a petition[297] the Commission underlined that help provided at sea to a person in a situation of danger is an obligation imposed by International Law, which is binding on the EU and all its Member States, and is fully transposed into national and EU frameworks. However, the Commission admitted that there is not enough clarity regarding the rules of application: "The Facilitation Directive [2002/90/EC] does not provide a definition of the concept of humanitarian assistance, leaving considerable discretion to Member States as to the definition, scope and application."[298] This is at odds with later comments in the general disembarkation section (Section 5.4) and also with the IMO Principles[299] establishing:

> The Government responsible for the SAR area where the persons were rescued should exercise primary responsibility for ensuring such cooperation occurs. If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control

[296] Communication from the EC. Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01, C/2020/6470, OJ C 323, 1.10.2020, p. 1–6, recital 3. Para. 5)

[297] Petition No 1247/2016 by Paula Schmid Porras (Spanish) on behalf of NGO Professional Emergency Aid (PROEM-AID) concerning the criminalisation of persons engaging with migrants in an irregular situation and the criminalisation of humanitarian assistance at sea (electronic resource). Available at: *https://www.europarl.europa.eu/doceo/document/PETI-CM-609434_EN.pdf?redirect (accessed on 25 May 2023).*

[298] Petition No 1247/2016, as above, Commission reply, 1, para. 2.

[299] IMO FAL 3/Circ. 194 of 22 January 2009. Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea (electronic resource). Available at: *https://wwwcdn.imo.org/localresources/en/OurWork/Facilitation/FAL%20related%20nonmandatory%20documents/FAL.3-Circ.194.pdf (accessed on 11 May 2023).*

> in which the persons rescued can have timely access to post rescue support (3.2, para 2).

Following Sánchez Legido, at EU level, this lack of clarity refers to national discretion, prioritises the obligation to repress and converts the humanitarian exemption into a simple option (Sánchez Legido, 2018). As can be seen from what has been said so far, the key point of rescue at sea by NGOs focuses on the subsequent disembarkation.

It is true that the New Pact on Migration and Asylum recognises over 1,800 rescues by the civil sector, and states that rescues by civil vessels must not be criminalised and cooperation is desirable, but establishes that: “with a view to maintaining safety of navigation and ensuring effective migration management, this cooperation should also be channelled through an expert group on search and rescue established by the Commission to encourage cooperation and the exchange of best practices” (4.3, para. 3). The idea of safety of navigation and compliance with the rules takes precedence over respect for human rights.

Other EU soft law sources include a Commission Recommendation[300] to Member States in relation to NGO vessels on rescue missions and an ongoing European Contact Group on Search and Rescue promoted by the Directorate General for Migration and Home Affairs.[301] The Commission Recommendation maintains the regulatory emphasis. Although it repeats the recognition of ONGs rescue activities, and the non-criminalisation of the private rescue activities, it also adds several restrictive remarks.

Firstly, the concern on the «large numbers of people in relation to the vessel capacity;» secondly it raises a request on «public policy, including safety;» thirdly, the requirement for the vessels to be «suitably registered» and «properly equipped» to meet «the relevant safety and health requirements» associated with this activity; and fourthly, the requirement of coordination with State authorities: “These activities need to take place in a coordinated framework, through reinforced cooperation and coordination between private operators and national authorities” (Recital 12).

The marked focus on getting the migration problem out of the way, while ignoring human rights, was evident in the case commented on by SOS-Méditerranée of the *Aquarius* ship on 23 and 24 November 2017, when the *Aquarius* received instructions from the MRCC in Rome to abandon positions

[300] Commission Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, OJ L 317, 1.10.2020, p. 23–25.

[301] European Commission: Register of Commission Expert Groups and Other Similar Entities (electronic resource). Available at: *https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupId=3752&fromMeetings=true&meetingId=25434 (accessed on 20 April 2023).*

and not to assist people in distress, because the Libyan Coast Guard was expected to arrive, with all that this represents in terms of risk to human rights (Abrisketa-Uriarte, 2020).

The lack of understanding between rescue NGOs and the EU has reached the point of Sea-Watch (which carries out periodic search and rescue operations on its own in the Mediterranean) filing a lawsuit against Frontex,[302] at the CJEU (April 2022). The claim, related to an alleged human rights violation incident off the coast of Malta on 30 July 2021, is for lack of help to a boat in distress with 20 people on board, intercepted by the Libyan coastguard and towed back to Libya.

Gathering information from the EU Agency for Fundamental Rights, Carrera and co-workers reported that "since 2016, 60 administrative or criminal proceedings against rescuing NGOs were initiated by Germany, Greece, Italy, Malta, the Netherlands, and Spain" (Carrera et al., 2023, p. 6).

The renewed EU Action Plan Against Migrant Smuggling allows for "the possibility to distinguish between humanitarian assistance (not mandated by law) and activities that aim to facilitate irregular entry or transit and allows for the exclusion of the former from criminalisation" (3.2.1. para 4).

The EU policy has been criticised as ambivalent (Carrera et al., 2023). The EU adopts an administrative position that seems to give preference to regulations over respect for human rights, with the excuses of public health and safety of navigation requirements. In other words: "although both international and European law impose a number of obligations on the EU Member States regarding persons in distress at sea, their effective implementation is limited by the manner in which they are being construed" (Moreno-Lax, 2011, p. 1).

Moving to the second perspective, that of Member States, there is no uniformity, and positioning can vary depending on political choices at the time. The case of Italy is a good example. Since October 2022, the new Italian government has adopted a series of disincentives[303] for NGO vessels to effectively carry out their activities in the Mediterranean Sea, which lead to higher rescue costs, for example by assigning the port of disembarkation to a distant location or by selective disembarkation.

[302] Sea-Watch verklagt EU-Grenzschutzagentur Frontex [Sea-Watch is suing the EU border protection agency Frontex] (2022). Available (under agreement) at: *https://www.proquest.com/docview/2656123413?accountid=14777 (accessed on 17 May 2023).*

[303] Decreto-legge 2 gennaio 2023, n. 1 (Raccolta 2023) Disposizioni urgenti per la gestione dei flussi migratori. (23G00001) (GU Serie Generale n.1 del 02-01-2023) note: Entrata in vigore del provvedimento: 03/01/2023. Decreto-Legge convertito con modificazioni dalla L. 24 febbraio 2023, n. 15 (in G.U. 02/03/2023, n. 15). [Decree-Law 2 January 2023, n. 1 (2023 Collection) Urgent provisions for the management of migratory flows. (23G00001) (GU General Series n.1 of 02-01-2023). Entry into force: 03/01/2023. Decree-Law converted with amendments in Law 24 February 2023, n. 15 (in Official Gazette 02/03/2023, n. 15)].

In late October and early November 2022, the vessels *SOS Humanity's Humanity 1 and MSF's Geo Barents* were stranded at sea for almost two weeks (carrying 179 and 568 people) and prevented from calling in Italian waters beyond the time necessary to ensure the disembarkation of vulnerable people while the rest of the migrants had to remain on board (Carrera et al., 2023). In November 2022, 89 people rescued by Mission Lifeline's ship *Rise Above* were also held at sea for a week before being allowed to disembark (this time all aboard) in Reggio Calabria.

Italy also denied safe harbour to the vessel *Ocean Viking* until France allowed disembarkation in Toulon, thus generating controversy (Frasca & Gatta, 2023). In the dispute with France, Prime Minister Meloni gave assurance that Italy aids the vulnerable subjects and follows the law, and added "aboard these ships, there are no shipwrecked people but migrants" (Carrera et al., 2023, p. 15).[304] Following the public political dispute between two Member States, the Commission launched the above-mentioned EU Central Mediterranean Action Plan on 21 November 2022.

On 11 April 2023, after receiving 3,000 migrants in just three days, Italy's Governing Council approved the declaration of a migration emergency, for a period of six months, in a clear call to Brussels for greater involvement in the problem. The intention to bypass some EU regulations became evident. The action is regulated under the Code of Civil Protection.[305]

These Italian provisions imply taking an anti-salvage stance to the limit. It is very difficult to meet the strict requirements imposed on NGO rescue vessels in terms of clearance, safety at sea, pollution prevention, certification and training of maritime personnel, as well as the living and working conditions required on their vessels; not to say the requirement to report to the authorities. Penalties for the ship's master range from 10,000 to 50,000 euros, with subsidiary liability for the shipowner, aggravated in the case of repeated offences, including the possibility of blocking the ship in port.

[304] Note that according to SAR Convention (chapter 2.1.10) the irregular condition of a migrant does not exclude the assistance that must 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."

[305] Presidenza del Consiglio dei Ministri Dipartimento della Protezione Civile Ordinanza 16 aprile 2023 Prime disposizioni urgenti per fronteggiare, sul territorio delle Regioni Piemonte, Liguria, Lombardia, Veneto, Friuli-Venezia Giulia, Umbria, Marche, Lazio, Abruzzo, Molise, Basilicata, Calabria, Sardegna, Sicilia e delle Province autonome di Trento e di Bolzano, lo stato di emergenza in conseguenza dell'eccezionale incremento dei flussi di persone migranti in ingresso sul territorio nazionale attraverso le rotte migratorie del Mediterraneo. (Ordinanza n. 984). (23A02349) (GU Serie Generale n.92 del 19-04-2023). [Presidency of the Council of Ministers Department of Civil Protection Order 16 April 2023 First urgent provisions to face, in the territory of the Regions of Piedmont, Liguria, Lombardy, Veneto, Friuli-Venezia Giulia, Umbria, Marche, Lazio, Abruzzo, Molise, Basilicata, Calabria, Sardinia, Sicily and the Autonomous Provinces of Trento and Bolzano, the state of emergency as a consequence of the exceptional increase in the flows of migrants entering the national territory through the Mediterranean migration routes. (Order No. 984). (23A02349) (Official Gazette General Series n.92 of 19-04-2023)].

In addition, the decree obliges the crew of the rescue vessel to inform about the possibility of applying for international protection, requiring NGO staff to take personal data of those who are going to apply for asylum and to share the information with the competent Italian authorities. This shifts the responsibility for receiving and examining applications to the flag State, something that cannot take place on board in the midst of an emergency situation, "the Master has no authority to hear, consider or determine an asylum request,"[306] which is the legal responsibility of the competent authorities. Moreover, this exchange of information between the crew and the official authorities could severely compromise the principles of neutrality and independence that underpin NGOs (Carrera et al., 2023).

Besides, this positioning includes a vision of territorial space closure. Strong border controls and strict compliance with law and/or administrative regulations; and the subsidiary measure of migrant-burden sharing among the State Members and offshoring the problem when possible. The core idea is to avoid the pull effect. Push-back and left-to-die practices have "long characterized the European border regime" (Topak, 2019, p. 398).

Cusumano and Villa reported that, despite the fact that between 2014 and 2019 some 120,000 migrants have been rescued in NGO operations, NGOs have been accused of facilitating irregular migration, particularly in Italian and Maltese courts, with the aim of restricting NGO vessels and their access to European ports. Even after repeated acquittals of the cases, the policy against NGOs persists, based on the pull factor argument commented on above. These authors demonstrated with quantitative data that this empirical argument is not supported by the available evidence (Cusumano & Villa, 2021).

The restrictive stance is based on the idea that just as it is not legal to set up a private armed organisation to protect the country, or to exercise private police activities, which are functions reserved to the army and security forces, respectively, it is also not possible to legally register a private activity of salvage and rescue, which is a function reserved to the State.

Administratively, NGOs cannot have statutory salvage purposes, nor can ships be legally cleared for such purposes, although a collateral outlet has been allowed here: dispatch for humanitarian actions. According to UN Model Law[307]

[306] UNHCR Rescue at Sea a Guide to Principles and Practice as Applied to Refugees and Migrants (as above), p. 10. See also, UNHCR. Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum; and UNHCR, General legal considerations: search-and-rescue operations involving refugees and migrants at sea (November 2017 Legal Considerations), as above.

[307] United Nations Office on Drugs and Crime: Model Law Against the Smuggling of Migrants, New York, 2010 (electronic resource) available at*:*
https://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf (accessed on 16 April 2022).
Also, in similar terms: United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, (as above) (Art.9.4).

recue actions “shall be carried out only by warships or military aircraft, or by other ships or aircraft [including customs, coastguard and police vessels,] clearly marked and identifiable as being on government service and authorized to that effect” (Art. 24.1).

According to this reasoning, rescues by NGO ships ─whether flagged to the coastal State or to another, without authorisation, or with clearance for other purposes, deliberately engaging in the search and rescue of migrants, contrary to what is documented in its clearance form, without an authorisation of the State responsible for the Search and Rescue Region of Responsibility (SRR), and outside the coordination and integration into the MRCC system─ is a breach of law. This policy option highlights that the rescue of people in distress at sea must be carried out in accordance with protocols that guarantee the safety and protection of those rescued.[308]

Actions committed by private rescue vessels, in accordance with international principles, cannot endanger the life or human rights of migrants, nor keep them in the rescue boat in precarious conditions. As discussed above, the EU's ambiguous and regulatory position tends more to support this approach. At odds with this argument are the obstacles to disembarkation. If that were the case, it would include rapid disembarkation to alleviate conditions and improve the safety of the rescued.

This political option is frequently associated with the requirement to examine whether the human and resource contributions of NGOs are genuinely altruistic actions or whether they raise reasonable doubts, as the prosecutor considered happened in the *Iuventa* case (to be commented on next). Also, whether vessels, cleared for humanitarian aid, have carried out actions that are not included on the clearance form. Fraudulent clearance declaration of oceanographic or other research vessels are also reviewed. The shipmaster (even the ship itself) may be held liable and, depending on the circumstances, the master, crew and/or owner may even be charged with criminal complicity in smuggling.

For their part, these NGOs, and their funders ─assuming that they are acting in good faith─ criticise the disproportionate policy of border closures and the practical impossibility of legal and safe access to European territory, which leads to human rights violations and a lack of solidarity towards the countries of origin. It is worth mentioning here again that immigration by sea represented

[308] IMO. Resolution A920(22) as above.
see also the IMO document: «Unsafe mixed migration by sea» (electronic resource): *https://www.imo.org/en/OurWork/Facilitation/Pages/UnsafeMixedMigration-Default.aspx (accessed on 9 May 2021).*

(2021) only 5.9 % of the total.[309] Many disembarkations take place anonymously and therefore blocking only the disembarkation of detected cases, putting the lives and rights of migrants at risk, has practically no effect on reducing the pressure of migrants in irregular situations requesting assistance from Member States.

This second positioning considers that acts of salvage are an obligation, prevailing and justifying acts of disobedience, always assuming a non-profit basis. According to this second reasoning, the first position is reprehensible and selfish because it does nothing to alleviate the drama of migration. Migrant's human rights are primordial elements, and if in order to safeguard these rights it is necessary to breach any civil or administrative precepts, this is done with a higher purpose, which is respect for life with no economic counterpart.[310]

Although with rather limited possibilities, organisations such as *Migrant Offshore Aid Station* (MOAS), *Médecins Sans Frontières* (MSF), *Proactiva Open Arms, Sea-Watch*, *Watch-The-Med*[311] and the like have occasionally performed activities of border counter-surveillance, i.e., monitoring actions on the respect of human rights in activities carried out by maritime border patrol vessels and "contributed to the visibilization [sic] of border policing to a certain degree" (Topak, 2019, p. 398), with the aim of publicly denouncing practices such as left-to-die and push-back, which are contrary to human rights.

The control that these NGOs carry out on the actions of border agents, or counter-surveillance actions, is not well received by them, with frequent hostile responses including the destruction of video recording equipment and other elements: "In the Mediterranean border zones, authorities react similarly to civilian groups so as to neutralize the countersurveillance threat they pose" (Topak, 2019, p. 399). Hostility against those NGOs' activities is increasing.

Cases such as the pre-emptive seizure of the *Open Arms* vessel (to be discussed next), with media coverage and denunciation by Amnesty International, gave rise to legal discussions, including the extent to which the rules established for States in its designated area of search and rescue oblige private entities, and the legal support for a pre-emptive seizure, in response to an alleged rescue action by a foreign-flagged vessel on the high seas (Sánchez Legido, 2018).

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[309] A figure of 112,600 out of almost two million (1.92) immigrant entrances in Europe for that year (2021). Total irregular 10.4% Source: Statistics on migration to Europe (electronic resource). Available at: *https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#developmentsin20192018* (accessed on 28 October 2022).

[310] Note that the UN Charter includes the right to live and other human rights (Art 1.3.) and according to it (Art. 103), Charter obligations prevail over other regulations that the States may develop.

[311] It even has a website where reports of alleged human rights violations are posted and a hotline number to report them (electronic resource). Available at: *https://watchthemed.net (accessed on 31 August 2021).*

During the meeting in Tallinn under the Estonian presidency (2017), Italy presented Member States with a 12-point code of conduct for NGOs involved in migrant rescue.[312] Following its implementation, Italy has banned the disembarkation of migrants from NGO vessels that have not signed the code of conduct. “Although it is not binding, it may lead to assumptions that those who have not signed engage in unlawful behaviour, thereby contributing to delegitimising sea rescue NGOs” (Öner & Cirino, 2023, p. 413).

Furthermore, “various NGO vessels were impounded and their shipmasters prosecuted” (Attard, 2020, p. 10). Italian minister Salvini went so far as to claim that there was a connection between human traffickers and maritime rescue NGOs, further criminalising their actions, which resulted in a reduction of financial support and donations to NGOs, after these accusations were published by the media. The Italian policy was challenged by the International Chamber of Shipping (ICS),[313] because of the resulting increase in rescue operations for merchant ships and the corresponding increase in costs.

UN human rights bodies[314] take a less strict stance that tends to support the reasoning of NGOs and justify their actions on the basis of protecting the human rights and safety of migrants.[315] This view also calls for a comprehensive approach to migration, promoting legal immigration and a greater contribution to the development of countries of origin. It is argued that pressure is also put on the EU's peripheral countries by providing them with greater means of border control, which have often been used in violation of human and refugee rights principles.

A number of cases exemplify this political bipolarity:

Open Arms case.[316] The legal aspects of this case has been thoroughly reviewed and described by (Sánchez Legido, 2018). On 15 March 2018, the

[312] Code of Conduct for NGOs Undertaking Activities in Migrants’ Rescue Operations at Sea. Italian Proposal (electronic resource) available at: *https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf (accessed on 15 August 2021).*

[313] International Chamber of Shipping [Press release]: Shipping Industry Increasingly Worried About EU Member States’ Policy on Migrants Rescued at Sea. 26 June 2018 (electronic resource). Available at: *https://www.ics-shipping.org/press-release/shipping-industry-increasingly-worried-about-eu-member-states-policy-on-migrants-rescued-at-sea/ (accessed on 20 April 2023).*

[314] See: Conclusions Adopted by The Executive Committee on The International Protection of Refugees (electronic resource) available at: *https://www.unhcr.org/en-us/578371524.pdf (accessed on 1 September 2021).*

[315] See a similar EU approach in: The Common European Asylum System and human rights: enhancing protection in times of emergencies. Claudio Matera and Amanda Taylor (eds.) Centre for the Law of EU External Relations (electronic resource) available at: *https://www.easo.europa.eu/sites/default/files/public/cleer-Article-final-3.pdf (accessed on 1 September 2021).*

[316] The *Open Arms* is a Spanish flagged ship, belonging to the Spanish NGO Proactive Open Arms, with statutory activities in the Central Mediterranean, focused on the rescue of people in distress at sea, under the protection of the right of free association for lawful purposes established by Art. 2.1 of the

Open Arms launched, a rescue operation, in international waters, taking on board 117 people crammed into a first boat. After finding a second empty craft, the crew was preparing to rescue a third one, which had 101 people on board, when a Libyan coastguard patrol boat, which had arrived in the meantime, cunningly positioned itself between the migrants' vessel and the Spanish rescue speedboats, attempting to prevent them from recovering anyone.

Notoriously, in this case jurisdiction was exercised by the Libyan authorities in international waters, an action against a Spanish flagged ship, on the high seas, unauthorised by the flag state (Spain). In addition, a question may be raised as to whether or not a SAR area had been then established by Libya, which in any case neither Spain nor Italy had officially recognised as being part of the RCC network, and consequently Libya had no responsibility for coordinating rescue actions.

The Libyan authorities urged the personnel of the auxiliary vessels to hand over the rescued women and children under threat of opening fire. According to journalist Cristina Mas onboard, the Libyans threatened the crew with weapons, demanding that the migrants be «returned» to them. It should be noted that the people on board the Open Arms were already under Spanish jurisdiction according to international law. The information was transmitted from the MRCC in Rome and from the Libyan patrol boat (donated by Italy) to the *Open Arms* shipmaster that the rescued migrants be transferred to the Libyan patrol boat.

After a period of communication with the Italian authorities, the Libyans left the scene of the rescue. The *Open Arms* then completed the rescue and headed towards Malta, where a Maltese patrol boat only took charge of a woman with her three-month-old baby son, who was in a critical condition. Nobody else was allowed to disembark. After almost two days' navigation with 216 people on board in the stormy sea, the port of Pozzallo (Ragusa) was established as the disembarking destination. The *Open Arms* was seized, and subsequent criminal proceedings initiated against three members of the Proactiva Open Arms staff.

Also notably, the initial claim of the Italian authorities was to exercise jurisdiction for conduct carried out on the high seas before the alleged perpetrators entered Italian territory, for disobedience to the authorities of the MRCC, and for refusing to hand over the rescued persons to agents of a third State, all on the high seas and with a vessel flying the Spanish and not the Italian flag.

According to Sánchez Legido the final authorisation of entry into Italian jurisdictional waters and the subsequent disembarkation of the people rescued

Spanish LO 1/2002 on the Right of Association. For an extensive review of Spanish associations and their responsibility see: (Mata de Antonio, 2013).

by the *Open Arms* in the port of Pozzallo at the request of Spain, was a decision taken responsibly by the Italian authorities. The author concludes that the incident is yet another consequence of European policies of externalisation and delocalisation of the migration problem (Sánchez Legido, 2018).

The *Alexander Maersk* incident (a Danish container ship) is a very similar case of such a policy of «await further instructions» leaving the ship alone for days without heeding the established obligation to allow a merchant ship involved in a rescue operation to pursue its course as soon as possible. The vessel was instructed by MRCC Rome to assist a boat in distress in international waters between Libya and Malta. Although the operation to rescue 113 migrants was fully successful, the vessel had to wait five days before being authorised to dock in Pozzallo on 26 June 2018.[317]

In other cases, the outcome has not been so favourable. The 152-metre-long Portuguese-flagged cargo ship *King Jacob* (IMO 9147215) was instructed by the Italian MRCC to rescue a 27-metre-long fishing ship off Lampedusa with about 800 migrants on board on 18 April 2015. In an allegedly evasive and erratic manoeuvre by the trawler, the ships collided and after panic-stricken migrants drifted to the side, the trawler sank, leaving only 28 survivors.[318] The possibility of not wanting to be rescued has been discussed above and the rescuer must be prepared for such an action.

The *Iuventa* case[319] had criminal implications (Tranchina, 2022). On 1st August 2017, the 33 m Dutch-flagged *Iuventa* of the NGO Jugend Rettet was ordered by the Italian authorities to proceed to Lampedusa and disembarking the following day to the Sicilian port of Trapani. By a judge's decision the ship was seized for alleged involvement in assisting illegal immigration and collaboration with migrant smuggling organisations on the occasion of three different rescue operations. The Trapani prosecutor claimed to have evidence that the NGO had contacts with migrant smugglers during one operation in September (2016) and two others in June, claiming that, rather than being rescued, the people on board were handed over to the crew of the *Iuventa* by smugglers.

Prosecutors have previously declared they believed *Iuventa* crew members colluded with smugglers in 2016 and 2017 to organise migrant transfers at sea. Appearing before the *Camera dei Diputati* (Schengen

[317] A disembarkation of 106 remaining migrants, seven having previously been trans boarded for medical reasons. Migrants transferred from Maersk tanker after more than month at sea, *Reuters* [Press release, 11 September 2000] (electronic resource) available at: *https://www.reuters.com/article/uk-europe-migrants-shipping-idUKKBN2622EQ (accessed on 15 August 2021).*

[318] For details see Migrant tragedy: Anatomy of a shipwreck, *BBC* [Press release, 24 May 2016] (electronic resource) available at: *https://www.bbc.com/news/world-europe-36278529 (accessed on 15 August 2021).*

[319] Italian Supreme Court. Criminal Sentence Section 1, *Molenbur v. Trapani Tribunal*, no. 56138. Date of hearing: 23/04/2018.

monitoring committee), the chief prosecutor of the Catania court insisted on his position that there were links between the rescue NGOs and Libyan migrant smuggling mafias. The crew of the *Iuventa* have been criminally charged and face years in prison.

In November 2019, the European Center [sic] for Constitutional Rights (ECCHR), an independent, not-for-profit non-governmental organisation, submitted a letter to the UN Special Rapporteur on the Situation of Human Rights Defenders, asking him to intervene in the situation in Italy. In its complaint letter the ECCHR argues that the criminal investigations against the *Iuventa* crew, and the following smear campaign by Italian authorities, violate the UN Declaration on Human Rights Defenders and the International Covenant for Civil and Political Rights. In October 2020, the UN special rapporteur publicly condemned Italy's actions against the sea rescuers and demanded that the charges be dropped.[320] Preliminary hearings started, and the case is still ongoing (as of January 2023).

The *Sea Watch* case[321] provides key jurisprudence by the Court of Justice of the European Union (CJEU) regarding NGO vessels and the interpretation of Directive 2009/16.[322]

Firstly, and a point of clarification, inspection action by the coastal state must be carried out by the coastal state. once the rescue procedure has been completed and the rescued persons are in a place of safety either by transhipment or by disembarkation (para 126). In other words, disembarkation cannot be delayed for additional inspection solely because a number of persons are being transported that is not commensurate with the capacity of the vessel or for lack of proper clearance (117):

> Such an interpretation would be contrary to the provisions of the Convention on the Law of the Sea inasmuch as it would be such as to hamper the effective implementation of the duty to render assistance at sea laid down in Article 98 of that convention. In addition, it would not be compatible with Article IV(b) of the SOLAS Convention (para. 118).

Still along the same line, and assuming that both the coastal State and the flag State are parties to the SOLAS Convention, neither of these two States can use their respective competences to ascertain whether the rules on safety at sea

[320] ECCHR: Sea rescuers under attack: Iuventa crew criminalized by Italy (electronic resource) available at: *https://www.ecchr.eu/en/case/sea-rescuers-under-attack-iuventa-crew-criminalized-by-italian-government/ (accessed on 29 July 2021).*

[321] Judgement of 1 August 2022, *Sea Watch EV v Ministero delle Infrastrutture e dei Trasporti, Capitaneria di Porto di Porto Empedocle*, C-14/21 & C-15/21 EU:C:2022:104. Rantos opinions also included in summary in the CJEU press release No 33/22, Luxembourg 22 February 2022.

[322] Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (recast). OJ L 131, 28.05.2009, 57−100.
References are for consolidated text after amendment by Directive (EU) 2017/2110 of the European Parliament and of the Council of 15 November 2017 on a system of inspections for the safe operation of ro-ro passenger ships and high-speed passenger craft in regular service and amending Directive 2009/16/EC and repealing Council Directive 1999/35/EC. OJ L 315, 30.11.2017, p. 61–77.

have been complied with, in order to verify whether the presence of too many people on board could lead to the NGO ship being in breach of any of the provisions of the SOLAS convention (para. 108).

This does not mean that the Coastal State has no right to inspections. The Court does not object, on the basis of Arts. 11 and 13 of the Directive 2009/16, as well as Part II of Annex I thereto, to inspect, either in coastal State waters or in port after ending the rescue procedure, whether there has been a danger to persons, property, or the environment.

Such a decision to undertake additional inspection "is left to the professional judgement of the competent authority" as those articles of the Directive, "confer on the competent authority of the Member State concerned a broad discretion to determine whether those circumstances are such as to constitute an 'unexpected factor' justifying such an inspection" (para. 119).

The inspection cannot be arbitrary. There must be "reasoned and, as to the substance, justified both in law and in fact" (para. 120). In case the inspection is due to discrepancies between the classification and clearance of the NGO vessel the systematic rescue actions, and the carriage of more persons than it is authorised to carry, the port State must "report the detailed legal and factual elements capable of establishing the reasons why that fact gives rise, on its own or together with other elements, to a danger to health, safety, on-board working conditions or the environment" (para. 135).

Detention measures in a totally paradoxical position of emphasising a possible future risk while ignoring the current risk of persons in distress, since the alternative would be to rescue no more than the number of persons the rescue vessel can legally carry, were addressed in Advocate General Rantos' Opinion (exposed on 22 February 2022) (paras. 57−65).

Referring to the Directive 2009/16 he noted that any ship, including those systematically searching for persons in distress at sea, must comply with the conditions for the safety and accommodation of persons on board. Consequently, the mere fact that a ship is engaged in maritime search and rescue activity on a regular basis does not exempt it from the obligation to comply with the requirements applicable to it under international or EU law, and does not prevent that ship from being subject to detention measures in accordance with Article 19 of that Directive if it fails to comply with those rules:

> Lastly, it seems to me that the directive must be interpreted as meaning that a ship systematically engaging in maritime search and rescue activities is not, as such, to be regarded as incapable of being subject to detention measures if it infringes the criteria applicable to it under international or EU law, without prejudice to the duty to render assistance at sea (para 65).

And he added that such ships "systematically transporting persons in numbers greater than the maximum number of persons which may be

transported according to its certificates may, in certain circumstances, pose a danger to persons, property or the environment" (B, question 2, para. 43).

It should be noted that while the coastal State may appreciate that the existence of a danger to persons, property and the environment by performing rescue activities for which the ships are not classified, the coastal State is not entitled to require a specific certification or clearance different from, or in addition to, that issued by the flag State —i.e. it may not require certification for a different category or for a sufficient number of passengers— because this would be an encroachment on the competences of the flag State, contrary to international law (UNCLOS III, Arts 91 and 92) and even Directive 2009/16 (paras. 138−139).

Moreover, the mere fact that, as a result of such an inspection ordered under Arts. 11 and 13 by the port State, the inconsistency between the dispatch and the action of the NGO ship is confirmed is not sufficient reason to retain the ship under Article 2(15) of the Directive (2009/16).

> [T]he Member State which is the port State may not make the non-detention of those ships or the lifting of such a detention subject to the condition that those ships hold certificates appropriate to those activities and comply with all the corresponding requirements (para. 159).

A formal prohibition to proceed to sea requires the ship to be considered unseaworthy (para. 147), i.e., "ships which need to be the subject of corrective action should, where the observed deficiencies are clearly hazardous to safety, health or the environment, be detained until the shortcomings are rectified" (recital 23 of that Directive). Under Art. 94(6) of UNCLOS III the appropriate action in such a case is to inform the flag State in order for it to take in coordination the necessary measures (para. 159).

The question of whether such NGO vessels, not being engaged in commercial activities, should be considered as vessels engaged in flag State activities, and therefore not subject to port State authority, was also addressed. In the first conclusive ruling on this case (*Sea-Watch*), the CJEU established that the Directive 2009/16/EC (as amended) is fully applicable to such ships.

According to Berti, the actions against NGOs have an additional political motivation that goes beyond simply blocking the entry of migrants (Berti, 2021). This author analysed the *Sea-Watch* 3 case including Social Media publications by Italian Minister Matteo Salvini to cast new light on how the tactic of criminalisation of NGOs can be exploited to reinforce other aspects of right-wing populism, such as anti-elitism, nationalism, exclusionary politics, personalisation, and polarisation.

These extreme right-wing positions show a vision of migrants as victims of NGOs, which are defined as an arm of corrupt elites, with criminal behaviour by the shipowner and the master. This allows them to present themselves as heroes fighting against those elites who intend to attack Italy, exploiting Euroscepticism

and criticising other countries involved in the case, in particular Germany and the Netherlands. Under this argument, any institution or political actor, national or international, that supports NGOs such as *Rackete* or *Sea-Watch* is part of this corrupt elite that attacks the people (Berti, 2021).

Restrictive disembarkation is no exclusive to NGOs activities. Both in the cases of EU Member States and Frontex's own operations, there have been alleged expulsions of irregular migrants towards the high seas and to Libya and Turkey waters.

Harmonising interception rules would be a positive step, but a will for the establishment of a "politically realistic legal regime for maritime interceptions" is required (Öner & Cirino, 2023, p. 413). Similar cases of obstacles to disembarkation, not related to the coastal waters of EU countries, will be discussed in chapter 5.

The question of the legal framework and punishability of the humanitarian assistance that NGOs provide to irregular/mixed migrants has been analysed in a study commissioned by the European Parliament's Policy for Citizens' Rights and Constitutional Affairs,[323] with rather narrow conclusions:

1/ Search and rescue are a national authority competence and compromise. Consequently, neither commercial nor not-for-profit organisations should act in search and rescue, outside of the legal framework that, according to the regulations, must be established by the corresponding State.[324]

2/ Even in the case of a vessel flying another Member State flag, the rescue activity within the Search and Rescue Region of Responsibility (SRR) requires authorisation and subjection to national laws, together with coordination with the MRCC.[325]

3/ Any other rescue action will represent a breach of the innocent passage right granted by the UNCLOS III, Art.17: "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea" as such "passage shall take place in conformity with this Convention and with other rules of international law" (Art. 19), and "the passage of a foreign ship shall be

[323] There are two versions of the document, first one from 2016, and the updated review: Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants (2018) Update (electronic resource) available at:
https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf (accessed on 8 May 2021).
Although the references for this thesis are closed as of 15 June 2023, it is worth at least mentioning the European Parliament resolution of 11 July 2023, on the need for EU action on search and rescue in the Mediterranean (2023/2787(RSP)).

[324] There is a reference to SAR Convention "Parties shall, either individually or, if appropriate, in co-operation with other States" (2.1.2).

[325] Following SAR: "[...] search and rescue operations shall, as far as practicable, be co-ordinated by the appropriate rescue co-ordination centre of the Party which has authorized entry [...]. (SAR, Annex, Chapter 3).

considered to be prejudicial […] If in the territorial sea it engages in any of the following activities: “the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.” (Art. 19.2.g).

The area of criminalisation covers all possible sanctions, including the prosecution of administrative and/or other offences, such as fraudulent declaration in the dispatch of the purpose of the ship's voyage, with a wide margin of discretion on the part of government authorities, who can ultimately, depending on the political assessment, determine the seriousness of the offence and the corresponding sanction.

But given the alternative, one wonders what is preferable, in good faith: to comply with regulations by abandoning or blocking migrants on NGO vessels that exceed the legal capacity of the vessel to prevent a possible future risks, or to care for them given that they are already at risk at present?

The human right to life of rescued persons is protected as a fundamental principle in international law. For the European Continent it is included in Art. 3 of the ECHR and Art. 4 of the Charter of Fundamental Rights of the European Union (CFREU).[326] So is the prohibition of torture and inhuman or degrading treatment.

There cannot be «moral equality» between this objective and those related to States' migration policy. The idea that the duty of assistance prevails is beginning to be seen in the findings of Italian courts concerning the prosecution of rescue NGOs active in the Mediterranean (Carrera et al., 2023).

The shipmasters have independent professional judgement, which cannot be restricted by any person, in accordance with SOLAS,[327] in their decisions to ensure the safety of life at sea. For their part, any instructions given by coastal authorities in the context of SAR may not contravene the very purpose of that Convention to preserve human life at sea nor violate the fundamental principles of the rescued persons.

In any case, there is no legal space for coercive measures on migrants, retention, and obstacles for disembarkation, as the CJEU made clear in the *Sea-Watch* case. Eventual administrative actions against the NGO cannot created a side effect of dereliction of human rights for the rescued, a basic right based in international, EU and national laws.[328]

[326] Charter of Fundamental Rights of the European Union [Lisbon], OJ C 303, 14.12.2007, p. 1–16.

[327] IMO, Resolution MSC. 78/26/Add.1, Adoption of Amendments to the International Convention for the Safety of Life at Sea (2004) Annex 3, Regulation 34-1.

[328] As reiterated by the EU itself: Document 52020XC1001(01), Communication from the EC. Commission Guidance on the implementation of EU rules …(as above) and Resolution 2018/2769)(RSP) (as above).

The breach (whether administrative or criminal) does not change the rights of those rescued. “A comprehensive approach is needed that involves all relevant actors, including UNHCR, IOM, and sea rescue NGOs, to develop long-term and sustainable solutions in the Mediterranean” (Öner & Cirino, 2023, p. 415).

As for Maccanico and co-workers: “criminalization promoted by high-level authorities is putting the core values of European democracies at risk” (Maccanico et al., 2018, p. 28). These authors fear that this focus, today on migration, could extend tomorrow to “environment, free speech, diversity and so on. In fact, any kind of freedom or rights is at risk when criminalization is used as a strategy” (Maccanico et al., 2018, p. 28).

We can conclude at least that there is a legitimate and serious concern about this growing tendency, which seems to be supported at the highest levels of the EU and Member States, to «forget» their obligations by criminalising migration.

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CHAPTER FIVE. THE UNFORESEEN ADDED FACTOR OF MIXED MIGRATION BY SEA

This chapter is dedicated to analysing the implications for rescue that arise as a consequence of repeated maritime migratory flows, something that was not taken into account when designing rescue rules. Two divergent and difficult to reconcile vectors arise, on the one hand the SAR obligations of States, and on the other hand, the anti-immigration policies that some of these States adopt to stem the flow of irregular migrants. These barriers, for migrants entering by sea, are established from the earliest stages of rescue, including diversion of vessels, delays, refusals to disembark, and hot returns.

Once the rescue has taken place and the rescuees are on board, the procedure enters the next phase with new legal aspects to consider, including how to organise life on board, what are the rights and duties the rescued persons have, how to resolve conflicts on board that may arise, and how to ensure that disembarkation is carried out in accordance with international law, while respecting human rights.

This chapter will address some of these controversial issues, where there is no unanimous position of the authors, including disembarkation, place of safety and the largely overlooked prohibition of refoulement. The chapter has been broken down into seven sections: i) travel documents, i.e., those «conditions imposed by the legislation applicable;» ii) the conceptual analysis of mixed movements; iii) the respective rights and duties on board; iv) disembarkation after salvage and the place of safety; v) the rule of non-refoulement; vi) social protection after disembarkation (outside Europe); and vii) the voluntary interruption of the migration process and repatriation.

5.1. Migrant Movements and Travel Documents

What are the requirements for migrant travelling? From the earliest times, there has been a need, whether for business, family, leisure, nomadic lifestyle, or for other reasons, to enter a foreign country. Countries are delimited by population and history, but also by cultural ties (especially language), customs, economics, international relations, and other political issues that shape their sovereignty, impelling them to mark and control their borders.

One problem that the migratory journey may encounter is the determination of State borders. Differences over the precise location of borders have been a cause of disputes throughout the centuries, and there is also a tradition to seek a mediating institution/authority in such conflicts.[329] Border disputes (terrestrial, maritime, or aerial) are still ongoing legal issues at the ICJ, despite a decision of an international court not being required. “The fixing of a frontier depends on the will of the sovereign States directly concerned.”[330] Although there may be temporary arrangements in relation to borders location, the ICJ promotes boundaries stability: “Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court.”[331]

There is a strong element related to sovereignty and territorial control within the space delimited by borders. The principle of *uti possidetis juris* was already included in Roman law. At the end of an armed conflict, unless otherwise established, the territory belongs to the State which possesses and controls it. This principle has been assumed in cases of States becoming independent, even without a formal declaration of war.[332] In terms of international law specifically, the territorial delineation raises and determines issues ranging from the nationality of inhabitants to the application of particular legal norms (Shawt, 1996. p. 75).

The principle of *uti possidetis juris* may be the source of conflicts when the new sovereignty is not accepted by a border or by another third State, as in the case of the 2014 Russian annexation of the Crimean Peninsula of Ukraine, generating further frictions in relation to the corresponding territorial waters. This is just one more of the still dozens of border and sovereignty claims in the world today (Núñez, 2021). In such cases, domestic legal operations may not be challenged, but internationally recognised sovereignty may be. “There is thus a close relationship between boundaries and territorial sovereignty” (Shawt, 1996, p. 77). In general, however, and as far as migration is concerned, any territorial disputes do not usually represent a substantial problem, as the frequent destinations of migrants tend to be countries with defined borders.

Although States are territorial (bounded) entities (Infante Caffi, 2016), it has been considered customary for a person to enter, remain in, and leave a country, as a human right under international law. “What we mean by a human right, or how we identify a human right —in contradistinction to mere social or political

[329] As an example, part of the current geopolitical map of the American continent is the result of the Pope’s decisions in the long disputes between the kingdoms of Spain and Portugal (e.g., Tordesillas Treaty blessed by Pope Alexander VI). There was a later arrangement in the so called «Exchange» (Madrid) Treaty of 1750 between the kingdoms of Spain and Portugal.

[330] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 6.*

[331] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment of 26 May 1961: I.C.J. Reports 1961, p. 17. and Reports 1962, p.34.* See also: *Aegean Sea Continental Shey, Judgment, I.C.J. Reports 1978, p. 3.*

[332] A well-known example of *uti possidetis juris* is the sovereignty changes in Alsace resulting from an over 300-year-long dispute between France and the Germanic States.

aspirations— is another question" (Higgins, 1973, p. 341). There are two opposing sides in travelling abroad: on the one hand, the individual's right to travel, based on ancient customary practices, and on the other, the receiving State's right to exercise sovereignty prohibiting entry.

Those ancient customary practices of migration into another country, also since earlier times, have included some formalities, usually some kind of documentation, authorisation, or *laissez-passer* for travelling. Historical references to such documents appear in different cultures both in Asia and the Middle East, well before the current era.[333] In addition to a valid passport, which the migrant must carry with him/her, an additional authorisation endorsement placed within a passport in the form of a visa is required in many cases. However, it should be noted that a passport, or *in lieu* document, by itself, does not grant immunity, except in cases of diplomatic passports.

The ordinary passport is a document "recognised in international law as entitling the holder to the protection of the issuing state" (Diplock, 1946, p. 42). "The passport does not confer anyone's right to enter a country. The host can exclude anyone it wants" (Holsti, 2004, p. 112). Travelling abroad is based on agreements where consent is a critical fact. Additionally, and very importantly, the passport is not a proof of nationality.[334] Efforts to provide greater consistency and robustness to the legal framework for travelling and migration have been constant over time. On the one hand, the control and identification process of the traveller with the increasing use of biometrics, and on the other, the growing conscience about protection of migrants' rights.[335]

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[333] The passport (zhuàn) including anthropometric description was well established in China, 2000 years ago, at least since the Western Han dynasty: "A special passport, sealed by the Chief Prosecutor of the central government, was required for utilizing official conveyance stations (Han Shu, 12, 359)" referred to in (Barbieri-Low & Yates, 2015, p. 679). Although the Bible is not a scientific text, it does reflect the customs and practices of ancient times and in this sense the mention of a safe-conduct appears in (Nehemiah 2:7-9).

[334] There have been many case law untying the passport with nationality in the USA, Jamaica, Cayman Islands, Lesotho, Nigeria, India, Portugal, the UK, and other courts. For a review of the issue of passports and nationality, including the loss, dual nationality, two or more state claims, and issue of passport to non-nationals see: (Muchmore, 2004). Also, illustrative, the cases *Kent v. Dulles,* 357 U.S. 116 (1958), [78 S. Ct. 1113; 2 L. Ed. 2d 1204; 1958 U.S. LEXIS 814 and *Herbert Aptheker et al., Appellants, v. The Secretary of State*, 378 U.S. 500 (1964) [84 S. Ct. 1659; 12 L. Ed. 2d 992; 1964 U.S. LEXIS 2225]. Notwithstanding, the withdrawal of passports, or refusal to grant travel abroad, is a valid prerogative of the State, when there is a risk of committing a crime or evading an obligation that may be detrimental to the State (see *Eunique v. Collin L. Powell*, 281 F.3d 940 [US Court of Appeals for 9th Cir. 2002].

[335] As seen in a number of instruments: i/ The Universal Declaration of Human Rights (as above); ii/ the Vienna Declaration and Programme of Action (Vienna, 25 June 1993); iii/ the establishment of a UN High Commissioner for Human Rights, with allegations by experts and reporters of human rights violations, denounced on its website; iv/ Resolutions of the General Assembly, related to the protection of migrants (as above) (A/RES/67/172 & A/RES/68/179); v/ Convention and Protocol Relating to the Status of Refugees (1951 Geneva Convention as above); vi/ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (as above); vii/ European Convention on Human Rights (as above); viii/ The Resolution Adopted by The UN General Assembly: The New York Declaration for Refugees and Migrants of 19 September 2016, A/Res/71/1, 3 October 2016, etc.
More information about these rights and law frames, including conventions or agreements specific for other world regions, may be found on the web *International Justice Resource Center*, a California based

Focusing on the topic of this section, related to travel documents, it is important to note that, since international travel is possible as a result of an agreement between States, the requirements regarding the appropriate documents to legally enter and stay in a country depend primarily on the host country. In most of the cases, there is an obligation to provide a valid ID at the authorities' request either for nationals[336] or foreigners. In the latter case, and as for the example of Spain:

> Artículo 13. Acreditación de la identidad de ciudadanos extranjeros.
> 1. Los extranjeros que se encuentren en territorio español tienen el derecho y la obligación de conservar y portar consigo la documentación que acredite su identidad expedida por las autoridades competentes del país de origen o de procedencia, así como la que acredite su situación regular en España.
> 2. Los extranjeros no podrán ser privados de su documentación de origen, salvo en el curso de investigaciones judiciales de carácter penal.
> 3. Los extranjeros estarán obligados a exhibir la documentación mencionada en el apartado 1 de este artículo y permitir la comprobación de las medidas de seguridad de la misma, cuando fueran requeridos por las autoridades o sus agentes de conformidad con lo dispuesto en la ley, y por el tiempo imprescindible para dicha comprobación, sin perjuicio de poder demostrar su identidad por cualquier otro medio si no la llevaran consigo.[337]

In case of a migrant consciously providing fake documents, there are two different offences to consider, one for the user and another for the person that has provided the false document. Again, taking the case of Spain, for the public officers or authorities providing such fake documents it will be the application pf Art. 390 of the Criminal Code.[338] As for a user, "simulando un documento en todo o en parte, de manera que induzca a error sobre su autenticidad"[339] the penalty established is six months to three years' imprisonment and a fine of six to twelve months.

Note that this provision is applicable even if the false identity passport or document appears to belong to another EU State, or a third State, or has been forged or acquired in another EU State or a third State, if it is used, printed or sold

not-for-profit organisation (electronic resource) available at: *https://ijrcenter.org/about/ (accessed on 13 May 2021).*

[336] For Spanish nationals and following the Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana [Organic Law 4/2015 of 30 March 2015 on the protection of citizen security] «BOE» no. 77, of 31/03/2015 (art. 9.2), they may be required to show the ID card (DNI). Note that it is not required to carry the document permanently but to be able to show it under request.

[337] [Article 13. Accreditation of the identity of foreign citizens.
1. Foreign nationals who are in Spanish territory have the right and obligation to keep and carry with them the documentation accrediting their identity issued by the competent authorities of their country of origin or provenance, as well as that which accredits their regular situation in Spain.
2. Foreigners may not be deprived of their documentation of origin, except in the course of judicial investigations of a criminal nature.
3. Foreign nationals shall be obliged to show the documentation mentioned in paragraph 1 of this Article and allow the security measures thereof to be checked, when required to do so by the authorities or their agents in accordance with the provisions of the law, and for the time necessary for such verification, without prejudice to being able to prove their identity by any other means if they do not have it with them]. Organic Law 4/2015 as above.

[338] Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, «BOE» no. 281 de 24/11/1995. [Organic Law 10/1995, of November 23 of the Criminal Code].

[339] [simulating a document in whole or in part in such a way as to mislead as to its authenticity].

in Spain.[340] The request for a valid US passport has come to light on several occasions at the US border with migrants holding dual passports. Some migrants who were naturalised US citizens were able to leave the country freely with their original passport, but unable to re-enter until the US consular office had provided them with the corresponding US passport, and only after completing the required administrative steps, resulting in inconveniences, delays, applying for appointments, etc.

As for Europe, it has been reported that up to 80% of irregular migrants travel without any kind of passport.[341] It should be noted that in many cases there is an intentional concealment of documents to make identification more difficult and delay the return process. Any measures that State law permits to be taken in the event that a migrant has no passport or a forged passport, including measures to allow entry or to expel the alien, must be in accordance with the International Covenant on Civil and Political Rights,[342] i.e., taking into account considerations of non-discrimination, prohibition of inhuman treatment and respect for family life. Travelling without a passport, with an expired document or even with a false passport will not necessarily result in the rejection of an application for international protection. Each case must be assessed on a case-by-case basis.

As mentioned above, the passport may not be the only entry requirement. A visa is often required. Proof of financial solvency for the intended length of stay, health care coverage or other requirements and declarations may be needed to obtain a visa.[343] As far as the visa is concerned, the carrier must check the traveller's documentation, among other requirements, because if entry is refused, the company must bear the cost of the traveller's stay in the international zone and repatriation, and face additional penalties (Sánchez Legido, 2018). As for the EU States, this is supported not only by an air regulation linked to the International Air Transport Association (IATA) agreement, but also by a number of EU-specific procedures to be followed by carriers, including those of the Entry and Exist System (EES) and European Travel Information System (ETIAS).[344]

This could be a way to hold migrant smugglers financially responsible, although in case of arrest, it is to be expected that smugglers would normally declare themselves insolvent. But it could be an avenue to explore in the future,

[340] Art. 392, 2, para. 2 of Spanish Criminal Code as above.

[341] German police report many illegal migrants travelling without Passports. *BBC Monitoring European* [Press report, 10 Jun 2016] (electronic resource). Available at: *https://www.proquest.com/wire-feeds/german-police-report-many-illegal-migrants/docview/1795459809/se-2 (accessed on 12 May 2022).*

[342] International Covenant on Civil and Political Rights, adopted on 16 December 1966, General Assembly resolution 2200A (XXI). In force since 23 March 1976.

[343] The surprising requirement to enter the US with a signed declaration that the signatory is not going to attack the president of the country is not so strange when you consider that, even if it is only an attempted scam, there will be an additional offence of false statement in a federal document under FBI prosecution.

[344] FAQ In support of carriers' public section (electronic resource), available at: *https://www.eulisa.europa.eu/Organisation/GoverningBodies/Documents/WG%20Carriers/Documents/Carrier_FAQ.pdf* (accessed on 9 June 2023).

through new international or bilateral arrangements, extending the possibility of seizure of properties or assets in the smuggler's country of origin or nationality. A visa defect, at least for Spain, is only administratively punishable.[345]

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5.2. Mixed Movements & Forced Migration

Mixed movements or mixed migration (group migration) refers to people travelling together, within a flow of usually irregular repeated routes/procedures and means of transport (Sharpe, 2018). Mixed movements are often complex and include asylum seekers, refugees, stateless persons, victims of trafficking, unaccompanied or separated children, and economic migrants. Some of them may qualify to be called refugees. They may be forced to travel because of an armed conflict, of persecution, or they may move simply in search of improved living conditions.

According to UNHCR “Refugees are people who cannot return to their country of origin because of a well-founded fear of persecution, conflict, violence, or other circumstances that have seriously disturbed public order, and who, as a result, require international protection.”[346] The concept of forced migration has been defined by IOM as “a migratory movement which, although the drivers can be diverse, involves force, compulsion, or coercion”, the text clarifies that it is not an international legal movement (International Organization for Migration (IOM), 2019, p. 77).

The label of mixed migration stems from the concept of global governance that emerged after the Second World War. It was a period characterised by a boom in migration, as many people, especially in Europe, were displaced and in need of protection and assistance. As part of the efforts that emerged, a clear separation between refugees and migrants (for economic reasons) was set. The 1951 Geneva Convention and its 1967 Protocol laid the fundamental human rights foundations and the international obligation to protect refugees from persecution, prevent their refoulement and guarantee their wider right to protection. “The increase in number of asylum seekers to the Global North was accompanied by a steady rise in anti-immigration sentiment as well as increasing scepticism as to whether those claiming asylum were in fact «genuine» refugee” (Kiseleva & Markin, 2017, p. 377).

The huge difference in acceptance of Ukrainian immigrants compared to those from Africa suggests that there is a strong racial component to this

[345] Ley Orgánica 4/2000, de 11 de enero Sobre Derechos y Libertades de los Extranjeros en España y su Integración Social (BOE no. 10, de 12 de enero) [Organic Law 4/2000 of 11 January on the Rights and Freedoms of Foreigners in Spain and their Social Integration (BOE no. 10 of 12 January)].

[346] The United Nations Refugee Agency (UNHCR): Asylum and Migration [electronic resource]. Available at:
https://www.unhcr.org/asylum-and-migration.html?gclid=Cj0KCQjwytOEBhD5ARIsANnRjViVEXlRxRV11CnycWsnif_NANLGVKhoyOXn0p3NUS9D897PpHpY3ugaAlX7EALw_wcB&gclsrc=aw.ds (accessed on 7 May 2021).

scepticism. It cannot be said that part of this component has not been maintained by an equally racist positioning of the media, as shown by a study in Spain that has verified its persistence, especially in local newspapers (Marco-Franco, 2023). For their part, many States in the South reacted against the Global North for its unwillingness to shoulder its share of the burden.

In 2000, after the increase in mixed flows, the UNHCR declared a global crisis in the international asylum and refugee system. The term originally employed by UNHCR was «asylum-migration nexus» but in 2007, due to the negative connotations that it has acquired, moved to use the new vocabulary of «mixed migration.» The IOM has played an important role in promoting the concept and in problem solving.[347] Moreover, this report forecasts that «future of migration is mixed.» The difficulties in carrying out asylum and refugee functions by the UNHCR increased in subsequent years, as António Guterres denounced in 2009.[348] The key concept of «migration state» has been coined (Hollifield et al., 2014), and it has been central to migration studies. This migratory state has been analysed with a focus on the rich countries of the Global North, and this narrow view may include "a bias toward liberal democratic states, and its findings are not always easily transferable to other contexts" (Adamson & Tsourapas, 2020, p. 855). Thus, "the field of migration studies lacks an adequate comparative framework for understanding the emergence of different forms of state migration management regimes outside the Global North" (Adamson & Tsourapas, 2020, p. 854). At the centre there is a paradox:

> Central to the migration state is the idea of the «liberal paradox.» On the one hand, states must respond to liberalism's economic logic, which encourages trade and the free flows of goods across borders. On the other hand, liberalism's political and legal logics are of territorial and juridical closure. This situation leads to a tension in migration policy-making in which states seek to balance the logic of markets and the logic of rights (Hollifield et al., 2014, pp. 886–887).

Although there is a clear lack of political will to solve the problem, it must be recognised that the mixed migration phenomenon creates serious difficulties for the SAR system. An occasional shipwreck, which with the current crew of a merchant ship may represent a relatively small number of people to be rescued, is one thing; the constant rescue of large groups of people in distress at sea is another.

The term refugee refers to two different concepts. On the one hand, it refers to an asylum seeker who obtains refugee status, on a personal basis. On the other hand, «refugees» is a term applied to a massive fleeing group, due to war or natural disasters, and does not necessarily imply evidence of persecution of each individual person in the group. One recent example is the massive movements

[347] IMO: Irregular Migration and Mixed Flows: IOM's Approach. MC/INF/297. 19 October 2009 [Ninety-eighth session].

[348] UNHCR: Statement by António Guterres, United Nations High Commissioner for Refugees, to the Third Committee of the General Assembly, 64th Session, United Nations Headquarters, New York, Tuesday, 3 November 2009.

towards EU States of Ukrainians as a result of the Russian invasion of the country in February 2022.

The term migrant applies to a person who moves away from home, either temporarily or permanently. In case of moving within the country, it is an internal displacement, while if it is out of his/her country it is called international migration. The concept by itself does not imply any persecution and the motivations may be economic or not. However, in many instances, border crossing is irregular. “Such crossings bring with them, more often than not, serious risks of injury or death at sea, as well as reckless endangerment of life, exploitation, or violence at the hands of smugglers and traffickers” (UNHCR, para. 3).[349] This distinction is not trivial. As opposed to the refugees whose refoul is forbidden by the 1951 Geneva Convention, and concordant provisions, economic migrants can be returned under conditions to be commented on next (Section 5.5).

For the first group, it must be taken into account that political asylum is a right; that does not change because the group is made up of a couple or hundreds of people, and according to the Universal Declaration of Human Rights (Art. 14.1) “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” The concept has: 1/ a subject requirement: he/she must be a foreigner; 2/ an object requirement: the motivation must be political (religious, ethnic, social, etc.), and cannot be either an evasion after the commission of a crime or to go against UN principles (Art. 14.2); and 3/ a temporary assumption: the situation must be actual and urgent, ceasing when the circumstance disappears (Ribeiro-Porfírio, 2019). An asylum seeker is a person who has applied for refugee status but has not yet been granted it. Moreover, even without refugee status, a migrant may be eligible for so-called subsidiary protection, an international assistance for asylum seekers who do not qualify as refugees. In European legislation, Directive 2011/95/EU[350] defines the minimum standards for obtaining subsidiary protection status.

The modern legal and normative framework regarding border crossing by fluxes of persons has been reviewed by Susan Martin for the Global Commission on International Migration (Martin, 2005) in a report for the (International Organization for Migration (IOM), 2010). The following essential items may be extracted from Martin’s review:

1/ The legal framework for migratory movements is based not only on international law, but also on "good practices and non-binding principles" (p. 1), i.e., on a broad legal basis. However, the key factor is respect for human rights.

2/ The powers and responsibilities to “enact law and regulations to govern issuance passports, admissions, exclusion and removal of aliens, and border security” relies on the State. It possesses “broad authority to regulate the

[349] The United Nations Refugee Agency (UNHCR): Protection at sea [electronic resource]. Available at: *https://www.unhcr.org/protection-at-sea.html (accessed on 15 April 2022).*

[350] Directive 2011/95/EU as above.

movement of foreign nationals across their borders" (p. 1). This makes it difficult to adopt more effective global solutions, although in the case of the EU a general agreement could be established that would have to be ratified by Member States at a later stage.

3/ The conditions and regulations may change from country to country or even in the same State as certain rights may be granted particularly. For example, according to the (UK) Immigration Act, it is possible to grant the «right of abode» with freedom "to live in, and to come and go into and from, the United Kingdom."[351]

4/ The international (either regular or irregular) migrants have rights and responsibilities. "Non-nationals enjoy all the unalienable rights applicable in international law." These are summarised in various covenants or conventions.[352] The concept of second-class citizens, which has obvious racist connotations, must be discarded. For example, in Spain, the aforementioned aid in cases of extreme need does not distinguish between nationals and non-nationals.

5/ The subsequent situation of migrants in distress at sea who move for family or economic reasons has loopholes in international law; they are excluded from the via of refugee status. Although the issue of refugees is contemplated by the UNHCR[353] "much of the consensus building has taken place through *ad hoc*, informal mechanisms such as the Berne Initiative,[[354]] at the international level, and the various consultative mechanisms established at the regional level".

6/ There are several instruments related to migrant rights,[355] but the Convention on Migrant Rights[356] —a key element for avoiding migrant discrimination, particularly at work— accounts for 75% of non-signatory States, including among these non-signatories virtually all rich countries of the Global North. There is a lack of systematic comparative treatment of State migration management policy that includes States outside Europe and North America (Boucher and Gest 2018, 22–24).

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[351] UK Public General Acts1971 c. 77, section 1(1). The legal text was replaced by Immigration Act 1988 (Immigration Act 1988, UK Public General Acts1988 c. 14), but without substantially altering the essential.

[352] i/ The International Covenant on Civil and Political Rights (ICCPR), ii/ the International Covenant on Economic, Social and Cultural Rights, iii/ the Convention on the Elimination of All Forms of Discrimination Against Women, iv/ the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child (CRC), etc., (Martin, 2005, p. 1).

[353] UN Convention and Protocol Relating to the Status of Refugees (1951 Geneva Convention as above). Also, General Assembly resolution 2198 (XXI), 1966.

[354] The Berne initiative was launched by the Swiss government (2001−2004) as a mechanism for consultation of States with the aim of improving migration management at the global and regional levels through enhanced cooperation between States. Its main outcome was the development of the International Agency for Migration Management (IAMM). See: Berne initiative [electronic resource] *Available at: https://www.iom.int/berne-initiative. Accessed on 9 June 2023*.

[355] A complete review of the refugees and forced migration issue may be found in the reference: (Fiddian-Qasmiyeh et al., 2014).

[356] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Assembly resolution 45/158 of 18 December 1990. Into force on 1 July 2003. [UNESCO 66440, doc. SHS.2005/WS].

The fact that a legal framework was not designed with mixed migration in mind, does not mean that the duty to assist mixed migrants in distress at sea should not be fulfilled, and States should facilitate the operation and not hinder the rescue vessel with unwarranted delays in disembarkation. Mixed migration does not alter the rights and duties related to the rescue operation. The lack of cooperation with rescue vessels, for political rather than for legal reasons, by some States, resulting in frequent avoidable delays in disembarkation, is a burden that is forcing some Maritime lines to plan alternative routes, away from the frequently mixed shipping routes.

It becomes clear that there are different approaches and institutional narratives among States. Two scholars from the Hellenic Foundation for European and Foreign Policy (Greece) have extensively analysed them on the basis of official documents, agendas, discussions, public statements, and reports "the narratives produced by the institutions regarding migration and asylum policy, the values put forth as their underlying basis and not on the policies themselves", i.e., an analysis of values (Dimitriadi & Malamidis, 2019, p. 3). According to the summary of their academic work, "migration does not appear to be a priority for EU Institutions until 2011. In that sense, the period since 2011 and especially 2015-2016 has been a game changer, with more institutions taking an active stance on migration" (Dimitriadi & Malamidis, 2019, p. 4).

However, other authors propose extreme measures to remove the problem from the coasts of the Global North, including egoistic solutions such as military intervention in countries of origin or transit, involving NATO if necessary, "providing armed protection for migrants in the country concerned; setting up refugee camps and asylum centres; protecting these camps and centres with arms […]" (Novotný, 2019a, p. 31).[357] This can only be interpreted as neo-colonialism imposed by force, a barrier to human solidarity and a lack of respect for State sovereignty and human rights.

The problem of mixed migration is therefore more a problem of global governance rather than of legal framework. There is no clear willingness to consider all aspects, including the positive contributions that a younger migrant population can bring. Approaches focus more on a skewed view towards the receiving side that does not take into account the reasons and conditions of the migrants, their ways of life and their social organisation. Without this recognition and their active participation, it will not be possible to develop effective legal instruments and we will continue to see the dark and desperate situation of these groups and the continuous trickle of deaths at sea.

[357] Although this author relies on Regulation 2016/1624 (as above) it should be noted that this regulation is no longer in force. It was repealed by Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019. It Is hard to fit the proposal within current limits of Art.37.2: "At the request of a Member State faced with a situation of specific and disproportionate challenges, especially the arrival at points of the external borders of large numbers of third-country nationals trying to enter the territory of that Member State without authorisation, the Agency may deploy a rapid border intervention for a limited period of time on the territory of that host Member State."

Perhaps a light can shine from the 2030 Agenda for Sustainable Development.[358] This document is a good start, as it recognises the positive contribution of migrants to inclusive growth and sustainable development, as well as the fact that international migration is a multidimensional reality of great relevance to the development of countries of origin, transit and destination, which requires coherent and comprehensive responses from both sides (Kiseleva & Markin, 2017).

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5.3. Respective Rights and Duties of the Shipmaster and of Migrants Rescued at Sea

As discussed in Chapter 2 (section 2.2.1) the jurisdiction of a vessel on the high seas is that of the flag State. This means that life on board is regulated by the rules of the flag State, under the authority of the shipmaster. However, the master is obliged to respect human rights, as established in UDHR.[359] The issue of rescued international protection and rights is widely developed by UN agencies, including the Office of the High Commissioner for Human Rights and partnership programmes[360] and by different legal instruments both from the UN and EU.[361] The Guideline on Treatment of Persons Rescued at Sea,[362] provides basic regulation. The rescuees are on their side obliged to follow the rules laid down on board.

On board, the shipmaster is entitled to take corrective measures if he/she deems it necessary. These corrective actions on board shall always be carried out with due respect for human dignity and human rights. The shipmaster has the authority on board, and is entitled to organise the life and assure the security on the vessel,[363] including ordering the restriction of movements within the ship, and the search and frisking of those rescued for weapons, drugs, or any other item that could compromise the safety of the ship or its crew.[364] Not all situations have an easy solution, for example the frisking of a Muslim woman, if there are no

[358] Resolution adopted by the General Assembly on 25 September 2015. Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/L.1, 21 October 2015.

[359] The Universal Declaration of Human Rights as above, art. 5 (and repeated in ECHR art. 3).

[360] United Nations Human Rights. Office of the High Commissioner: Partnership (electronic resource), available at: *https://www.ohchr.org/EN/Countries/Pages/PartnershipsIndex.aspx (accessed on 6 May 2021).*

[361] United Nations Millennium Declaration, as above. Resolution on Protection of migrants adopted by the General Assembly on 20 December 2012, A/Res/67/172, 3 April 2013; and in a further Resolution on Protection of migrants, A/Res/68/179, as above. As for the EU, the Directive 2013/32/EU (as above). These are of application also on board.

[362] Resolution MSC 167(78) as above.

[363] Marine Insight, a leader organisation in holding up and updating maritime professionals with private and governmental support, offers a guide with 23 Points "for Merchant Ships to Rescue Migrants at Sea" (Herwadkar, 2019).

[364] Note that in territorial waters some jurisdictional issues are a matter for the coastal State, for example, it may be an offence under coastal State law to carry arms on a merchant ship, despite the long-standing custom accepted by many flag States —which has its historical origins in the prevention of mutiny on board— that the master and occasionally senior officers may carry arms.

women in the ship's crew. However, there are limitations such as imprisonment in restricted areas exposed to engine fumes, or long stays on the deck exposed to extreme conditions, in breach of due treatment to the rescued. Maintaining law and order on board is not always an easy task. On the chemical tanker Torm Lotte, her crew of only 20 people was trying to maintain order amidst fights breaking out between migrants and smugglers, who had also been rescued; in other cases, there have been suicide attempts and other violence.[365] Cargo can carry highly flammable products, and the smoking ban is not always effectively enforced, which can pose a serious risk.

The rights of the rescued also have other limitations. According to the Resolution MSC.167(78)[366] the master has the obligation to "do everything possible, within the capabilities and limitations of the ship, to treat the survivors humanely and to meet their immediate needs" (5.1.2). Therefore, the shipmaster has the right not to meet demands from rescued persons that exceed the vessel's availability and possibilities.

Although the general issue of salvage-related criminal offences will be dealt with in chapter 6, a comment on how to proceed in case of criminal disputes on board may be appropriate now in this section on shipboard duties and rights. It should be recalled that, according to UNCLOS III, even in territorial waters, jurisdiction on board remains with the flag State, with few exceptions:

> The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage (Art. 27).

Even for those exceptional cases "the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew." (Art. 27.3). The master is not entitled to impose penalties on board simply for the fact of migrants' irregular entrance, as established in the Convention and Protocol Relating to the Status of Refugees[367] (Art. 31) or any other police action that is not justified in ensuring the safety of the ship, or the people on board, including rescued persons.

In addition, according to UNCLOS III "no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national" (Art. 97). The shipmaster, although in some respects representing the

[365] Suicide attempts, fights engulf rescue boat carrying 180 migrants. *Aljazeera News* [Press release, 4 July 2020) (electronic resource) available at: *https://www.aljazeera.com/news/2020/7/4/suicide-attempts-fights-engulf-rescue-boat-carrying-180-migrants (accessed on 26 March 2023).*

[366] Resolution MSC 167(78) as above.

[367] Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

flag State, remains a private actor with a (limited) delegated flag State authority, emanating directly from the agreements signed by the flag State. His/her obligation is constrained to that of rescue, assistance, and protection of the rescued and their human rights and needs, within the possibilities and resources available on the ship, until disembarkation or transhipment. He/she is not a judicial or administrative authority and therefore cannot judge or impose penalties on rescued persons, on behalf of the flag State. Very importantly, according to UNHCR Mandate, the shipmaster is not authorised to establish asylum seeker or refugee status.

> 4.3.1. All Applicants undergoing individual Refugee Status Determination (RSD) procedures must have the opportunity to present their claims in person in an RSD Interview with a qualified Eligibility Officer. As a general rule, a refugee status claim should not be determined in the first instance on the basis of a paper review alone.
> 4.3.2. In situations where an individual RSD interview cannot be conducted in person for reasons of safety and security, availability of resources or significant costs and/or other obstacles relating to travel or access to the Applicant or public health imperatives, the RSD Interview may be conducted remotely, through telephone or videoconference.
> (Procedural Standards for Refugee Status Determination under UNHCR's Mandate).[368]

Another situation that could be a legal issue is the case of a migrant rescued at sea who wants to jump into the sea. Such desperate situations have been described after waiting fruitlessly for disembarkation. The media have reported threats to jump into the sea even from those who declared they could not swim.[369] Jumping from a vessel, particularly when sailing, is a dangerous and high-risk action. In addition, sea conditions and the person's ability to survive in the water play a key role. In cold water the survival time, even without damage from the fall, is very short. At 5°C, muscle and coordination deficits start in about 15 minutes (Tipton, 1989). If it is an area of sharks or other predators, particularly if the person is bleeding, the danger is notably increased by the risk of attack. The issue is different if it happens in international or territorial waters. In international waters, a rescue to return the person on board can be done freely and without any restrictions, since the only jurisdiction that remains is that of the ship.

The problem gets worse in territorial waters, where some restrictions apply. The first and most significant is that the person once into the territorial waters is no longer under the jurisdiction of the flag State of the vessel but under the coastal State jurisdiction. UNCLOS III requires a number of requirements for the right of innocent passage, including that it be continuous and expeditious,[370] although there is an option open to render assistance to persons in danger, allowing stopping and even anchoring if needed (Art 18.2). However, the rescue of

[368] UNHCR. Refugee Status Determination and Procedural Standards for Refugee Status Determination under UNHCR's Mandate, as above.

[369] «I'm going to jump:» tensions on Ocean Viking migrant rescue ship, *France-24h* [Press release 30 June 2020] (electronic resource) available at: *https://www.france24.com/en/20200630-i-m-going-to-jump-tensions-on-ocean-viking-migrant-rescue-ship (accessed on 26 July 2021).*

[370] UNCLOS III, Section 3.A.

persons, either de novo or after having intentionally jumped into the water, in the territorial sea, risks being considered as a disturbance of good order (UNCLOS III, Art. 19, g), of the safety of navigation (Art. 21, a) or a "breach of the customs, immigration, fiscal or sanitary laws and regulations of the coastal State" (Art.21, h), so in order to avoid unintended consequences, it is imperative to inform the coastal State of such a circumstance and act accordingly to instructions provided.

The person in the water could be picked up by a coastal patrol and, on a strict interpretation of the law, the coastal State could treat the operation as an attempt to illegally enter in the country. Regrettably, not all coastal States will show the same level of understanding of the situation and respect for human rights. This could also extend to a crew member jumping in to pick up another person and dragging him/her to the ship.[371] The dangers and legal consequences of launching into territorial waters must made clear to rescued persons.

Additionally, in rescue procedures close to the shore it is necessary, especially in these cases of unforeseen salvage requirement, to take into account the risks to the vessel itself, which depend on the seabed, tides, weather conditions, currents, and possible damage to floating elements such as buoys, navigation signals, cables, etc. UNCLOS III requires the vessel to comply with the following requirements: "(a) the safety of navigation and the regulation of maritime traffic; (b) the protection of navigational aids and facilities and other facilities or installations; (c) the protection of cables and pipelines" (Art. 21.1).

We can conclude this section by saying that it is not possible to provide general guidance covering all the possibilities that the master may encounter once the rescuees are on board, and his/her decision will ultimately be based on the rules described above, and final judgement will be made, after consultation, if necessary, with the relevant authorities. The aforementioned list of rights and duties should be exercised always without prejudice to the master's primary duty to maintain the safety of the ship, its crew, passengers, or cargo.[372]

There is a final right, very relevant for the rescue vessel, that must be repeated here. Resolution 167(78),[373] among others, provides that the shipmaster has the right to proceed on his/her course without delay and to be released promptly from the care of those rescued at sea either by disembarkation or transhipment: "A ship should not be subject to undue delay, financial burden or other related difficulties after assisting persons at sea; therefore coastal States should relieve the ship as soon as practicable" (Art. 6.3). The topic of prompt disembarkation will be expanded in the following section.

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[371] In application of Article 19.2 (g) of UNCLOS III: "the loading or unloading of any goods, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state."

[372] See UNCLOS III (21, 39, 42, 94, 225, 242…), SOLAS chapter V, etc.

[373] Resolution MSC 167(78) as above.

5.4. Disembarkation after Salvage and the Concept of Place of Safety

This section will address the contentious issue of landings, an issue that has given rise to a wide-ranging legal debate. Some comments have already been made in advance, concerning the waters of EU Member States (Chapter 3).

Let us begin here with another case law on offshoring: *Ruddock v. Vadarlis* (*MV Tampa* case).[374] The *Tampa* was a Norwegian freighter which on 26 August 2001, rescued 433 mostly Afghan migrants on international waters, about 80 miles north of the Christmas islands (an Australian territory). Despite the fact that the complete and successful rescue of all those in distress was beyond the ship's capacity and that some people were in need of urgent medical assistance, the ship was not allowed to berth at the nearest port on the island of Christmas. After several days of waiting, anchored 14 miles off the coast, with the corresponding economic loses for the shipowner, it was diverted to Nauru for extraterritorial examination of asylum claims, a solution resulting from a tense diplomatic discussion and agreement between the authorities of Australia, New Zealand, and Nauru.

The Australian prime minister John Howard himself prevented the *Tampa* from disembarking the asylum seekers on Christmas Island, authorising the use of armed pressure from Australian forces to have those rescued taken to an offshore detention centre set up for the purpose in Nauru. But more at odds with any rule of respect for human rights was the decision of the Federal Court of Australia (18 September 2001) ─shrouded in controversy and in the midst of an election─ that there was no unlawful detention of the migrants. Australia has the prerogative to decide who enters its territory and that as the rescued were not being held there was no *habeas corpus* proceeding. The Court cited previous decisions of the Court, the House of Lords, and the USA Supreme Court.[375] Not surprisingly, the decision was criticised internationally.

The UNHCR granted the Nansen Refugee Award to the captain, crew, and owner of the *Tampa*, who demonstrated “personal courage and unique degree of commitment to refugee protection” (Cue, 2002, p. 1). The legal friction in the *Tampa* case is the argument that the exact wording «disembarkation in the closest port» did not appear to be supported by international practice (Sánchez Legido, 2018). This opened a debate on the extent to which the obligation to provide assistance includes a phase of disembarkation of rescued persons and the provision of a place of safety, i.e., whether disembarkation is also included in the rescue obligation. According to Abrisketa Uriarte “la segunda ambigüedad reside

[374] *Ruddock v. Vadarlis,* [2001], FCA 1329; 110 FCR 491; 183 ALR 1; 66 ALD 25.

[375] Notoriously: *Sale v. Haitian Centers Council, Inc.* 509 U.S. 155 (1993). [Argued March 2, 1993. Decided June 21, 1993].

en la inexistencia de la obligación de aceptar el desembarco por parte de los Estados una vez que se ha producido el rescate."[376]

The question of the disembarkation obligation thus constitutes one of the most notable legal frictions. Other authors' approaches seem to support that positioning, as in this statement: "notably, the «Government responsible for the search and rescue region» has «primary responsibility» to coordinate disembarkation but not an absolute duty to provide a 'place of safety' itself." (Guilfoyle & Papastavridis, 2014, p. 6). According to Esteve-García, under international law, no State has a clearly attributed responsibility for the acceptance of rescued persons and several States may be linked in a rescue operation (Esteve-García, 2015).

So let us look at this option of rescue without disembarkation. Considering the vessel's undoubtable obligation to rescue, the only alternative, following this reasoning is that the rescuer vessel could accommodate rescued persons (e.g., a cruiser), so that the rescued were no longer at risk, and disembarkation was no longer an issue, because what is clear is that the rescue procedure continues until the rescued are in a place of safety. Would in this case the rescuer vessel be a place of safety and consequently should the rescued remain on board without further obligations on the part of the coastal State? The answer is clearly negative. The absence of immediate danger does not relieve the responsible Parties of their obligations. Even in that case of full suitability of the assisting vessel passing by, that ship is not a place of safety in the terms envisaged by IMO, MSC.167(78):

> 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 [Place of safety] 6.13[377]

As commented on above, according to the SAR convention, the operation of salvage ends when rescued persons arrive at the so-called «place of safety.»[378] Ratcovich argues that this concept is not defined by SOLAS or SAR convention in a clear form (Ratcovich, 2015). Whatever concept could be considered, what is clear is that, according to the reference above, it is not the rescue ship. Moreover, IMO MSC.167(78) has clearly defined that concept as "a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter, and medical needs) can be met" (4.8.2). The provision of a place of safety is a requirement according to SOLAS and SAR; it is not optative. Since the ship cannot be a place of safety by definition (vide supra), and the ship has the right to a prompt release and to continue with its journey,[379] and the

[376] The second ambiguity lies in the absence of any obligation on the part of States to accept disembarkation once rescue has taken place (Abrisketa-Uriarte, 2020, p. 28).

[377] Also included in SOLAS and SAR amendments, (2.5); and Resolution MSC155(78) as above, 4.8-5.

[378] SAR Convention (Annex, para 1.3.2), reproduced in MSC.167/78 (6.12).

[379] MSC155(78) as above, 3.1.9 and MSC 167(78) as above, 6.3.

rescue only ends when rescuees are in a place of safety, how can the combined obligations be fulfilled except by providing a prompt place of disembarkation?

These considerations, which should be sufficient to avoid circumvention of the good faith landing obligation, were undermined by the MV *Tampa* case, discussed above, where Australia omitted the duty to authorise disembarkation. This motivated a subsequent discussion at the IMO Assembly on 29 November 2001,[380] resulting in promoting the adoption of amendments, reinforcing that rescued survivors must be delivered to a place of safety and within a reasonable time. Following the Tampa incident —and in order not to discourage vessels from sea rescues— SOLAS and SAR Conventions were amended to require the State responsible for the SAR area in which the rescue takes place to provide a place of safety for disembarkation. These amendments reinforce the obligation of the MRCC to initiate the process of identifying the place of disembarkation and informing the rescue vessel and the parties, establishing a new paragraph 3.1.9, added after the existing paragraph 3.1.8 to the 1979 SAR Convention:[381]

> 3.1.9 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 these 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 co-operation occurs, *so that* survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.

As for SOLAS a new section in Rule 33 was introduced in this 2004 amendment:

> The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable (1.1).

Both SOLAS and SAR conventions amendments establish that "[t]he 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."[382] This obligation extends to all signatories of SAR convention.[383] The SAR authority must provide the place of safety within a «reasonable time» as a consequence of the assistant vessel rights granted

[380] Resolution A.920(22), adopted on 29 November 2001, Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, IMO, 22 January 2002.

[381] Resolution MSC.155(78) as above, Chapter 4, 8.4.

[382] SOLAS and SAR Convention amendments, as included in Resolution MSC 167(78) as above, 2.5.

[383] Note that Malta has not adhered to the 2004 amendment.

"coastal States should relieve the ship as soon as practicable."[384] Diligence in carrying out procedure is also required according to the need to minimise the inconvenience for the rescue ship as requested by the IMO MSC Resolution 167(78) to: "ensure that persons in distress are assisted, while minimizing the inconvenience to assisting ships."[385]

But even after those amendments, some authors continue to have doubts about the disembarkation obligation, affirming that there is textually no obligation to accept the landing and that, in terms of facts, the principle of territorial sovereignty and the decision of the coastal State on the vessels that may or may not enter their territory prevails. If rescue occurred outside the SAR zone, the coastal State does not have to assume any role in rescue or disembarkation, leaving the problem to the flag State (Abrisketa-Uriarte, 2020). This can only be considered a form of refoulement.

However, there are further considerations, even in this case of a ship not in the SAR zone. Firstly, the UDHR, which take precedence over national legislation, establishes, as a principle, that human beings shall enjoy fundamental rights and freedoms without discrimination. Blocking disembarkation is a form of discrimination. Secondly, as refugee status cannot be granted on board (see p. 143), in the meantime all those rescued must be presumed to be potential or possible refugees, until it is established who is or is not a candidate for asylum. Failure to do so could result in the refoulement of vulnerable persons in breach of 1951 Geneva Convention on refugees. The concept of refugee has been fixed in said Convention, after the modification introduced by the 1967 Protocol as:

> Any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it. Art I.A.1 (amended).

Consequently, if the coastal State, even without an assigned SAR area, once informed that there is a rescue vessel approaching its territorial waters carrying rescued persons (potentially refugees) and requesting permission to disembark, does not grant such disembarkation, it would be in breach, not only of customary law, but also of 1951 Geneva Convention:

> The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country (Art.31.2)

[384] MSC 167(78) as above, 6.3; Also, SOLAS and SAR amendments, (2.5); Resolution MSC155(78), as above, 4.8.5.

[385] MSC167(78) as above, 2.3.

Also, Arts. 32 and 33 of the 1951 Geneva Convention will be applicable, as such an act could represent a threat to his/her life and freedom:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (Art. 33.1).

In Resolution MSC.167(78), the IMO has stressed that States must avoid actions or inactions that lead to the disembarkation of rescued people in unsafe places insists on the provisions of SOLAS 1974, as amended in relation to the obligation for "Governments to ensure arrangements for coast watching and for the rescue of persons in distress at sea round their coast" (para.3). Since international agreements are signed by States, not authorising the disembarkation of a ship from another State that requests help to protect the lives of those rescued, constitutes, additionally, at least an unfriendly action towards the flag State, and against UNCLOS III:

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of *the United Nation*s (Art. 301).

The obstinacy in the positioning of no legal duty of disembarkation cannot but be considered a far-fetched way of avoiding a moral duty and the obligation to contribute to the rescue and to respect human rights, starting with the lives of those rescued, passing the problem to rescue vessel that, once the rescue tasks have been carried out, has the right to continue its route as soon as possible.

Reluctance or delay on the part of the government authorities responsible for the SAR region in fulfilling the obligation to "retrieve persons in distress, provide for their initial medical and other needs, and deliver them to a place of safety,"[386] may result in the rescued being kept on board for a long period, which may endanger the ship or life on board, in contradiction with the safety of the ship, an established *prima conditio* in the provision of assistance, and in contradiction with basic human rights principles, especially if, as is often the case for migrants on patera, there are situations of vulnerability such as minors or pregnant women that require priority action. Such dilatory actions are immoral, inhumane and have no legal justification.

An interesting consideration is that, according to the rule, the place of safety is not defined geographically and does not need to be on land. For the proper fulfilment of the rescue obligation, a transhipment of the rescued people to another vessel, for example, following the instructions of the MRCC, would be perfectly valid to terminate the rescue vessel's obligations. Two points may be relevant here: first, the option for the shipmaster to suggest a point for disembarkation, and second, the MRCC obligation to request information on "the

[386] SAR Convention Annex, Chapter I, 1.3.2.

master's preferred arrangement for disembarking the survivors";[387] these points are also stressed By the UN Refugee Agency.[388]

Regarding the proposed place of safety for disembarkation, according to MSC.167(78) the master of the ship may refuse to follow the approach instructions of the authorities of another State, knowing that the latter has a practice of requiring disembarkation in unsafe places, or where proper asylum processing systems are not in place (6.17). This position can be reinforced by a request of the shipmaster to his/her flag State, making use of jurisdictional power if necessary. Such circumstance must be communicated to the MRCC. The MSC.167(78) emphasises that the shipmaster must "seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized" (5.1.6).

Even accepting that there is no international agreement with a literal phrase requiring States to disembark rescued persons in all circumstances, this obligation, which is also a moral duty, unquestionably arises as a result of the various provisions mentioned above. The authors cited (Abrisketa-Uriarte, 2020; Coppens & Somers, 2010; Esteve-García, 2015; Guilfoyle & Papastavridis, 2014) and positioning against this obligation seem nothing more than using a textual subterfuge to elude an obligation set by international law.

Another question is how long the process of establishing the disembarkation place can take, i.e., the question of diligence. IMO in the Resolution MSC.167(78) establishes that "the master should understand that in some cases necessary co-ordination may result in unavoidable delays" (6.9). Since the minimum timeframe is not regulated, it is not uncommon for States to try to delay the process with negotiations extended over long periods of time — ignoring the situation of the rescued and the damage to the commercial activity of merchant ships— in an attempt to avoid future responsibilities for hosting the rescued, bringing up the discussion on relocation mechanisms (Van Berckel Smit, 2020).

The last issue in this section concerns the establishment of some kind of on-board differentiation or classification of the persons rescued and their possible qualification as seekers of international protection. According to the UNHCR, such classification on board is not allowed, but this rule has not always been respected, and cases have been reported where rescued persons are asked to fill out questionnaires to assess their asylum claims on board. Since the shipmaster cannot establish the status of the migrant, how can non-refoulement and right to seek asylum be guaranteed without disembarkation and the corresponding analysis case by case? (Goodwin-Gill, 2011). Sometimes the treatment for the rescued was different according to their nationality; e.g., there have been cases of Cuban nationals who were immediately interviewed by asylum officers on board

[387] Included in Resolution MSC 167(78) as above, 6.10.

[388] UNHCR. Rescue at Sea. A Guide to Principles and Practice as Applied to Refugees and Migrants (as above).

the US Coast Guard[389] and, if eligible after screening, were transferred to Guantánamo Bay for further status determination (Frenzen, 2010).

It must be mentioned, finally, that the State's obligation in relation to rescue is one of due diligence and does not include a guarantee of an outcome. The obligation is fulfilled if, after having provided the available means, the operation ends in failure or the death of the boat people. However, according to the ICJ a claim may have grounds in case where the State "manifestly failed to take all measures."[390] Thus, if the rescue took place in the State SAR zone, it must be proven that all required steps were taken, including the setting of a place of safety.[391]

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5.5 The Rule of Non-refoulement after Rescue. A Largely Overlooked Prohibition

The act of refoulement "may consist in expulsion, extradition, deportation, removal, informal transfer, «rendition», rejection, refusal of admission or any other measure which would result in compelling the person to remain in the country of origin."[392] The Convention and Protocol Relating to the Status of Refugees [393] not only established the status of refugees but also the prohibition of refoulement to "territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (Art. 33).

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[394] further reinforced this prohibition "No State Party shall expel, return («refouler») or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" (Art. 3). The same principles have been followed in the several case law such as, for example, *Soering v United Kingdom* [395] relating the risk of accepting extradition to the USA of a German fugitive indicted of murder in the US due to the possibility of his conviction resulting in a death sentence. However there have been some discrepant resolutions in courts.

[389] To what extent such on-board interviews meet the requirements of legal counsel, interpreter and other rights of asylum seekers would be another question open to debate.

[390] In application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43.

[391] This has not always been the case. See Spain and Italy's complaints in this regard [IMO, 'Measures to protect the safety of persons rescued at sea, Compulsory guideline for the treatment of persons rescued at sea,' Submitted by Spain and Italy, FSI 17/15/1 (13 February 2009)].

[392] *Hirsi Jamaa and Others v. Italy, as above,* § 60

[393] 1951 Geneva Convention, as above.

[394] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as above.

[395] *Soering v. United Kingdom* [GC], no.14038/88, ECHR 1989-VII.

The controversial case of *Sale v. Haitian Centers Council,*[396] has two aspects, refoulement and extraterritoriality. The extraterritoriality issues will be addressed in Chapter 7. As for refoulement, it represents another example of a restricted application of Art. 33 of the 1951 Geneva Convention. Refoulement was forced following an interception of a vessel, this time on the high seas. This moved, the Inter-American Court of Human rights to declare that Art. 33 has no geographical limitations[397] and added:

> Collective expulsions or deportations are manifestly contrary to international law. A collective expulsion or deportation is defined as an expulsion carried out without making individual determinations of status […] Summary deportation proceedings or direct return (refoulement) policies are contrary to the guarantees of due process in that they deprive migrants of the right to be heard, to defend themselves adequately, and to challenge their expulsion or deportation (Principle 72).

Relevant also is the Inter-American Court mention that there is no punishment for the mere fact of irregular entry. “Exemption from punishment for irregular entry, presence, or status. The fact that a migrant is in an irregular situation in a State does not harm any fundamental legal good that needs protection through the punitive power of the State” (Principle 67).

The UNHCR has also clarified the interpretation of Art. 33 of the 1951 Geneva Convention: “The obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders.”[398] However, the “international refugee law does not apply to migrants who do not allege a fear of persecution, such as the economic migrants” (Xernou, 2016, p. 20). A similar case was *CPCF v. Minister for Immigration and Border Protection* heard in the High Court of Australia (HCA)[399] concerning an Indian-flagged vessel with 157 migrants ─mostly seeking protection as refugees─ which was intercepted (on 29 June 2014) by the Australian Navy in the Australian contiguous zone,[400] transhipped and returned to India. The Court ruled a much discussed limitation that non-refoulement only applies within territorial waters (Tomasi, 2015).

In *Khlaifia and other v. Italy*[401] the ECtHR basically analysed the breach of Arts. 3 and 4 of Protocol 4 of the ECHR in a collective return. The applicants left Tunisia aboard rudimentary boats bound for the Italian coast. After several hours at sea, their boats were intercepted by the Italian coastguard (exact place of

[396] *Sale v. Haitian Centers Council,* as above.

[397] Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking. Resolution 04/19 approved by the Commission on December 7, 2019. Section XIV Refugees, asylum and international protection (principles 55−57).

[398] UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council,* 32 ILM 1215 (1993). See also Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

[399] *CPCF v Minister for Immigration and Border Protection*, HCA I, SA169/2014, (28 January 2015).

[400] Note the different approach to jurisdiction for the contiguous zone in this case and in the *Enrica Lexie* case to be commented on in this chapter.

[401] *Khlaifia and others v. Italy* [GC], no. 16483/12, ECHR 2016-XII.

interception is not included in the sentence), who escorted them to a port on the island of Lampedusa. They were held, according to their claim, in poor conditions, moved several times, after an-escape attempt, and finally returned to Tunisia. The judgment sets out a reference for conditions and requirements to be met in the case of persons in custody, in particular a space of 3 sq. m of floor surface per detainee (§166), with access "to toilets with respect for privacy, ventilation, access to natural air and light, quality of heating and compliance with basic hygiene requirements" (§167). The ECtHR concluded that, although the applicants "had undergone an identity check, this was not sufficient in itself to rule out the existence of a collective expulsion within the meaning of Article 4 of Protocol No. 4 (§213)." Thus, the Chamber found that "the applicants' expulsion had been collective in nature and that Article 4 of Protocol No. 4 had therefore been breached" (§213).

In some cases, ships patrolling the border have fired warning shots, pressing migrant boats to desist from any attempt to continue their journey, forcing a hot refoulement, which should be considered, at the very least, a psychological when not a physical coercive measure (Solomon, 2019), at odds with the requirement of the Universal Declaration of Human Rights (UDHR):[402] "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Art. 5), replicated in Art. 3 of the European Convention on Human Rights (ECHR).[403] This point has been clarified by the ECtHR in the case *Hirsi Jamaa and others v. Italy*[404] establishing:

> The principle of non-refoulement, as interpreted by the ECHR, essentially means that States must refrain from returning a person (directly or indirectly) to a place where he or she could face a real risk of being subjected to torture or to inhuman or degrading treatment" (B, 34, para. 6).

The Court in this case explicitly reiterated the extraterritorial application of the non-refoulement principle not only in the EEZ but also on the high seas and refused to accept that human rights law did not apply on the high seas:

> Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (para 178).[405]

We can conclude that the prohibition to refoul a person to a country where a migrant can run the risk to be an object of torture or maltreatment, or inhuman or degrading treatment "is well established by international law" (Santos-Vara & Sánchez-Tabernero, 2016, p. 77). Particularly for the EU,[406] the responsibility of

[402] The Universal Declaration of Human Rights, as above.

[403] ECHR (as above).

[404] Hirsi Jamaa case as above.

[405] The ECtHR in this paragraph (178) refers also to *Medvedyev et al. v. France* no. 3394/03, as above, (para 81).

[406] TFEU above, Art. 57.

the EU itself may arise from the breach of the principle of non-refoulement (Xernou, 2016). If the migrant is not an asylum seeker or a refugee, the refoulement is possible, however, it should be borne in mind that the rule of non-refoulement still ensures that torture, degrading treatment and punishment for irreparable harm is avoided (Office of the United Nations High Commissioner for Human Rights, 2018).

The cases in which refoulement is legally possible must be analysed on a case-by-case basis, as rules may have exceptions ,particularly in cases of pregnant women, victims of trafficking, and unaccompanied minors. The issue of unaccompanied minor migrants is a complex one, as evidenced in the 2021 crisis with Morocco.[407] Spain has regulated by means of an Organic Law and related Decrees,[408] the obligatory departure or expulsion under certain circumstances. The 1951 Geneva Convention[409] establishes two basic exceptions to the principle of non-refoulement: (i) in case of threat to the national security of the host country; and (ii) in case their proven criminal nature and record constitute a danger to the community.

In conclusion, there is no doubt that the principle of non-refoulement applies not only within the territory of States, but also extraterritorially, including the high seas, in order to protect persons in need of international protection; more on extraterritorial issues will be discussed in section 7.3.

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5.6. Scope of Social Protection Following the Disembarkation of Persons Rescued at Sea Outside Europe

The circumstances referring to Europe have already been mentioned in Chapter 3. Depending on the circumstances, an immigrant who enters illegally, or who remains in an irregular situation after the end of his/her period of legal stay — typically after entering as a tourist— may follow different vias which may include expulsion, temporary or permanent regularisation.

At a global level there are three soft law instruments on migrants' protection derived from the UN Charter of the United Nations: i) the New York Declaration for Refugees and Migrants[410] (note the differentiation between refugees and migrants, i.e., it includes also migrants who are not asking for asylum); ii) the

[407] See the document of the European Union Agency for Fundamental Rights: Returning unaccompanied children: fundamental rights Considerations (electronic resource) available at. *https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-returning-unaccompanied-children_en.pdf (accessed on 25 July 2021).*

[408] Art, 28.3(a-d) and 57 of the Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social [Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their social integration.] «BOE» no. 10, de 12/01/2000.See also Royal Decrees RD 557/2011 and RD 903/2021.

[409] 1951 Geneva Convention as above, Art. 33 (2).

[410] New York Declaration for Refugees and Migrants. UN General Assembly, 19 September 2016. A/RES/71/1 (3 October 2016).

Global Compact for Safe Orderly and Regular Migration,[411] a cooperative framework signed by heads of State, government and high representatives, reaffirming the New York Declaration. It is notable its objective 15 declaring: "[…b]y implementing the Global Compact, we ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle" (para. 6); and iii) the International Covenant on Economic, Social and Cultural Rights (ICESCR).[412]

Although the UN General Assembly launched the non-binding project Global Compact for Safe, mentioned some days later endorsed by a Resolution of the UN General Assembly (UNGA),[413] even in Europe some States have not shown enthusiasm and remained silent on this initiative as there is no uniformity on the migration policy approach. "The risk of this silence is the potential lack of coherence in the implementation of the Compact among the EU Member States" (Santos Vara & Pascual Matellán, 2020, p. 176). There are a number of rights such as legal advice, interpreter, and that notice of the application be given to UNHCR. During the processing the asylum seeker shall remain in the premises set aside for this purpose (Art. 20).[414]

Note that the legislator has not considered asylum to be equivalent to permanent integration in the host country. The rule clearly has an aspect of temporariness, stemming from the logical perspective of returning to the country of origin, when conditions allow, or of integrating in the receiving country or elsewhere, in case of obtaining a permanent status. Living as an asylum seeker or refugee is not the ultimate goal of international protection. According to the United Nations High Commissioner for Refugees, it aimed to "ensure the individual's renewed membership of a community and restoration of national protection, either in the homeland or through integration elsewhere" (United Nations High Commissioner for Refugees (UNHCR), 1996, p. v). The refugee status "can cease, however, once meaningful national protection is re-established" High Commissioner for Refugees (UNHCR), 1996, p. 2).

Out of Europe there are also other initiatives that offer assistance and fight against smuggling and trafficking in persons. In the Pacific and Indian Oceans, the (Regional Support Office (RSO) to the Bali Process, 2015), established in 2002 a voluntary and non-binding regional consultative process co-chaired by the

[411] It was adopted unanimously by the Assembly on 16 September 2016, with two processes the Global Compact on Refugees and the Global Compact on Migration finalising in July 2018 and formally adopted by 164 states (Intergovernmental Conference, Marrakech, 10 – 11 December 2018).

[412] International Covenant on Economic, Social and Cultural Rights adopted by the UN General Assembly resolution 2200A (XXI) on 16 December 1966. The supervisory body of the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR), has called for a *minimum core obligation on all States parties to ensure the satisfaction of at least minimum essential levels of each of the rights* (General Comment Nº 3, para. 10, General Comment Nº 4, General Comment Nº 12, para. 4 and 15, General Comment Nº 14.

[413] A/RES/73/195, 19 December 2019.

[414] ACNUR brochure in several languages provides basic information on the steps (electronic resource), available at: *https://www.acnur.org/es-es/el-asilo-en-espana.html (accessed on 27 July 2021).*

Governments of Australia and Indonesia and comprising country members and organisations, with support of IMO and IOM.

Also, for Africa related migration, the Assembly of Heads of State and Government of the Organisation of Africa Unity (OAU**)**,[415] at its sixth ordinary session, in Addis-Ababa, addressed the specific aspects of refugee problems in Africa included in a Convention[416] where refugee-related concepts were set out (Art. 1).

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5.7. Interruptions to the Migratory Journey. Voluntary Repatriation

Post-rescue developments depend to a large extent on the migration policy of States, and following decisions on the disembarkation of the MCCR, there may be a further destination of those rescued to other States, especially in the case of applying for international protection under the EU umbrella.

Not infrequently the dream of migrating to a better world is just that, a dream, and migrants, particularly for economic reasons, decide to return to their places of origin. The voluntary repatriation was set out as early as 1950 in the Statute of the Office of the UN High Commissioner for refugees[417] "calling upon governments to cooperate" […by] assisting the High Commissioner in (her) efforts to promote the voluntary repatriation of refugees" (p.1).

In the meantime, the country of asylum is obliged to treat refugees according to international standards and allow the UNHCR to supervise the well-being of asylum-seekers and refugees (United Nations High Commissioner for Refugees (UNHCR), 1996, p. 13), and consequently to help in the process of voluntary return.

The voluntary abandonment of the migratory journey has no major legal problems except those derived from the frequent absence of adequate documentation for the border crossing and the lack of financial resources for the return, something that may be negotiable.

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[415] Replaced by African Union (AU) on 9 July 2002, following a decision of September 1999.

[416] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969, entry into force 20 June 1974.

[417] UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V)

CHAPTER SIX. CRIMINAL ASPECTS RELATING TO THE RESCUE OF MIGRANTS AT SEA

Some aspects of criminal prosecution related to the maritime salvage process have already been discussed in previous chapters. In this sixth chapter, some of these criminal aspects are discussed in more detail. However, it is beyond the scope of this dissertation to go into general aspects of international criminal law. The following paragraphs are focused only on those criminal aspects related to the issue of migrants in distress at sea and migrants' smuggling. For a comparative analysis of criminal procedural laws and the main differences and impact they have over the development of EU legislation see: (Sellier & Weymbergh, 2018).

For the purposes of this thesis, an armed or weaponed vessel means ─in addition to the concept of warship as set out in UNCLOS III (Art. 29)─ any type of vessel owned by the State or a State-related agency, security force or body engaged in law reinforcement activities carrying any type of weapon, launcher or similar arming device normally with a mount on its deck, such as customs, coast guard, maritime police, civil guard and similar patrol vessels. This category does not include light weapons intended for self-defence that law enforcement and security forces may lawfully carry. The distinction of military and law reinforcement activities is pertinent as seen in the ITLOS case law no 26 to be commented on next. However, both are included in the immunities of UNCLOS III, Art. 32.

Seven sections are included here: The first section is devoted to migrants' rescue and weaponed vessels. The second one deals with the increasingly recognised differentiation between the offences of irregular and illegal migration. The third section discusses the differences between the crime of people smuggling and human trafficking. The fourth section then reviews the issue of piracy and violence at sea, while the fifth look at analysing crimes related to migrants on board. The sixth section reviews the criminal aspect of unflagged vessels, which are frequently used by people smugglers. The final seventh section addresses the question of whether, in the case of criminal actions, the state of necessity of those rescued, which could lead to criminal actions both on board and once they have been disembarked, could be considered as an exonerating circumstance.

6.1. Migrants' Rescue and Weaponed Vessels

Occasionally there may be violent responses to a rescue attempt. The question is, to what extent can action against migrant smugglers or boats be responded to with armed action? Also, whether there is a legal basis for blocking migrants' access to territorial waters by force with armed action on the high seas, or in the EEZ.

Since UNCLOS III does not mention smuggling of migrants, in view of the growing illegal activity of migrant smuggling organisations and its tragic consequences, some coastal States, such as Italy, in their fight against this growing criminal activity, have extended their zone of control to the high seas, on the basis of the «right of access» (UNCLOS III, Art. 110, and the «right of hot pursuit» (Art. 111). Note that these rights, in any case, cease as soon as the vessels enter the territorial waters of a third State or their own flag State, unless otherwise agreed bilaterally. In some cases, this extension to include armed actions beyond the territorial waters has been justified because the vessels involved in the criminal activity do not carry a flag or change it, which would justify intervention based on the unflagged vessels rule (UNCLOS III, Art. 92). But in other cases, the vessels were sailing under a legitimate flag.

In response to migrant critical situations, a significant increase in resources (including military personnel), technology (drones) and use of databases (Eurodac) have been deployed in those weaponed actions. This raises a jurisdictional conflict, given that the sovereignty of a vessel on the high seas is that of the flag State. Another justification used was on comparative terms of equivalence to transport of slaves, prohibited in UNCLOS III (Art. 99) which seems nothing but a rather loose interpretation.[418] What is the International Tribunal for the Law of the Sea (ITLOS) position on weapon use on the high seas or in the EEZ for pursuing territorial law enforcement? As we will see next, the ITLOS maintains the utmost respect for the sovereignty of the flag State on the high seas ─even though actions taken there may have an alleged result on the coastal State─ reflected in several case law resolutions.

The *M/V Norstar* case[419] is one of these cases of a dispute about action off the coasts, concerning the freedom of the high seas as enshrined in Art. 87 of UNCLOS III. The *Norstar,* a Panama-flagged oil tanker, sold tax-free fuel to mega yachts that were exclusively moored at EU ports, «off the coasts of France, Italy and Spain» in their continuous vigilance zone. The *Norstar* was seized by Spain under Italy order. In this regard the ITLOS stated that "[c]onsistent with the above, on a sketch map provided in the Request, the M/V "Norstar" is positioned in «international waters»" (§176). Italy argued that the yachts returned to EU ports with

[418] Note that as a difference with slaves, or with trafficking with human beings, migrants start the journey voluntarily (and usually after payment) and are free to leave the journey at any time, unless the smugglers prevent them from doing so at some point because of the risk of compromising the entire criminal operation. This issue will be expanded in section 6.3.

[419] *M/V "Norstar" (Panama v. Italy), Judgment, ITLOS Reports 2018–2019, p. 10.*

no statement for custom purposes. In this regard, the Tribunal established that: "the purchase of fuel intended to be stored on board by leisure boats outside the territorial sea line and for its subsequent introduction into the territorial sea shall not be subject to the payment of import duties *as* long as the fuel is not consumed within the customs territory or unloaded on the mainland." A rather ambiguous statement in practice, given that once inside territorial waters or in port, the ship will consume fuel from the tanks, and it would be very difficult to determine which part was purchased taxed and which part was not. Finally, the Tribunal found that "Italy violated article 87, paragraph 1, of the Convention […] that article 87, paragraph 2, of the Convention is not applicable in the present case […and added] that Italy did not violate article 300 of the Convention" (§469).

The M/T *San Padre Pio* case (corresponding to ITLOS cases nos. 27 and 29)[420] is another example of ship-to-ship transfer of bunker oil in the Nigerian EEZ. The M/T *San Padre Pio*, a Swiss-flagged tanker, was intercepted and detained by the Nigerian navy upon arrival at the ordered destination in Port Harcourt. The claim was similar to the previous case, "conspiring to distribute and deal with petroleum product without lawful authority or appropriate license, and with having done so with respect to the petroleum product onboard" (§ 33). The case was removed from the Tribunal list, after a Memorandum of Understanding signed by Switzerland and Nigeria on 20 May 2021. In the previous considerations, the Tribunal noted that Switzerland's argument that bunkering activities carried out by the *San Padre Pio* in the EEZ of Nigeria *are* part of the freedom of navigation and reiterated the exclusive jurisdiction in this regard of "the flag State over the vessel with respect to such bunkering activities." However, also noted was Nigeria's argument that "it has sovereign rights and obligations […] to exercise its enforcement jurisdiction over the bunkering activities in question in its exclusive economic zone" (§107). In the Tribunal's view, "taking into account the legal arguments made by the Parties and evidence available before it, it appears that the rights claimed by Switzerland in the present case […] are plausible" (§ 108). Again, recitals in favour of the sovereignty of the flag State in the EEZ.

Another ITLOS case, also removed from the Tribunal, was the M/T *Heroic Idun*,[421] a crude carrier flying the flag of the Marshall Islands. According to the application, on 12 August 2022, while the ship was in the EEZ of Sao Tome and Principe, it was seized by the Equatorial Guinean Navy. On 15 November 2022, the President of the Tribunal removed the case from the Tribunal's docket, as the Agent of the Marshall Islands stated that Equatorial Guinea caused the vessel and its crew to be transferred to the jurisdiction, control, and custody of Nigeria on 11 November 2022 which, regrettably, rendered the Marshall Islands' Request for Prompt Release

[420] *M/T "San Padre Pio" (Switzerland v. Nigeria)* as above, and Order of 6 July 2019, ITLOS Reports 2018–2019, p. 375.

[421] *The "M/T Heroic Idun" Case (Marshall Islands v. Equatorial Guinea), ITLOS, Application of Prompt Release, 9 November 2022.*

moot. But in any case, the nautical position in the EEZ did not prevent a request for provisional measures in defence of flag sovereignty.

Interesting, as related to weaponed vessels, is ITLOS case no 26 related to the detention of three Ukrainian vessels by the Russian Federation, prior to the war, on 25 November 2018.[422] The dispute between the Parties concerned the Ukrainian warships the *Berdyansk* and *Nikopol*, and the Ukrainian «naval vessel»[423] the *Yani Kapu*, on 25 November 2018, in the Black Sea. The issue refers to disputed Crimea territorial waters which, as for Ukraine, are part of its territorial sea or EEZ. There was also a disagreement between the Parties regarding jurisdiction on the applicability of article 298, paragraph 1(b), of UNCLOS III, which excludes military activities. As opposed to the Russian Federation, Ukraine asserted that the dispute did not concern military activities, but rather law enforcement activities. In this regard, the Tribunal ruled that "the distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the activities in question", nor can this distinction "be based solely on the characterization of the activities in question by the parties to a dispute" (§ 64 and 65). Such a distinction "must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case" (§ 66). The Tribunal observed that "it is difficult to state in general that the passage of naval ships *per se* amounts to a military activity" and that "[u]nder the Convention, passage regimes, such as innocent or transit passage, apply to all ships." As transit passage refers only to the EEZ, it means that as for the ITLOS, the war ships are free to navigate without restrictions in this area.

The Tribunal stated that "the context in which such force was used is of particular relevance" and that Ukrainian vessels developed "a law enforcement operation rather than a military operation" (§ 73 to § 76). Based on "the information and evidence available to it, the Tribunal accordingly considers that *prima facie* article 298, paragraph 1(b), of the Convention does not apply in the present case" (§ 77). Recalling its statement in the *ARA Libertad case*[424] the Tribunal observed that "a warship, as defined by article 29 of the Convention,[425] «is an expression of the sovereignty of the State whose flag it flies»". It adds that "[t]his reality is reflected in the immunity it enjoys under the Convention and general international law". The Tribunal noted that "any action affecting the immunity of warships is capable of

[422] *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), ITLOS Provisional Measures, Orders 2019/1 of 23 April 2019, 2019/2 of 2 May, and of 25 May 2019.*

[423] Note that the last one it is not defined as a warship as the ship is a tugboat.

[424] "*ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 33.* Incidentally, a tall ship sailing school vessel that does not mount offensive firepower on deck is still considered a warship.

[425] It seems clear that also refers to other weaponed or unweaponed vessels that do not fulfil the concept of warships, as the Art. 29 refers also to «other government ships operated for non-commercial purposes,» and this is the reason for including also the *Yani Kapu* tugboat. (Also, UNCLOS III includes in Arts. 31 and 32 «other government ship operated for non-commercial purposes.» Although the agencies or corps may have their own legal personality and their crews are not on the country's navy list, their link to the State is evident.

causing serious harm to the dignity and sovereignty of a State and has the potential to undermine its national security" (§ 110). In the view of the Tribunal, "the actions taken by the Russian Federation could irreparably prejudice the rights claimed by Ukraine to the immunity of its naval vessels and their servicemen if the Annex VII arbitral tribunal adjudges those rights to belong to Ukraine" (§111). The Tribunal considered it appropriate "to prescribe provisional measures requiring the Russian Federation to release the three Ukrainian naval vessels and the 24 detained Ukrainian servicemen and to allow them to return to Ukraine in order to preserve the rights claimed by Ukraine" (§ 118). What these ITLOS resolutions show is that the EEZ is not «international waters» (a concept certainly lacking in UNCLOS III) as it has been wrongly claimed. They undoubtedly do not legally have the status of «high seas,» but according to UNCLOS III they are waters open to international navigation and to any "internationally lawful uses of the sea," which even includes "laying of submarine cables and pipelines" (Art. 58).

Regarding the use of force to stop a vessel suspected of human smuggling, in the *M/V Saiga* case[426] the ITLOS provided some guidance on the use of force in arresting vessels. As this aspect is not specifically regulated by UNCLOS III, it remains under general international law. The Tribunal held "that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances" (§155). There are established procedures for stopping a ship: "The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals" (§ 156) if a radio request is not attended. This enshrines the procedure by establishing the practice to stop a ship at sea, with the corresponding international signals first and prior to any further action to be taken. It must be considered that according to UNCLOS III, "States Parties shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right" (Art. 300). The interpretation of this article has been a source of debate. In the *MV Louisa case*[427] *the ITLOS* rejected the pretension of Saint Vincent and the Grenadines of supporting its claim based on UNCLOS III, Art. 300. The scope of this article was extensively reviewed in this case law (§§ 126−142). The Tribunal remarked that "article 300 cannot be invoked on its own. It becomes relevant only when «the rights, jurisdiction and freedoms recognised» in the Convention are exercised in an abusive manner" (§ 137).

In this sense, the ECtHR has also set a guideline[428] for clarifying the issues of respect for human rights and territoriality, and in reference to violent actions including extrajudicial killing by agents of one State outside the territorial space. The Court refers (p. 21) to two previous cases law: *Carter v. Russia*[429] and *Issa and*

[426] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)* as above.

[427] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain),* as above.

[428] Guide on Article 1 of the European Convention on Human Rights. Obligation to respect human rights – Concepts of "jurisdiction" and imputability. ECtHR, 31 August 2022 (electronic resource). Available at: *https://www.echr.coe.int/documents/guide_art_1_eng.pdf (accessed on 16 May 2023).*

[429] *Carter v. Russia* [3rd Section], no. 20914/07, ECHR 2021-IX.

Others v. Turkey,[430] emphasising that Art. 1 of the Convention [ECHR] cannot be interpreted as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory, According to this principle, if hot return is not allowed in territorial waters, less could be allowed in the case of a vessel of another flag State on the EEZ, or on the high seas, where coastal State sovereignty is much lower or inexistent. The blocking of a ship in the legitimate exercise of maritime border security cannot go against the international law and human rights.

As for the question of the blockade in the EEZ, on the basis of the right of «hot pursuit,» it cannot be applied in this case as it requires "good reason to believe that the ship has violated the laws and regulations of that State" (UNCLOS III, Art. 111) and no violation can be invoked until it enters territorial waters and becomes jurisdictionally dependent on the coastal State, within the limits established by the Convention. Since the EEZ is an area of free navigation, there is no infringement of the law by sailing into territorial waters to the extent that such movement does not infringe any of the rights of the coastal State's EEZ. All this leads to no other conclusion than that seizing a boat in the EEZ for the sole reason of transporting migrants asking for international protection is not legal under international law, not to say on the high seas.

The *Enrica Lexie* case, brings up the complex issue of the practice of commercial shipping using armed protection. This incident occurred in India EEZ alongside the coast of the Indian State of Kerala on 15 February 2012. Two Italian special corps marines ─assigned to protection measures of the Italian privately owned[431] oil tanker *Enrica Lexie* flying the Italian flag─ open two sets of rounds of warning fire to drive away the *St. Antony*, a fishing boat they found suspicious, first at 500 m and the second at 300 m. According to the statement of Chief Warrant Officer Latorre, trying to "deter the craft from continuing to keep its course heading toward the *Enrica Lexie.*"

After the *St. Antony* ignored the warning and being at about 100 m, the marines opened fire again and killed two Indian fishermen on the fishing boat. This craft, according to this declaration, was at 30 m when it finally changed abruptly its

"However, in the view of the Court, the principle that a State exercises extraterritorial jurisdiction in cases concerning specific acts involving an element of proximity should apply with equal force in cases of e*xtrajudicial targeted killings by State agents acting in the territory of another Contracting State* outside of the context of a military operation. This approach is consistent with the wording of Article 15 § 2 of the Convention, which allows for no derogations from Article 2, except in respect of deaths resulting from lawful acts of war" (§130).

[430] *Issa and Others v. Turkey* [2nd section], no. 31821/96, ECHR 2004-XI.
"Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State […] Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."

[431] Note that in this case, although automatic weapons were used by military personnel, the ship is not, by the definition set above, a weaponed vessel.

course. Indian authorities intercepted the tanker in international waters, forced it to dock in the port of Kochi, arrested the two non-commissioned officers Massimiliano Latorre and Salvatore Girone and imprisoned them. In short, the waters were Indian EEZ, the shooters were Italian soldiers firing from a merchant registered ship flying an Italian civilian flag and the dead were Indians aboard a fishing ship flying an Indian flag. This created a dangerous diplomatic situation of jurisdiction dispute and legal debate (Fabris, 2017), seen in the Permanent Court of Arbitration (PCA) on 21 May 2020[432] and in the ITLOS (case no. 24).

The Italian position was that, after the incident, the Indian authorities by use of force and coercion intercepted the tanker in the high seas obliging it to change its course and dock at the port of Kochi. That armed Indian personal boarded the vessel and realised a coercive investigation and interrogation of the crew despite that, according to the exclusive flag State jurisdiction, it was for the Italian Courts to judge the case, and Indian authorities lacked both enforcement and prescriptive jurisdiction (Fabris, 2017, p. 8). Italy also raised the issue that the *St. Antony* was sailing outside the rules of the sea and without clear identification, so it could not be assumed that the vessel was Indian. India argued that since the victims were Indian nationals and died on board an Indian fishing vessel in India's EEZ, prescriptive and enforcement jurisdiction rested with India.

According to the claim the action violated India's sovereign rights under Article 56 of UNCLOS. Italian marines had interfered with the right of free fishing in the EEZ in breach of the Article 87, paragraph 1, subparagraph (a) and Article 90, of the Convention. It was also analysed whether the *St. Antony* was a properly Indian registered ship. India argued that UNCLOS III, Article 94, paragraph 2-a, implies that ships that "are excluded from generally accepted international regulations on account of their small size" by a State may nonetheless qualify as "ships flying its flag" and that a flag may thus be regarded as 'visual evidence' or 'a symbol' of nationality, but is not determinative for that vessel's nationality or whether it is found in a public register. The dispute about the Indian as the flag state of the St Anthony was solved in favour of India:

> Accordingly, it follows that States may, exceptionally, exercise their freedoms under Article 87 of the Convention also through small non-registered vessels, although the Convention tends to discourage non-registration. India, as the flag State of the "St. Antony", was entitled to the freedoms and rights attendant to this status under the Convention (Provision 1034).

The question on whether the Italian tanker obliged the Indian craft to change its course interfering with the navigation of the *St. Antony*, was also ruled in favour of the Indian claim, as the Tribunal considered that Italy acted in breach of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention (Provision 1043). As for the peaceful use of the EEZ, India asserts that Italy infringed its rights under Article 88 because "the use of force by another State is inconsistent with

[432] *Italian Republic v. the Republic of India,* 21 May 2020*.* PCA Case No. 2015-28, and *"Enrica Lexie" (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 182*. For an extensive legal review of the case see (Fabris, 2017).

India's right to have its EEZ reserved for peaceful purposes" while Italy argued Article 88 of the Convention is not engaged in this case "because Italy did not have any purpose that was not peaceful in India's exclusive economic zone". After a long legal reasoning, including references to the Charter of the UN and case law, the Tribunal ruled in favour of Italy, denying any breaking of Article 88 of UNCLOS III (Provision 1077). India was subject to an infringement of its freedom of navigation. Such injury is a consequence of the breach of the Convention by Italy and "entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State" (Provision 1086).

Based on the *Corfu Channel*[433] case law the Tribunal established that this reparation can only take the form of satisfaction: The shooting at the *St. Antony* interfered with the freedom of navigation and constituted a breach of Article 87, paragraph 1, subparagraph (a), and Article 90. Crew members lost life, material damage including the craft itself and moral harm. "India is accordingly entitled to payment of compensation in respect of such damage, which by its nature cannot be made good through restitution" (Provision 1088). Amount of compensation to be fixed by the parts.

As for the criminal aspect of the controversy, the two marines were detained without formal charges and after two and four years were released and returned to Italy. The EU Parliament released information in 2015 referring to detention without charge being a serious breach of their human rights.[434] The Permanent Court of Arbitration had already recognised functional immunity of the two Italian marines: "Immunity *Ratione Materiae* of the Marines as Applicable in the Context of the Present Case" (Provision 846) as engaged in a mission on behalf of the Italian Government; note that the immunity was not *ratione personae* based on their military condition. This question may be also linked to the SUA Convention Art. 3 (b) as the Indian craft's close approach could be "likely to endanger the safe navigation of that ship" although it will remain to be proved and clarified according to the navigation rules[435] which ship should stand-on and which give-way and to prove the unlawful and intentional action by the St. Anthony.

It should be remembered that as long as a ship is on the high seas, it is subject to the jurisdiction of its flag State, and consequently, if that legislation allows weapons to be carried on board, the situation is entirely lawful. It is a different matter if such a commercial vessel enters territorial waters, which may have different regulations on whether carrying weapons could be considered or not a violation of the right of innocent passage. "Floating armories essentially operate in a legal gray area in which they are not subject to international or national laws and regulations" (Wilpon, 2016, p. 880). Craig Agranoff has analysed the issue of the

[433] *Corfu Channel Case* (*United Kingdom v. Albania*), as above.

[434] MEPs call for Italian marò [sic] accused of killing Indian fishermen to be repatriated [press release, 15.01.2015] (electronic resource), available at: *https://www.europarl.europa.eu/news/en/press-room/20150109IPR06318/meps-call-for-italian-maro-accused-of-killing-indian-fishermen-to-be-repatriated (accessed on 24 July 2021).*

[435] The IMO International Regulations for Preventing Collisions at Sea (COLREGs) (as above).

carrying of weapons by US ships in the territorial waters of other States (Agranoff, 2014). An analysis of little use beyond the country because the US has not ratified UNCLOS III, like so many other international treaties. As an economic and military power its positioning is governed both at home and abroad by its own provisions given its dominant position.

In agreement with Mitsilegas, under international law the so-called «preventive justice,» is nothing but another form of creeping jurisdiction, with many gaps that “poses a challenge to the rule of law and human rights” (Mitsilegas, 2019, p. 307). It has been argued that smugglers use a well-known *modus operandi* involving poor seaworthy boats to compel the coastal State to act on duty or render assistance at sea (according to UNCLOS III, Art. 98), creating a state of premeditated necessity. Italy is one of the States that has justified the extension outside Italian territorial waters in this fight against smuggling of migrants on the basis of the creeping jurisdiction at sea "applied *mutatis mutandis* in the field of criminal law" [since criminal actions, although initiated outside Italian jurisdiction] "oblige the Italian border and coastguard authorities to intervene" (Fantinato, 2020, pp. 226–227). In response to this extended interpretation of UNCLOS III, some smugglers moved to use Turkish or US flag ships, as these States have not ratified the UNCLOS III. However, nothing can prevent the rights of those in danger at sea to be disembarked safely and with respect for their human rights. When all the above is analysed, we can state that such actions have no justification under the international law of the sea. Nothing justifies creeping jurisdiction. All ships, carrying persons seeking international protection, should have the right to transit any waters, under the control of the relevant authorities if required, and to disembark expeditiously, without prejudice to any subsequent action against smugglers, or against the rescue ship itself, its master or owner, as appropriate, in case of infringement of the law. But the priority of human rights requires that such actions be postponed until the applicants are in a place of safety.

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6.2. Irregular versus Illegal Migration. A Progressively Accepted Conceptual Differentiation

Before starting this section, it is needed to define the concept of irregular crossing. Notoriously, this concept is not included in any of the normative instruments of the EU (Abrisketa-Uriarte, 2020). The definition was set out by the CJEU in jurisprudence.

> In the light of the usual meaning of the concept of an ‘irregular crossing’ of a border, it must be concluded that the crossing of a border without fulfilling the conditions imposed by the legislation applicable in the Member State in question must necessarily be considered ‘irregular’, within the meaning of Article 13(1) of the Dublin III Regulation.[436]

The CJEU also clarified that movement to a second Member State, even for the purpose of seeking asylum, is still considered irregular, even if it originates from

[436] Judgement of 26 July 2017 [GC], *Khadija and Zarinab Jafari, v. Bundesamt für Fremdenwesen und Asyl*, C-646/16, ECU:C:2017:586, paragraph 74.

another Member State, and even if the first border crossing was tolerated or exceptionally authorised.[437]

What is the legal status of a migrant who crossed the border irregularly? Some legal texts use the terms illegal migration and irregular migration interchangeably, but there is a growing tendency to consider them as different.[438] Although there is no universal consensus, the view is gaining ground to consider the crime of illegal migration applicable only to the person providing assistance (smuggler), in cases of the smuggling of migrants or trafficking in human beings (i.e. applicable to the offender who organises the border crossing). In many legislations irregular migrant crossing or irregular status is considered an administrative, not a criminal offence (for the migrant), as is the case for Spain. Even the new law of 2022 favours the integration of irregular migrants into the labour market.[439]

The IOM glossary (Perruchoud & Redpath-Cross, 2019) defines irregular migrants as those cases of unauthorised entries or entries that do not comply with entry conditions, involve expired/invalid visas, and those who, while entering legally, have overstayed their authorised period of stay. “The term ‘irregular’ is recommended over ‘illegal’ because the latter carries a criminal connotation and is considered to deny the humanity of migrants” (p. 54). This more benevolent approach applies only to migrants. Promoters of unauthorised entry, transit or stay outside the established procedures, commit a crime. The increased trafficking in human beings and exploitation of migrants moved the European Council to dedicate a special meeting to this issue, which took place in Tampere, Finland, in October 1999.[440] According to the presidential conclusions, “the rights of the victims of such activities shall be secured with special emphasis on the problems of women and children” (rec. 23).

Thus, doctrinally, it becomes necessary to distinguish between the action of the smuggler, which constitutes the crime of promoting or committing an act of illegal immigration, and the situation of the migrant, which is (normally) typified as an administrative offence only, conditioning an irregular, but not illegal, situation.[441]

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[437] Judgement of 26 July 2017 [GC]*, A.S. v. Republika Slovenija*, C-490/16, EU:C:2017:585, paragraph. 39. This sentence also makes reference to *Khadija and Zarinab Jafari* case, as above, in paragraphs 73-92.

[438] A detailed legal analysis of the issue can be found in Magdalena Perkowska’s research at the University of Bialystok in Poland (Perkowska, 2016). Her work analyses up to eight main legal ways in which non-nationals become unauthorised migrants.

[439] Real Decreto 629/2022, de 26 de julio, por el que se modifica el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009, aprobado por el Real Decreto 557/2011, de 20 de abril. [Royal Decree 629/2022 of 26 July amending the Regulation of Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration, following its reform by Organic Law 2/2009, approved by Royal Decree 557/2011 of 20 April.]

[440] Tampere European Council 15 and 16 October 1999. Presidency Conclusions (electronic resource). Available at: *https://www.europarl.europa.eu/summits/tam_en.htm (accessed on 25 August 2022).* For a 20 years review of the topic see: (Carrera et al., 2020).

[441] It is for this condition of lack of illegality that irregular migrants living in countries such as Spain have the right of health care and education, among others. Note, as commented on in the previous section, that Spanish law provides for a different level of sanctions for passport falsification and for passport use.

This is in line with the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, establishing that: "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in Article 6 of this Protocol."[442] Mayordomo-Rodrigo in her review of the issue from the Spanish criminal framework[443] has differentiated three concepts, which, in accordance with her analysis, have not been very happily included in the Spanish legislation related to irregular border crossing (Mayordomo-Rodrigo, 2011):[444]

1/ Illegal immigration,[445] being accountable (Art. 1) "any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens." There are additional sanctions (Art. 2) applicable to the instigator, accomplice, or to the attempt to commit the offence. It is also significant that there may be an exception opening the possibility to any Member State not to impose sanctions to entrees "to provide humanitarian assistance to the person concerned" (Art. 1.2).

Mayordomo-Rodrigo includes as examples both the clandestine entrance using a patera and the fraudulent entrance as a tourist with the purpose of working without having permission to work or reside in the State. According to this author "Es una actividad de carácter transnacional. Al no existir traslado forzado del afectado que desde el inicio de la cadena acepta su condición de migrante irregular, predomina la defensa de los intereses de los Estados a controlar los flujos migratorios y la indemnidad de sus fronteras."[446]

2/ Migrant smuggling. The illegal act to facilitate the entry of a person into a State Party of which the person is not a national or a permanent resident for the purpose of obtaining, directly or indirectly, a financial or other material benefit. The entrance may occur by using an established (legal) entrance or not. Additional offence may result, in case of providing false documentation or bribery. According to this interpretation, a person who would help, e.g., by lending a boat to people to migrate, without financial compensation, would not be smuggling.

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[442] United Nations Convention Against Transnational Organized Crime… (as above), Art. 5.

[443] See: LO 11/1999 of April 30 and LO 5/2010 of June 22 amending the Spanish Criminal Code.

[444] See also the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto: Resolution of The General Assembly 55/25 of 15 November 2000 and the Protocol Against the Smuggling of Migrants by Land (as above).

[445] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, p. 17–18. It must be taken into consideration that the Directive recital (2) establishing: Consequently, measures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings. The title of the convention is "defining the facilitation of unauthorised entry, transit and residence."

[446] [It is an activity of a transnational nature. Since there is no forced transfer of the affected person who, from the beginning of the chain, accepts his or her condition as an irregular migrant, the defence of the interests of the States to control migratory flows and the indemnity of their borders prevails] (Mayordomo-Rodrigo, 2011, p. 328).

It is not essential for the existence of the crime that the movement of migrants has been completed, since the mere attempt is considered illegal; moreover, smuggler place the lives of migrants at risk and violate their rights, and in addition, there is the legal issue of the attempt to prevent the State from being able to control migration flows and maintain the integrity of its borders. It is an offence of transnational nature. The smuggler here plans and controls (directly or indirectly) the travel getting and economic benefit for the operation.

3/ Human trafficking. The key element in this crime is the absence of acceptance, i.e., voluntariness of the victim. Here there is no requirement for transnational activity, although it is frequently associated with misleading and illegal trafficking as is often the case with the prostitution trade.

It should be promoted and emphasised at both the UN and European level, this growing trend of differentiation between the administrative irregular migratory status for migrant subjects and the illegal migration crime for promoters of migrant smuggling or trafficking. More on the criminal aspect of smuggling and trafficking will be expanded in next section.

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6.3. Crimes of Smuggling and Trafficking in Persons

The distinction between an irregular migrant (which is normally an administrative offence) and a people smuggler who, according to most legislation, commits the crime of illegal migration, is important even from the beginning of the rescue process. Although it is not up to the shipmaster to take any judicial action in this regard, it is worth reviewing the general doctrinal framework, since in the event of embarking a person suspected of human smuggling or trafficking in persons, the shipmaster may assess, depending on the suspected seriousness, measures of deprivation of freedom of movement, or other preventive actions, to ensure that the alleged offender does not attempt to cause damage to or endanger the ship or persons on board, including those rescued.

The UN Security Council established that although smuggling and trafficking may share some common features, they are different crimes and therefore have to be treated differently in terms of legal, operational and policy responses.[447] According to the United Nations, they require differing legal, operational and policy responses.[448] Consequently, the UN has included each crime in a separate protocol.[449] As defined by the UN “Smuggling of Migrants is a crime involving the

[447] Resolution adopted by the Security Council on 9 October 2015, on migrant smuggling and human trafficking into, through and from the Libyan territory and off the coast of Libya, S/RES/2240(2015).

[448] Convention Against Transnational Organized Crime and the Protocols Thereto (UNTOC). Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and Protocols Thereto. Resolution of the General Assembly, A/RES/55/25 of 15 November 2000. Into force since 29 September 2003. Resolution adopted by the Security Council on 6 October 2016, extending authorization to intercept vessels suspected of illegal smuggling from Libya, S/RES/2312(2016), para. 23

[449] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, UN Treaty Series, Vol 2237, p 319, Doc A/55/383 (15 November 2000) and the Protocol against the Smuggling of Migrants by Land, Sea and Air, as above.

procurement for financial or other material benefit of illegal entry of a person into a State of which that person is not a national or resident."[450] As for Gallagher and David it "refers to the unauthorized movement of individuals across borders for the financial or other benefit of the smuggler […] it can be understood as facilitating the breach of migration laws for profit" (Gallagher & David, 2014, p. 1).

With regard to trafficking in persons, the UN has defined the term as "the recruitment, transportation, transfer, harbouring or receipt of persons," when the condition of "threat or use of force or other forms of coercion, of abduction, of fraud, of deception", i.e., an act of abuse of power or of taking advantage of a position of vulnerability of another person, and it also applies to the case of "the receipt of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."[451] The definition does not restrict it to exploitation for prostitution, but also for forced labour or services, slavery or similar, and even organ removal. Moreover, "The recruitment, transportation, transfer, harbouring, or receipt of a child [aged less than 18 years] for the purpose of exploitation shall be considered «trafficking in persons»" even if none of the above means are used.[452] Several elements differentiate smuggling from trafficking in persons (Batsyukova, 2012):[453]

1/ Location: Smuggling implies crossing an international border, this is inherent to the crime, while trafficking may happen inside the same country or not.
2/ Consent: Smuggling is a service on request. The person acts as a «customer» of the illegal service, much like a person who buys drugs on the illegal market. This person implicitly accepts the risks of the journey, whether he or she knows them or not.[454] The requester's knowledge of the legal framework and risks does not change the essential fact that the service is requested voluntarily.
3/ Exploitation: Smuggling usually limited to one-off payment or benefit in exchange for one illegal entry into a country. Once payment and crossing the border, or attempted crossing without success, is completed, the agreement ends, and the person exercises his/her self-determination. In contrast, trafficking in persons involves the use of coercive methods such as threats, violence, blackmail,

[450] Migrant Smuggling. UN Office on Drugs and Crime. Migrant Smuggling Report [electronic resource]. Available at: *https://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html?ref=menuside (accessed on 28 April 2021).*

[451] Resolution of the UN General Assembly 55/25 as above, Art. 3.a

[452] Same Resolution of the UN General Assembly 55/25, Art. 3.b.

[453] See also these two references from UNODC:
Distinguishing between trafficking in persons and smuggling of migrants [electronic resource]. Available at: *https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_1-2.pdf*
Differences and commonalities [electronic resource]. Available at:
https://www.unodc.org/e4j/zh/tip-and-som/module-11/key-issues/differences-and-commonalities.html (accessed on 25 April 2022).

[454] In the event that, in addition to their irregular status, an illegal action could be considered in any jurisdiction against the migrant for using an illegal entry service, it is important to note that the migrant may even mistakenly think that the service provided is not a crime, lacking, in this case, the cognitive or volitional elements necessary for *dolus.* Even in this case of criminal lawsuit, the possibility of recklessness (*dolus eventualis*), or even careless behaviour should be considered.

kidnapping or deception for the purpose of exploitation, usually with a pattern of continued financial gain.
4/ Length: Smuggling is short-term criminal action while trafficking is a longer-term one.
5/ Term compensation: Smuggling of individuals is usually a one-term payment prior to the trip. Trafficking often involves a strategy of asking for a percentage before departure (or even no money at all) and the rest being counted as debt. “It is this debt that puts the victims at the mercy of their traffickers. The difference between smuggled individuals and trafficked persons may be apparent only when the journey has ended” (Aranowitz, 2009, p. 4).[455]
6/ Court of Justice: Smuggling is an *actus reus* against the State. Trafficking is an *actus reus* against the person.[456] Each lawsuit will be heard in the corresponding court.

Thus, “Trafficking involves the movement of people through violence, deception, or coercion for the purpose of exploiting them. Smuggling is when a person is assisted to cross a border illegally for gain and then left to their own devices” (Skrivankova, 2006, p. 229).

The fight against transnational organised crimes at sea poses challenges of jurisdiction and efficient cooperation between the authorities of different States. “This may be addressed by co-ordination between competent international organizations and by the development of more Mutual Legal Assistance (MLA) and extradition agreement” (Papastavridis, 2014, p. 52). Actions are much more effective when they have a common approach as proposed by the Economic Community of West African States (ECOWAS).[457] As for Europe, a simplified cross-border judicial surrender procedure is available the European Arrest Warrant (EAW).[458] The fact that criminal prosecutions are, in some respects, based on EU law while others on State law makes such coordination all the more necessary.

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[455] This reference provides comprehensive information about trafficking including victims, patterns by region, subregion and country, hidden forms, operation and organisation structure and statistics.

[456] With regard to human trafficking and smuggling, the requirements for the *actus reus* and *mens rea* can be found in the document: Anti-human trafficking manual for criminal justice practitioners. UNODOC (UN, 2009), pp. 4-5. Electronic resource available at:
https://www.unodc.org/documents/human-trafficking/TIP_module1_Ebook.pdf (accessed on 15 June 2023).

[457] Ecowas Common Approach on Migration. 33rd Ordinary Session of the Head of State and Government, Ouagadougou, 18 January 2008.

[458] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, p. 1–20. See also: Report from the Commission to The European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM/2020/270 final. For a critical general review of the EAW, including the problems originating due to the procedure itself and those due to incompleteness and imbalance of the EU Area of Criminal Justice see the report requested for the European Added Value Unit of the Directorate for Impact Assessment and European Added Value within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament (Weyemberg et al., 2014).

Statistics, legal procedures, and case law may be found in the comprehensive UNODC reports on smuggling. In 2012, this Office has published a *Digest* with an unofficial version in Spanish.[459] It was an initiative by the authorities of Italy, Colombia, and Interpol, counting additionally with several experts. The *Digest* initiative was coordinated by Ms. Simonetta Grassi (UNODC).[460] However, and despite all these definitions and legal instruments, how to differentiate smugglers, traffickers and terrorists may not be straightforward, and questions arise not only in Europe but also in other places such as Malaysia, which is striving to establish protocols in this regard to improve national security and public safety (Rahim et al., 2015).

Returning to the rescue ship, where this thesis is mainly focused, if even once ashore and in the hands of the competent authorities, the distinction between a smuggler, a human trafficker, and even a terrorist, may be difficult to determine, even less so for the master of the rescue vessel. The reasonable course of action is to act pre-emptively, when a person suspected of being a criminal is on board a salvage vessel, by taking precautionary measures to ensure the safety of the vessel and the persons on board, authorising search, seizure of weapons or drugs, confinement, or any other proportionate measures as necessary. As for the fate of migrant victims, the different policy options, and actions that States can adopt on them do not differ significantly, whether for migrants arriving by sea, as in our case, or by any other means, so to expand on this point would blur the focus of this dissertation.[461] Further destiny of the criminals will depend on the criminal code to be applied, and this will depend on the jurisdiction of the State. Migrant smuggling is not considered a universal crime. The issue is different in cases of human trafficking, normally considered a crime against humanity (Obokata, 2005; Reynolds, 2011), having specific legal frameworks including its own EU resolution.[462]

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[459] Digest of organized crime cases. A compilation of cases with commentaries and lessons learned. Prepared in cooperation with the Government of Colombia, the Government of Italy, and Interpol [electronic resources].
(SP): *https://www.unodc.org/documents/organized-crime/SpanishDigest_Final291012.pdf*
(EN): *https://www.unodc.org/documents/organized-crime/EnglishDigest_Final301012_30102012.pdf*
(Accessed on 6 July 2021).

[460] For more about procedural issues related to transnational crime (from the US perspective) see the key reference with 1368 pages from Georgia University (Luban et al., 2019). As for the European perspective, including history, core documents, protocols and specific issues of smuggling by sea, see the work from Oxford University (Hauck & Peterke, 2016).

[461] See for more: (Carrera & Guild, 2016). Matilde Ventrella suggest providing permanent visas to victims who collaborate by denouncing human traffickers (Rimini method) and migrant smugglers (Siracusa [sic] method) (Ventrella, 2010).

[462] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA. OJ L 101, 15.4.2011, p. 1–11.
On 14 April 2021, the European Commission presented its new 2021-2025 strategy on combatting trafficking in human beings: Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025, COM/2021/171 final.

As for irregular entrance facilitators, the EU has strengthened the criminal framework to prevent this offence[463] including penalties and sanctions to natural and legal persons, that "any activity of a criminal organisation as defined in Joint Action."[464] The Directive related to the facilitation of unauthorised entry, transit, and residence in the EU has already been mentioned.[465] The actions, referring to EU competences, then transferred to Member States' legal instruments, do not exclude additional criminal charges, which, according to each Member State's rules, can be furthermore established in accordance with its own national legislation.

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6.4. Migrant-Related Piracy and Violence

The subject of piracy deserves a few lines, as piracy related to maritime salvage can go two ways. On the one hand, it can lead to victims (rescued) being thrown into the sea after a fake rescue, and on the other hand, it can also happen that the people in distress (real or fake) take over the rescuer ship. The use of violence by armed or violent rescued migrants is not just a theoretical exercise. "Security risks may be posed by rescued migrants who threaten the lives of the crew" (Attard, 2020, p. 210), as evidenced in *El Hiblu 1*, and *Vos Thalassa* incidents where the rescued threatened to use force to avoid being returned to Libya.[466] In accordance with the regulations on personal data protection and the code of ethics, explicit references to the names of individuals or criminal proceedings in this open public document have not been included. Registered lawyers, authorised to access these documents, will be able to find them easily by means of the identification data provided.

In the *El Hiblu 1* case, on the night of 25-26 March 2019, a rubber boat from Libya with approximately 114 people on board, including 20 women and at least 15 children, was rescued by the oil tanker *El Hiblu 1*. A few hours later, those rescued realised that they were being returned to Libya. According to testimonies, scenes of despair and panic began, with many shouting that they would rather die at sea than be returned to Libya. Additional facts should be clarified during ongoing legal proceeding. Following these incidents, at the outer limit of Malta's territorial sea, *El Hiblu 1* declared a hijacking on board. The ship was subsequently boarded and secured by a Maltese special operations team using a helicopter, proceeding to Malta under military escort. Three of the rescued passengers, two minors (aged 15 and 16 at the time) and a 19-year-old teenager, were immediately arrested on

[463] 2002/946/JHA: Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, p. 1–3.

[464] This quotation corresponds to (Art. 1.3) of the above-mentioned Council Framework 2002/946/JHA, referring to Joint Action 98/733/JHA, OJ L 351, 29.12.1998, p. 1. However, it is no longer in force. It was repealed by the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime.

[465] Council Directive 2002/90/EC, as above.

[466] At the time of reviewing this text (10.06.2023) the media report the raid by Italian special forces on a Turkish-flagged DFDS ship where migrant stowaways on board, armed with knives, apparently attempted to hijack the vessel. Details in this report, at this time, are sketchy.

various charges including terrorism, as well as for allegedly hijacking the ship and forcing it to head for Malta.[467]

As for *Vos Thalassa* the legal procedure is already finished. In December 2021, the Italian Court of Cassation (TC) overturned the convictions of three and a half years handed down on 3 June 2020 by the Court of Appeal (TC) of Palermo against X.X from Ghana and Y.Y from Sudan, after first (abbreviated) procedure of Trapani Tribunal (03/06/2019)[468] considered ringleaders of a protest on board the tug *Vos Thalassa* to prevent its return to Libya in July 2018.

The proven facts are that a group of 67 migrants of various nationalities were rescued from a wooden boat in distress in international waters (in the Libyan SAR zone), as reported to the Italian MRCC at 15:18 on 8 July (2018). The Libyan authorities were informed but did not respond, so the Italian MRCC ordered the *Vos Thalassa* to head towards Lampedusa to rendezvous with a support vessel. At 22:00, the Libyan coastguard ordered the tug to turn back towards the African coast to transfer its passengers to a Libyan vessel, so the *Vos Thalassa* changed its route. At 23:34, the shipmaster called the MRCC requesting the dispatch of an Italian military vessel due to a situation of danger to the crew, following resistance from the two defendants to return to Libya.

It is hard to consider the crime as a simple act of terrorism. The aim of the defendants was clear, and at least that should be taken into account as a mitigating factor, given that the vessels were to carry out a hot repatriation to a country whose respect for human rights is, to say the least, questionable. In other words, to what extent desperation in the face of the defendants' expectation of a hot return without allowing them to disembark in Europe was a determining factor in the crime and the *dolus*.

Contrary to these alleged hijackings or violent actions, which are not specifically listed in UNCLOS III, piracy, as the oldest criminal activity at sea, already had a detailed legal framework prior to UNCLOS III which, moreover, has been reinforced in this Convention with several additional articles (100 – 107). Note that according to Art. 104, a pirate ship retains its nationality unless otherwise "determined by the law of the State from which such nationality was derived" that is the flag State, but also, on the high seas (in case of suspicion of piracy) every State —but only with ships being on governmental service and authorised for that purpose (such a weaponed boat)— may take over a ship or aircraft, arrest the persons, and seize the property on board. It is to the flag State which carried out the seizure to decide upon the penalties to be imposed (Art. 105), but if this seizure was

[467] More details in: No prosecution of the *El Hiblu* [electronic resource]. Available at*: https://elhiblu3.info/legal (accessed on 10 June 2023).* It seems hard to consider that this action is an act of terrorism.

[468] Full sentence with blanked identification data [electronic resource]. Available at: *https://archiviodpc.dirittopenaleuomo.org/upload/4095-sentenza-gip-trapani-con-omissis.pdf (accessed on 10 June 2023).*

done without adequate grounds the capturer shall be liable to the flag State of the ship.

Unlike other criminal activities —such as the transport of slaves (Art. 99), the illicit traffic in narcotic drugs or psychotropic substances (Art. 108), and the unauthorised broadcasting from the high seas (Art. 109)— included in UNCLOS III, notoriously the smuggling of migrants is not mentioned in the Convention. In addition to the claim avenues to be discussed in Chapter 7 for abandonment and failure to assist persons in distress at sea, any illegal act of violence on the high seas against persons or their properties could be prosecuted for piracy. For example, in the case of the recovery of migrants in distress on the high seas, for a criminal purpose such as human trafficking, or any other type of violence, and assuming that the migrants are, logically, in some kind of watercraft, or floating element (to be considered technically as «ship»), Art. 101.a(i) of UNCLOS III applies, since such an act is ─in addition to other criminal considerations─ piracy, i.e., an illegal detention committed for criminal purposes from a private vessel, acting against another ship.

But note that Art. 101-a(ii), also conceptualises as piracy any act of violence, detention, or depredation (the act or instance of plunder, robbery, or pillage) and applies it to acts committed by crew and/or passengers against persons outside the jurisdiction of any State. Note that this point (ii) is different from point (i), as neither of the two requirements (another ship and the high seas) are included here, so it could apply even if the migrants' vessel has sunk prior to the pirate ship's arrival and they are at sea (i.e., not in a ship), or the victims are on a reef or islet with no military or police presence that can exercise the *de facto* sovereignty of the State to which they belong.

Piracy must be distinguished from insurrection and mutiny. In these cases, there is no profit motive and no other ship (Martínez Alcañiz, 2009). Consequently, If migrants hijack the vessel, as in the cases reported above, it cannot be considered an act of piracy,[469] but if a situation of distress is faked in order to gain access to the ship and hijack the ship for mercenary purposes, even if the persons in fake distress are on board a small inflatable or rowing boat, it would clearly be an act of piracy (United Nations Office on Drugs and Crime, 2003).

Other risks of potential violence deserve a word. Terrorists use of migrant routes to gain access to a country is also feared. “The flag State should offer the necessary support to the shipmaster when rendering assistance has resulted in embarking persons who later pose a threat to life. This could also happen if embarked rescuees have been infected with deadly diseases” (Attard, 2020).

Finally, additional criminal actions could be considered in cases where a vessel not only fails to render assistance, but also performs actions with the aim of

[469] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation [SUA] (1988 Rome Convention). IMO. Adopted 10 March 1988; Entry into force 1 March 1992; 2005 Protocols: Adopted 14 October 2005; into force after 28 July 2010.

hindering or sinking the vessel, including the discharge of any kind of element (water or solid) on the vessel or persons in distress, intentionally violent tows with the aim of sinking the boat, or communicating false news to then detriment of the vessel.[470]

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6.5. Criminal Issues Related to Migrants on Board

As advanced under the jurisdiction of the flag State, the shipmaster has the power to act in case of disputes on board, and can order a search for drugs, weapons, or any other element that may disrupt the safety of navigation, crew, passengers, or cargo, and take any (proportionate) preventive measures to ensure safety on board. Only in the case of navigation through a territorial sea or EEZ may some restrictions from the coastal State apply, but as for criminal jurisdiction, the coastal State exercises jurisdiction only in case of certain very specific aspects and circumstances.[471] Obviously, the first of these circumstances is when the master of the ship, or the flag State itself (directly or through a diplomatic or consular official on its behalf), requires the assistance of the local authorities.

The coastal State is also authorised to act in the event of serious disturbance of a foreign flag vessel which endangers the peace of the country or the good order of the territorial sea, or when such action is necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. With the exception of these specific circumstances, the criminal jurisdiction on board a vessel in territorial waters remains with the flag State. The general rule is that the coastal State can exercise jurisdiction (*motu proprio*) over acts committed on board only when they cause effects within its territorial waters or borders (Fabris, 2017, p. 9). In some cases, determining the jurisdiction is not simple. The topic of jurisdiction will be commented on in the next chapter. Although the State has extraterritorial prescriptive jurisdiction, the enforcement jurisdiction is almost exclusively territorial, as is “arresting a person who is voluntarily present on the territory, or by seizing property of the defendant located in the territory” (Ryngaert, 2015, p. 57).

As far as crimes on board, the rules on criminal prosecution do not basically differ, regardless of whether the person is a rescuee, a passenger, or a crew member, although some considerations, related to jurisdiction, may apply on a case-by-case basis. Crew members have an employment relationship with the shipowner and, additionally, some aspects of labour law may be of consideration. Also, passengers who by virtue of their contract of carriage, may bring subsidiary civil actions. Finally, in the case of allegedly criminal acts committed by migrants, the possible situation of necessity discussed below (section 7) could also be taken into account.

[470] In application of the United Nations Convention SUA, already mentioned and the London Protocol of 2005, Art. 3.1. Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, as above.

[471] UNCLOS III, Art. 27.

Concerning the issue of migration alone, most current legal frameworks do not criminalise migrants just for irregularly crossing the border. The option of not prosecuting or imposing sanctions on the victim is set out in the EU.[472] Additionally, assistance and support to victims of trafficking in human beings and their protection, including legal counselling, and even the possibility to claim compensation, is specified in Articles 11 and 12 of that Directive. In case of minor victims (understood as those under the age of 18) Articles 13 to 15 apply, and the particular case of unaccompanied minor victims is covered by Article 16.

Moving now to the shipmaster in territorial waters and crime, could the coastal State take criminal action against the shipmaster of a foreign vessel passing through its territorial waters who does not fulfil his/her obligations to assist a person at sea? Firstly, a ship which fails to comply with its duty of rendering assistance in territorial waters by endangering the lives of persons in distress breaches its innocent passage status (UNCLOS III),[473] in addition to failing to comply with its own flag State obligation to provide assistance. As a general rule, established in UNCLOS III, Art. 27: "The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea […] in connection with any crime committed on board the ship during its passage." However, there are some exceptions. The first one (Art. 27.1.c) if there is a request of the shipmaster or the authorities or representatives of the flag State; but also (27.1.b) "if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea." If the lack of rendering assistance results, for example, in migrants being left alone, in precarious conditions, perhaps alongside a corpse, reaching the shores[474] or in the waters of the coastal State, could this be considered to be in breach of the good order of the territorial sea? Some bilateral or regional agreements could also play a role in the case.[475] However, "[c]onsiderable skill as a juristic navigator is required of anyone attempting to explore the law of territorial waters" (Brown, 2017, p. 101).

Another noticeable exception related to criminal jurisdiction is the investigation and possible arrest related to a presumed crime committed in inland waters by someone on board a foreign vessel. The right can be exercised even if the vessel has already left the inland waters: "the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters" (UNCLOS III, Art 27.2). However, the jurisdiction of the coastal State does not unconditionally extend to the ship itself, in case of civil claims: "No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any

[472] Directive 2011/36/EU as above, Art. 8.

[473] Art 19.2.(a): "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, *or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations*".

[474] In breach of Art. 27.1.a: "if the consequences of the crime extend to the coastal State."

[475] Maritime Crime: A Manual for Criminal Justice Practitioners. United Office on Drugs and Crime. United Nations, New York, 2017, p. 11.

authorities other than those of the flag State" (UNCLOS III, Art 97.3). Even if a ship is passing through the territorial sea, "the coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship." (UNCLOS III, Art. 28.1).

It can be concluded that, with few exceptions, crimes on board, even in EEZ or territorial waters, should be dealt with in accordance with the jurisdiction of the flag State.

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6.6. Flagless Vessel Offence: is it a Universal Crime?

The next issue relates to unflagged vessels (equal to a watercraft without nationality),[476] not infrequently used by migrants' pateras or smugglers, and the criminal act in which it could be framed.[477] As such a vessel on the high seas has no defined jurisdiction, we may ask ourselves: Could a flagless vessel be considered a universal crime?

To begin with, there is no unified doctrinal definition of universal crime. It is not even clear whether considerations must be based on *lege lata* or *lege ferenda*, and when it should be included among the morally repulsive universal acts. However, it is reasonable to think that the obligations established by *jus cogens*, are obligations *erga ommes* (Einarsen, 2012, p. 8).[478] According to this author, a «universal crime» requires a serious breach of the rules, committed, organised or tolerated by powerful actors and considered punishable whenever and wherever it is committed, i.e., with a generalised qualification as a crime by the legal systems of different countries.

There is no doctrinal homogeneity in terms of which crimes are recognised by the community of nations as being of universal concern. The following group is usually included in this category: piracy, slave trade, attacks on or hijacking of aircraft, crimes against humanity, genocide, torture, aggression, war crimes, smuggling of nuclear and other potentially deadly materials, traffic in drugs and psychotropic substances, unlawful arms trade, money laundering, and occasionally some acts of terrorism. The offense list varies from author to author (Einarsen, 2012; O'Sullivan, 2017; Xernou, 2016), probably reflecting the different sociocultural perspectives.

[476] Note that also it is considered as having no nationality the vessel sailing under more than one flag, using one or the other/s according to convenience (UNCLOS III, Art. 92).

[477] A key reference in this regard is the first in a four-part series entitled "Rethinking the Essentials of International Criminal Law and Transitional Justice" by Professor Einarsen Judge of the Gulating Court of Appeal in Norway (Einarsen, 2012). The author discussed the different conceptualisations by Cassese (2008), Currier (2010), Bassiouni (2008), Cryer et al (2010) Ratner et al (2009), Schaba (2010, Werkle (2009), Zahar and Sluiter (2008), among others.

[478] The opposite is not necessarily true. However, the priority over an inferior rule is also supported by its condition of *lex specialis*. "The condition of *lex specialis* does not necessarily imply that the specialis rule pre-empts the application of a coexisting more general rule, although this would generally be true. […] The maxim *lex specialis derogate legi generali* is a generally accepted technique of interpretation and conflict resolution in international law" (Einarsen, 2012, p. 130 & footnote).

The common denominators are crimes that shock humanity and civilised societies. They must have a high degree of atrocity on the one side and, also, affect the entire international community. Universal crimes must have a foundation not only in law, but also in international law (customary rules). Another authoritative review of this question was done by Cassese (Cassese et al., 2013).[479] As per these authors, four conditions are required for international crime consideration:

1/ Violations of international customary rules.
2/ Affect rules and values considered important by the whole international community.
3/ A worldwide interest in repressing those crimes.
4/ Except for diplomatic immunities (the scope of which will have to be assessed on a case-by-case basis), if the perpetrator has acted in an official capacity, the prohibited act is barred from claiming immunity (Cassese et al., 2013; Einarsen, 2012).

Einarsen established that five conditions are required:

1/ Manifest violation of fundamental universal values or community interests.
2/ A conduct universally regarded as punishable due to its inherent gravity with punitive sanctions legitimate regardless of the time and place of the crime.
3/ A conduct recognised as of serious international concern.
4/ The proscriptive norm must be anchored in binding international law, that is, in at least one of the four law-creating sources of international law.
5/ Criminal liability and prosecution is independent of the territorial state where the offence was committed or the national state of the alleged offender or victim. (Einarsen, 2012, pp. 236–247).

These positions are basically in agreement that universal (customary) recognition requires a serious offence, and that the crime for some valid reason, could not be left exclusively to a particular State. This has a corollary consequence: criminal responsibility and prosecution are not linked to the consent of a State that may claim to be affected. Einarsen differentiates universal crimes from grave crimes and considers the following decreasing classification for crimes:

VI) Core international crimes.
V) Other international crimes against the peace and security of mankind.
IV) International crimes not dependent on the existence of threats to international peace and security international offences.
III) International crimes *lege ferenda*.
II) Non-grave international offences, non-international crimes.
I) National crimes
(Einarsen, 2012, p. 252).

Although several attempts have been made to include unflagged vessels among crimes against humanity, some of the basic conditions mentioned above are not met, and this is further supported by the fact that the unflagged vessels are not

[479] Judge Cassese was president of the Special Tribunal for Lebanon, and president of International Criminal Tribunal for the former Yugoslavia.

included in UNCLOS III as an international crime (Art. 110). “As far as state practice is concerned, there seems to be no consensus on attribution of a universal crime character to statelessness [...] undesirable, yet not unlawful status” (Xernou, 2016, pp. 41 & 39).[480] Even accepting that these vessels are not subject to the rule, their failure to assist persons in distress at sea could constitute *hostis humani generis.*

The right (of a warship) to board a vessel flying another flag (Art. 110, UNCLOS III) does not mean that the jurisdiction of the flag State of boarding automatically applies to the vessel being boarded. This right —very clearly delimited in the Convention— allows to act but in compliance with international regulations, without exercising further control on the vessel. A jurisdictional nexus between the ship and the intervening State is needed to establish enforcement jurisdiction.

Is it any via to act in case of flagless boat presumably engaged in the smuggling of migrants? The UN migrant Smuggling Protocol,[481] could be considered, and for actions with Frontex, its guidelines:[482] “when ships without nationality are presumably engaged in the smuggling of migrants the persons on board may be apprehended.”[483] Within territorial waters the jurisdictional issue seems clearer, and even extended creeping jurisdiction has been applied by some courts. This is illustrated in the case law of the alleged trawler *Cemil Pamuk,*[484] which, otherwise, confirms the pre-eminence of the crime of smuggling in persons over the irregular circumstance of an unflagged vessel. The court convicted 11 defendants in a migrant smuggling operation involving 353 persons, mostly Kurds, who were transferred between trawlers on the high seas. The defendants claimed that they had merely carried out a rescue operation. However, the Italian authorities provided monitoring of the operation for a long time before the transhipment process, and the Court argued:

> Orbene, per scardinare l’argomentazione degli imputati basterebbe un’elementare osservazione: sc davvero essi hanno agito per salvare i compagni da un naufragio, come mai li hanno poi abbandonati al loro destino, trasbordandoli su un’altra imbarcazione in pieno mare aperto anziché condurli in un porto sicuro? *(*Motivazione, 2, para. 2).[485]

The defendants' argument of lack of Italian jurisdiction which it was specifically rejected by the Court:

> Tra le ore 18:30 e le ore 18:50 si è perfezionata l’operazione di “aggancio” tra il Guardacoste della G.d.F. e il motopeschereccio occupato dagli imputati: il

[480] As established in *Cemil Pamuk* case, P.N. A.A., M.C., O.A., K.Z., A.M., B.M., O.S., T.M., K.N., D.S., v. Republic of Italy, Sentenza del Tribunale di Crotone del 12 settembre 2001, n. 1118] [Court of Crotone, Italy, judgment 1118] of 12 September 2001, the condition of stateless ship was not declared as illegal or legally critical by itself but as a basis for establishing jurisdiction.

[481] Protocol Against the Smuggling of Migrants by Land, Sea and Air, as above.

[482] Best Practice Technical Guidelines for Automated Border Control (ABC) Systems (2015). Frontex [electronic resource]. Available at: *https://euagenda.eu/upload/publications/untitled-6349-ea.pdf (accessed on 2 May 2022).*

[483] Protocol as above, n. 10, Annex, Part I, paras. 2.5.2.5. and 2.4.(d).

[484] *Cemil Pamuk* case as above.

[485] [Now, one elementary observation would suffice to undermine the defendants' argument: if they really acted to save their comrades from a shipwreck, why did they then abandon them to their fate, transferring them to another vessel in the open sea instead of taking them to a safe harbour?].

> Comandante del Guardacoste ha intimato l'alt al peschereccio in quanto privo di bandiera o di altro segno identificativo (in tal caso l'art. 111 della Convenzione O.N.U. di Montego Bay del 10.12.1982, ratificata dall'Italia con legge 689/1984, accorda il "diritto di visita" allo Stato territoriale); l'equipaggio del Motopeschereccio "sconosciuto" sulle prime non ha ottemperato all'ordine, poi, anche per l'intervento di supporto di un secondo Guardacoste della G.d.F., ha fermato i motori consentendo al personale di P.G. di salire a bordo e di rinvenirvi gli undici imputati nominati in epigrafe (Motivazione, considerando, para. 4).[486]

Note that the only reference to the absence of the vessel's flag refers to visiting rights but does not appear in the list of offences or as an aggravating circumstance. In this regard, the Court established that the action was supported "by the UN Montego Bay Convention (Art. 111)".[487]

Moving outside of Europe, the issue of flagless vessels has changed in the USA jurisprudence, with the successive stages against drug trafficking. Under the Marijuana on The High Seas Act [488] it was first established that the crime of drug trafficking would apply to any vessel under US jurisdiction whether in international waters or not, without the need for the government to prove that the drugs discovered were bound to the US. It was also stated *that* it would apply to unflagged, or fraudulently registered vessels in any waters. This unilateral US action has been criticised doctrinally (Tousley, 1990).

The consideration of a stateless vessel was further extended to include even those vessels whose flag State does not oppose prosecution, assuming an extension of its prescriptive jurisdiction [Maritime Drug Law Enforcement Act (MDLEA) and the Drug Trafficking Vessel Interdiction Act (DTVIA)].[489] This progressive extension of US jurisdiction has also been criticised by Bennett,[490] both in itself and for the effect of copying other countries with less legal certainty. As per this author, the statelessness circumstance by itself has not the same universal harmful consideration as other crimes. It has already been mentioned that a universal crime requires international community recognition as such. "If courts do not realize that the statelessness of the vessels is not playing merely a jurisdictional role, however, they may give ambiguous laws and dangerously broad interpretation [which could have negative consequences, e.g., on refugee laws and protection] While vessels without nationality do threaten the public order on the high seas,

[486] [Between 6.30 p.m. and 6.50 p.m., the operation of "coupling" between the Coastguard of the G.d.F. and the fishing boat occupied by the defendants took place: the Coastguard Commander ordered the fishing boat to stop because it lacked a flag or other identifying sign (in this case, Article 111 of the O. N.U. Montego Bay Convention of 10.12.1982, ratified by Italy with law 689/1984, grants the "right of visit" to the territorial State); the crew of the "unknown" fishing vessel initially did not comply with the order, then, also due to the support intervention of a second Coastguard of the G.d.F., stopped the engines allowing the G.d.F. personnel to board the vessel and find the 11 defendants named in the epigraph].

[487] UN Montego Bay Convention was used in this Court to name UNCLOS III. The Convention was ratified by Italy by law 689/1984.

[488] 21 U.S.C. §§ 955 a-d (1980), transferred to 46 U.S.C. §§ 1901-1904 of Shipping Act (1987), followed by the Maritime Drug Law Enforcement Act, 46 U.S.C §§ 1901-1903 (1986).

[489] MDLEA, 46 U.S.C.§ 705 (2006), and DTIVA, Pub. L. No 110-407, 18 U.S.C.A. § 2285 (2008).

[490] Allyson Bennett is a distinguished professor at Yale Law School.

making the operation of such vessels a universal crime is not the solution" (Bennett, 2012, p. 462).

The exercise of prescriptive jurisdiction over ships without nationality has a well-known case law precedent in the *Asya* case.[491] The vessel was sighted by a British destroyer on the high seas, 100 miles off Jaffa. "Ship flying no flag when sighted —Turkish flag hoisted later but hauled down when boarding party approached, when Zionist flag was hoisted."[492] The ship was found to carry 733 persons without legal documents to enter Palestine. Molvan claimed the freedom of the open sea as the ship was sailing on the high seas. However, the Court dismissed the appeal:

> Having no usual ship's papers which would serve to identify her, flying the Turkish flag, to which there was no evidence she had a right, hauling it down on the arrival of a boarding party and later hoisting a flag which was not the flag of any State in being, the Asya could not claim the protection of any State, nor could any State claim that any principle of international law was broken by her seizure (Judgement one, (e), para. 19).

Thus, the doctrine seems to conclude that the absence of a flag on a ship is not only not a universal crime, but also not, in itself, a relevant crime to be considered in international law. To the extent that a flag can be identified along the arrest process, it is required to inform that State before acting. As a practical conclusion, for European border control, in case of a legitimate flag detected, the Frontex coastguard or warship must request the authorisation from the flag State and if some urgent measure is taken "it shall promptly inform the flag State concerned" (Fantinato, 2020, p. 224). It must be remembered that although actions of Frontex depend on EU regulations, the final ships' action relies on its Member State flag (Fantinato, 2020, p. 226). It may be pertinent to always remember, when carrying out detention actions, that "relevant rules of customary international law are found in international human rights laws, and the right to life" (Scovazzi, 2015, p. 395).

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6.7. Migrants Crimes and State of Necessity

Sometimes rescued victims find themselves in severe deprivation and psychological distress, which can lead to actions such as theft or food hoarding. In case of such a victim on board, could actions, e.g., a mother trying to steal milk from the ship's galley for her child, be considered from the perspective of a 'state of need'?

The state of need is included in some criminal codes as is the case for Spain.[493] Could an approach for considering the survival instinct be the one that pushes migrants' action as the one commented on the paragraph above to be assimilated to the «powerful stimulus» contained in Art. 21–3ª? How does the

[491] *The Asya case. Naim Molvan v. Attorney General for Palestine.* 81 Ll L Rep 277, UK: Privy Council (Judicial Committee), 20 April 1948.

[492] The Asya case as above, Held, para. 1.

[493] Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, as above, (Art. 20–5º).

doctrine interpret this state of extreme need? What are its conditions? (Cuerda Arnau, 1997; Iberley, 2016). According to the law,[494] and aside from other assumptions contemplated in Art. 20, exempting from criminal responsibility, such as mental disorders, influence of drugs, etc., focusing on a case such as the mentioned action of theft on board, responsibility exemption could be invoked if:
1/ The harm caused is not greater than the harm to be avoided (5º–prim).
2/ The situation of need has not been intentionally caused by the subject (5º–seg).
3/ May be driven by insurmountable fear (6º).
This does not mean that any illegal action of a migrant on board can be shielded by a «state of necessity,» but it could be considered an exemption from liability on that ground in certain circumstances, as could be considered in the mentioned case of a distressed mother who, after being rescued, wishes to stockpile food for her child in case of future shortages, even if she has been offered sufficient food after the rescue. Another question is whether the exclusion of criminal liability includes exemption from civil liability.

Outside of Spanish legislation, the state of need does not appear in all legislation around the world, although the analysis of extreme necessity in law dates back at least to the Middle Ages. According to Mancilla “the canonist Huguccio [Hugh of Pisa], around 1190, is arguably the first to articulate this idea” (Mancilla, 2016, p. 28), a concept also present in Italian theologian Giovanni di Fidanza (Saint) Bonaventure (1217–1274);[495] Thomas Aquinas (1225–1274); Hugo Grotius (1583–1645); and Samuel Freiherr von Pufendorf (1632–1694), among others. Grotius postulated “that the right of necessity was a revival of the right of common use” (Mancilla, 2016, p. 36), an open question as nothing is said about the owners of the resources. Grotius established three admonitions that are necessary to invoke the state of extreme necessity, which are close to the requirements mentioned in the Spanish Code. The extreme necessity is present in distant legislations such as in the Criminal Code of the Russian Federation[496] as it was in the former Criminal Code of the USSR (art. 14) and it has a long tradition in Muslim cultures (ضرورة, darūra) (Stewart & Gerber, 1999). It is also included in the Italian Legislation,[497] and in other South American legislations.

The extent to which the state of necessity may be invoked for actions of migrants rescued on board, or in the receiving centres, has to be considered on a case-by-case basis, depending on the flag of the rescuer vessel, the disembarking State and the particular circumstances.

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[494] With subsequent jurisprudence in the Criminal Sentence No. 440/2015, Madrid Provincial Court, section 1, rec 1237/2015 of 5 November 2015.

[495] The theologian's birthdate appears in sources as 1217 or 1221. Stanford encyclopaedia indicates circa 1217.

[496] Уголовный Кодекс Российской Федерации (С Изменениями На 8 Июня 2020 Года) [Criminal Code of The Russian Federation], amended 8 June 2020].Criminal Code of The Russian Federation, amended June 8, 2020, Art. 39).

[497] Regio Decreto 19 ottobre 1930, n. 1398, Approvazione del testo definitivo del Codice Penale. [Royal Decree No. 1398 of 19 October 1930, Approval of the Final Text of the Criminal Code],

CHAPTER SEVEN. JURISDICTIONS AND CLAIMS RELATED TO RESCUE AT SEA

In addition to the criminal issues discussed in the previous chapter, there may be other procedural queries in relation to rescues, mostly related to non-compliance with obligations to provide assistance, delays in disembarkation and similar questions primarily related to human rights. In addition to established agreements and conventions (UNCLOS III, SAR, SOLAS) to provide assistance, which some States may not have ratified, there is still customary (maritime) law and, in general, rescue must be approached first and foremost on the basis of a conscience as human beings and members of society, which morally obliges us to help and protect each other when lives are in danger. This was the driving force that later crystallised into international human rights, and salvage regulations. This approach makes sense because, in more than a few cases, the vessels themselves, owned either directly by States or through their agencies, hinder the process of rescuing and disembarking migrants, and it is the human rights legal via that it is most likely to succeed in the event of a complaint. Therefore, in addition to the possibility to act against a particular master or ship, complaints could be directed against the governments themselves and their agents which, despite having signed up to respect these agreements, often seek ways, even of dubious legality, to evade them.

This chapter, the last one dedicated to the state of law, includes three sections: The first one on jurisdictional principles that may be applicable in cases related to sea rescue; the second one on the state of the art of jurisdictional disputes after the general framework established by UNCLOS III; and finally a comment on tribunals and courts to which rescue claims may be addressed.

7.1. Jurisdictional Principles and Sea Rescue

The functional jurisdiction related to a treaty or agreement ─as postulated by Judge Giovanni Bonello in *Al-Skeini's and Others v. the United Kingdom*[498]─ is the set of human rights functions (obligations) of the signatory State derived or engaged by the agreement in question.

> In my view, the one honest test, in all circumstances (including extra-territoriality), is the following: did it depend on the agents of the State whether the alleged violation would be committed or would not be committed? Was it within the power of the State to punish the perpetrators and to compensate the victims? If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the State (Annex, §16).

[498] *Al-Skeini's and Others v. the United Kingdom* as above

The question of extraterritorial jurisdiction is an issue that has generated much debate. In Judge Bonello's concurring opinion, signatory States to the ECHR must ensure the observance of human rights in five primordial ways: 1/ not to violate human rights, 2/ to have systems in place to prevent human rights violations, 3/ to investigate human rights complaints 4/ to punish agents who violate human rights, and 5/ to compensate victims (§ 10).

A distinction has to be made among prescriptive, enforcement, and adjudicative jurisdictions. Prescriptive authority corresponds to the law to apply in the particular case. Enforcement jurisdiction refers to the authority to compel compliance with law, while adjudicative jurisdiction refers to "the authority to subject an individual to a state's judicial system" (Bennett, 2012, p. 436). How do these three elements apply to failure to provide assistance at sea?

The State may exercise prescriptive jurisdiction over activities initiated in its territory but carried out outside its territory (subjective territorial jurisdiction) or over activities that compete in its territory but that may have been initiated outside its territory (objective territorial jurisdiction). This is on the assumption that it is not the case of a State-flagged vessel on the high seas, because in this case jurisdiction offers no doubt under international law.

However, in 1996 the US Congress adopted two highly controversial pieces of legislation: the Cuban Liberty and Democratic Solidarity Act,[499] better known as Helms-Burton and the Iran-Libya Sanctions known as D'Amato-Kennedy.[500] A series of political and scholar criticisms followed as "the laws had extraterritorial effect, imposed secondary boycotts, violated the principle of international economic organizations […] as well as the charters of international financial institutions" (Smis & van der Borght, 1999, p. 227).

They have originated a still ongoing debate about the principle of territoriality, partially solved in practice with bilateral agreements.[501] In the USA, case law has faced this question accepting that "[A]ny State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences withing its border which the State reprehends" (Gavouneli, 2007, p. 8). This was set out in *US v Aluminium Company of America* (Alcoa)[502] and reaffirmed in *US v. The Watchmakers of Switzerland Information Center Inc.,*[503] and in *Hazeltine Research Inc. v. Zenith Radio Corporation.*[504] But the legal basis of jurisdiction relies on the State sovereignty, i.e., on an external manifestation of State power. Any mutual limitation between sovereign and independent powers, whether by agreement

[499] H.R. 927 − Cuban Liberty and Democratic Solidarity Act. 104th Congress (1995-1996). Act of 1996.

[500] H.R. 3107 - Iran and Libya Sanctions. 104th Congress (1995-1996). Act of 1996.

[501] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom. OJ L 309, 29.11.1996, p. 1–6.

[502] *United States v. Aluminium Co. of America*, 148 F.2d 416 (2d Cir. 1945), at p. 443.

[503] *United States v. Watchmakers of Switzerland Inf. C*., 133 F. Supp.40 (S.D.N.Y. 1955).

[504] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 239 F. Supp. 51 (1965), *aff'd* 395 U.S. 100 (1969).

between the parties or by acceptance of an international convention, is possible when the right of one State to prescribe (and enforce) rules for persons in another State is subject to the right of that other State to prescribe (and enforce) those rules. It is only by such mutual agreement, or by acceptance of a convention, that such a limitation has a legal ground to be sustained, but the Helms-Burton act, for example, affected the interests of Spain (among others) without fulfilling any of the two above mentioned conditions.

Therefore, the legitimacy of any claim related to rescue must be verified on the basis of commonly agreed jurisdictional criteria following the principles of manifestation of jurisdiction: territoriality, nationality, universality, passive personality, and protectivity. These five principles have been analysed in depth by (Gavouneli, 2007), and summarised here in an abridged non-verbatim transcription:

1/ Principle one: Territoriality, determining jurisdiction by linking the offence to the place where it is committed. It stems from the *summa potestas* of State territoriality. It is complemented by the circumstances commented on above in which the State exercises prescriptive jurisdiction over activities initiated in its territory but carried out outside it [or vice versa]. It may expand beyond the physical territory and acquires a functional nature. e.g., when extended to the Contiguous Zone for the exercise of customs, fiscal, sanitary or immigration jurisdiction (Art. 33, UNCLOS III). However, "UNCLOS instituted a balance between the *mare liberum* and the principle of territorial sovereignty through a carefully crafted system of 'progression' or 'graduation' from stronger to weaker forms of jurisdiction over maritime zones" (Ventura, 2020, pp. 103–105). Therefore, jurisdiction is not strictly territorial in the EEZ and on the continental shelf. In any case, even within its borders, the State must act in accordance with international agreements (starting with human rights included in the UN Charter). As per Gavouneli, the assertion of territorial jurisdiction in cases of enforcement jurisdiction is universally accepted (Gavouneli, 2007).[505]

2/ Principle two: Nationality, determining jurisdiction by reference to the nationality or national character of the person committing the offence. This opened the debate on whether international crimes should be prosecuted by the State of nationality or by the International Criminal Court. In any case, a quite limited consideration, as this court scope is for individuals charged with the gravest crimes of concern to the international community. A related issue is the requirement of a genuine link between the State and the individual (whether a natural or legal person).[506] This is of utmost importance in the case of vessels. It is generally accepted that this genuine link is acquired upon the registration of the ship.

According to UNCLOS III (Art 91.1): "[…] Ships have the nationality of the State whose flag they are entitled to fly. There must be a genuine link between the

[505] See the Guide on Article 1 of the European Convention on Human Rights. Obligation to respect human rights – Concepts of «jurisdiction» and «imputability», as above.

[506] Under some legislations it is possible to suit the Corporate Criminal Liability. This breaks the old principle of *Societas delinquere non potest.* In the case of Spain, it is set out in Art. 31 of the Criminal Code.

State and the ship." The issue of the flag of the vessel has been discussed in Section 2.2.1. There is a UN project to establish a specific regulation for the registration of ships, but the text, after several decades, has not achieved sufficient consensus[507] and has never entered into force. The Article 94 of UNCLOS III established: "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." However, the extent to all powers, not just the administrative one, remains elusive (Gavouneli, 2007, p. 17). While each State is free to set the conditions for the nationality of its ships, once the flag is granted, it is widely accepted that the registration of the ship provides the genuine link;[508] the genuine link issue is referred to in the *MV Saiga*[509] repeatedly (pp. 41 & 43). The nationality principle could also apply in the case of an unflagged smuggling vessel against the master or skipper.

3/ Principle three: Universality. Jurisdiction is determined or conditioned by reference to the custody of the person committing the offence. Since jurisdiction is clearly allocated and delimited, it is possible to avoid prosecution and punishment by moving to territories where the State is unwilling or unable to exercise its competences or simply where no mandate applies. This principle "is distinguished from the 'co-operative limited university principle' which confers upon de State the right rather than the obligation (may instead of must) to prosecute" (Gavouneli, 2007, p. 20; Reydams, 2004, pp. 35–42). The principle of *aut dedere aut judicare* i.e., «either using the right to proceed or leave it to the party making the appeal» is already present in the surprisingly modern position of Grotius as seen in the updated 2005 version of his work *De Jure Belli ac Pacis*: "[The State] should, on request, punish the person sued according to his demerits, or else hand him over to be dealt with at the discretion of the injured party" (Grotius, 1625/2005, p. 1062).[510] Under the universality principle, a State has the power to punish offences of universal concern, for a crime becoming universal if the international community considers it as such. In this case, it does not require a connection with the State. "The universality principle collapses the distinctions […] among enforcement, adjudicatory, and prescriptive jurisdiction" (Bennett, 2012, p. 437). The list of crimes so heinous and universally abhorred as to be considered international crimes usually includes genocide and war crimes, but others, such as piracy, terrorism or drug trafficking have not been universally included in this category, and the same holds for human trafficking. Even considering that the failure to render assistance could be included as an act of violence, and of application Art. 101, a(ii) of UNCLOS III, still will not fulfil the condition of such a universally abhorred crime.

4/ Principle four: Passive personality, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Under this

[507] UN Convention on Conditions for Registration of Ships, 1986 (A/DEC/41/435 of 12 January 1987).

[508] This has been confirmed by the International Tribunal for the Law of the Sea in cases no 2 and 8: *MIV "SAIGA" (Saint Vincent and the Grenadines v. Guinea), as above.*

[509] MIV "SAIGA", as above, §41 & §43.

[510] It corresponds in the original to *De Jure Belli ac Pacis* (1625) Book II, Chapter XXI, IV: *Alterum facere debeat, aut ut ipsa interpellata pro merito puniat nocentem, aut ut eum permittat arbitratio interpellantis*.

principle, closely related with the protective one (as a mirror), jurisdiction is created based on the nationality of the victim. This principle was typically applied for war crimes, as in the *Eichmann* case.[511] In the case of rescues, this would be the residual jurisdictional via if none of the others can be applied.

After the tragedies of Oklahoma City (19 April 1995) the possibility of perpetrators located abroad but committing a criminal act against citizens of the State was considered, and the Antiterrorism Act (AEDPA) of 1996, counted with wide US Congress support.[512] A related issue that falls outside the scope of this thesis is the commission of a criminal offence using devices (e.g., drones or unmanned craft guided from another State). But it could be considered if sufficient technology were to exist in the future to be possible for a smuggler to guide a craft from far enough away to remain outside the jurisdiction of the destination State of migrants. In any event, *mutatis mutandis,* it seems rational that the fact that the skipper is not physically on the vessel does not represent any fundamental change about the jurisdictional applicability discussed above. Such a vehicle shall be a registered or unregistered maritime vessel, and the person operating it shall be in some place subject to a certain jurisdiction or in any case shall have a nationality. There is additionally the possibility to apply passive personality.

Another illustrative case was the dispute over an international arrest warrant issued on 11 April 2000 by a Belgian examining judge against the acting Congolese Minister for Foreign Affairs, Mr. Abdulaye Yerodia Ndombasi, seeking his detention and subsequent extradition to Belgium «alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity.»[513] The Court ruled against the Belgian claims. The resolution echoes the difficulties of differentiating between the acts that an active minister performs as a representative of the State and those that he or she may perform in his or her private activity. However, this immunity is based on customary international law, it is not granted for personal benefit, but to ensure the effective performance of the functions on behalf of their respective States. Though even when the Belgian claim was discharged and a request of cancelling the warrant was ordered, the court sentenced that the immunity did not mean "[…] impunity in respect of any crimes they might

[511] *Attorney General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem, (Criminal case No. 40/61, 11 December 1961, 36 ILR 18 (1968), pp. 5–276. Eichmann was an Austrian citizen living in Argentina to avoid prosecution for war crimes against Jewish citizens perpetrated in Germany during Hitler's rule. He was abducted by Israeli Security Forces in Argentina and handed over to the District Court of Jerusalem to stand trial for war crimes, crimes against humanity and crimes against the Jewish people for a total of 15 counts. The question of jurisdiction, considering the citizenship, the place where he was abducted, and whether the jurisdiction was negated by the abduction from a foreign country was reviewed. The accused was convicted on all counts and sentenced to death.

[512] Antiterrorism and Effective Death Penalty Act of 1996. Public Law 104–132, 110th Congress, Apr.24, 1996. This law has been criticised mainly for its Title I, which substantially modifies federal *habeas corpus* law. Although it has been argued on the grounds of avoiding continued appeals and delaying the serving of sentences for those convicted of terrorism, it has also been argued that this reduction in appeals could result in the conviction of an innocent person.

[513] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3,* Recital 1.

have committed, irrespective of their gravity. While jurisdictional immunity was procedural in nature, criminal responsibility was a question of substantive law."[514] This aspect is important as complete exoneration from any criminal responsibility is not included in the immunity: "immunity might well bar prosecution for a certain period or for certain offences."[515] The passive personality principle could be evoked through the State of the victims, in case an unflagged ship does not provide assistance and the nationality of her master cannot be established.

5/ Principle five: Protectivity, determining jurisdiction by reference to the national interest injured by the offence. Although less clear in its development than in the idea, State protection has been widely accepted as a principle for jurisdiction. It has been invoked in immigration and economic crimes. This principle has also promoted environmental regulations.[516] The protective principle is the basis for protection against offences addressed against the State representatives, and the core of the 1973 Convention[517] among other jurisprudence (Gavouneli, 2007). As for the sea, jurisdiction based on the two principles of passive personality and protectivity is supported by the SUA, Art. 6:[518]

> 1. Each State party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 3 when the offence is committed:
> (a) Against or on board of ship flying the flag of the State at the time the offence is committed; or
> (b) In the territory of that State, including its territorial sea; or
> (c) By a national of that State.
> 2. A State Party may also establish its jurisdiction over any such offence when:
> (a) It is committed by a stateless person whose habitual residence is in that State; or
> (b) During its commission a national of that State is seized, threatened, injured or killed; or
> (c) It is committed in an attempt to compel that State to do or abstain from doing any act.

The combination of these jurisdictional principles creates overlapping situations that are sometimes not easy to resolve. It is not currently disputed that a State has human rights obligations towards persons outside its territory. However, this issue continues to give rise to frequent interpretations of its scope and jurisdiction, some of them will be commented on next.[519]

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[514] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), as above, § 60.*

[515] *Arrest Warrant of 11 April 2000, as above, §* 8.

[516] For example, the Arctic Waters Pollution Prevention Act (AWPPA) approved by the Canadian Parliament on June 17, 1970, with amendments (1970, R.S.C. 1985, c A-12). or the 1990 US Oil Pollution Act, (OPA 90), 33 U.S.C. Ch. 40 [§2701-§2762], 101st Congress (1989-1990).

[517] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, Annexed to General Assembly resolution 3166 (XVIII) of 14 December 1973.

[518] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, as above.

[519] More can be found at (den Heijer & Lawson†, 2012; Raible, 2018). For a review of the extraterritorial jurisdiction of the ECtHR see (Igiriogu, 2012).

7.2. Dissenting jurisdictional interpretations following UNCLOS III

Although UNCLOS III still have areas where progress is needed, including improvement of definitions, no doubt "UNCLOS still represents the undisputed authority and the obvious starting point when looking for answers to any question on states' jurisdiction over activities at sea" (Ringbom, 2015, p. 11).[520] Questions may be raised about the extent to which the Convention resolves not most but all of the issues. According to Ventura, "every jurisdictional claim apparently inconsistent with or un-regulated by the Convention amounts to creeping jurisdiction, being therefore an illegal and undesirable behaviour" (Ventura, 2020, p. 170). Other authors consider that some aspects remain unclear and there have been important divergences on "how states in reality exercise jurisdiction over ships" (Ringbom, 2015, p. 1). More can be found at (den Heijer & Lawson†, 2012; Raible, 2018). For a review of the extraterritorial jurisdiction of the ECtHR see (Igiriogu, 2012).

Notably, the principle of protectivity, discussed in the previous section, was controversially applied by the U.S., when boarding a foreign vessel on the high seas without permission of the flag State (Honduras) as presented in the *case United States v. González et al*.[521] Recital IV of the case law addressed the question on whether the application of US drug laws on the high seas violates UNCLOS. Firstly, it was considered previous jurisprudence[522] establishing that, as Honduras had not ratified the treaty, its provisions were not available to appellants. Secondly, it was considered even more significant that the UNCLOS is not self-executing:

> [T]he Convention is not self-executing, and that the United States' ratification of the treaty did not "incorporate the restrictive language of article 6, which limits the permissible exercise of jurisdiction to those provided by treaty, into its domestic law and make it available in a criminal action as a defense to the jurisdiction of its courts. "United States v. Postal", 589 F.2d 862, 878 (5th Cir.1979) [Footnote]: Even if ratification had created limits on United States jurisdiction, section 955a(c) was enacted subsequent to ratification, and therefore would override any inconsistent treaty provisions. Whitney v. Robinson, 124 U.S. 190, 8 S.Ct. 456, 31 L.Ed. 386 (1888).[523]

And in defence of sovereignty and national interests without restrictions limited by the Convention, referred to this *United States v. Postal* case added:

> But the question we must answer is whether by ratifying the Convention on the High Seas the United States undertook to incorporate the restrictive language of article 6 [[524]], which limits the permissible exercise of jurisdiction to those provided by treaty, into its domestic law and make it available in a criminal action as a defense to the jurisdiction of its courts. There is nothing in the

[520] A key work undertaken by scholars of the International Law Association's Committee on Coastal State Jurisdiction Relating to Marine Pollution to clarify and provide academic uniformity on how to interpret UNCLOS III concepts was included in the Yearbook of the International Law Association, 2000.

[521] *United States v. Angel Rey Gonzalez, Antonio Barrios, Laureno Antonio Gonzalez, Rafael Salvador Gonzalez, Emilio Reyes Royer, and Jose Alejandro Severino*, no. 84-5709, 776 F.2d 931, 11th Cir. (1985), recital 1. The reason behind this was for intentionally possessing, with intent to distribute, marijuana on board a vessel within the customs waters of the United States 21 U.S.C. Sec. 955a(c).

[522] *United States v. Cadena*, 585 F.2d 1252, US Court of Appeals, 5th Cir. (1978).

[523] *United States v. Angel Rey Gonzalez et at, as above, § 32.*

[524] It is unclear to what Art. 6 refers; UNCLOS III Art. 6 is devoted to reefs. The flag State sovereignty issue is included mainly in UNCLOS III Arts. 92 & 94.

> circumstances surrounding the formulation and adoption of the Convention that would support the conclusion that it did.[525]

Thus, jurisdictional uncertainty arosed with consequences for the avenues to claim for failure in assisting persons in distress at sea. After an meeting in Geneva promoted by the UNHCR Executive Committee (1980), the rule of the flag State's responsibility and sovereignty remained, but it became, surprisingly, an object of debate to the point that some authors considered that the flag State rule "cannot be considered customary international law" (Xernou, 2016).[526] This positioning is reinforced with the polemic case law *Sale v. Haitian Centers Council.*[527] However, except for a few unfortunate exceptions, such as this case, there are not many doctrinal discrepancies in accepting that the jurisdiction to be applied in a vessel on the high seas is that of the flag State.

It has already been commented on that, in addition to *de jure* jurisdiction, there may be a *de facto* jurisdiction to cover all those instances where the State acts using its power or control under international law ─frequently on an extraterritorial basis─ to involve the exercise of legislative or enforcement powers, such as the control of a vessel engaged in a rescue operation, but, once more, even in this case, such a State remains obliged to respect its human rights obligations (Attard, 2020; Papanicolopulu, 2014, 2016).[528] "In rescue operations the events may fall under the *de jure* or *de facto* jurisdiction of different States [...it] is possible to envisage overlapping jurisdiction by the flag State, the State of nationality, and the coastal or SAR State" (Attard, 2020, p. 203). The flag State remains the general avenue for claims against failure to provide assistance at sea. The jurisdiction may extend even to penal and disciplinary responsibilities, but the legal proceeding against the shipmaster, or person responsible, must be instituted in the flag State or in the State of which the responsible is a national, not in the coastal State: "no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national" (UNCLOS, Art 97.1). The coastal State may act —in defence of its sovereign rights on living resources— on boarding, inspecting or even arresting vessels and crews, but only to ensure compliance with the laws and regulations. The Convention grants jurisdiction also in the EEZ, but only in the aspect of preservation of sea resources. In case of retention of a foreign vessel, she must be promptly released, the penalties cannot include imprisonment and even the action of the coastal States in case of crimes is very limited (see Chapter six). "In cases of

[525] *United States v. Postal*, 589 F.2d 862, 878 (5th Cir. 1979), § 67.

[526] See details of these meetings and debate with alignment of UK, Netherlands, and Greece in the mentioned reference pp. 37-38.

[527] Sale v. Haitian Centers Council *as above.* (See refoulement, Chapter 5.5).

[528] See *Medvedyev and others v. France*, as above. Note that if the ship is flagged to a State party to the ECHR the shipmaster is subject to the human rights responsibilities imposed by it and to comply with these obligations imposed by the convention and its protocols. Also, a "shipmaster of a vessel registered in a non-ECHR State may still find himself subject to the obligations of the convention if the circumstances of the case result in an exercise of *de jure* or *de facto* jurisdiction or control of an ECHR State party" (Attard, 2020, p. 203).

arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed" (UNCLOS III, art. 73).

The case law of the frigate *ARA Libertad*[529] exemplifies a discrepancy over the interpretation of sovereign immune vessels in the territorial waters and in port. Due to previous claims against the Republic of Argentina by hedge fund NML Capital,[530] on October 2, 2012, a Ghanaian judge decided to seize the frigate training ship of the Argentinian navy *ARA Libertad* in the port of Tema. The case was taken to ITLOS with ordered measures to release and resupply the ship on 15 December 2012. As seen in this case "rights and obligations of states in this field keep developing and merely consulting the «Constitution of the Oceans» will not always provide a sufficiently accurate picture of the precise extent of the state' rights and obligations" (Ringbom, 2015, p. 11).

Another relevant case is The Republic of the *Philippines v. The People's Republic of China.*[531] The Philippines initiated arbitration proceedings on the basis of Annex VII of the UN Convention on the Law of the Sea concerning the waters and seabed of the South China Sea on what China calls the «nine-dashed line.» China, citing historical rights, objected to the legitimacy of the procedure and therefore did not participate in the arbitration. It referred to a 2006 statement of its own, where it excluded itself from the Convention's compulsory dispute settlement procedures. Two elements are interesting in the Arbitration Award of 12 July 2016. First that "China's non-appearance in these proceedings does not deprive the Tribunal of jurisdiction" (1202.B), and that any historical claim prior, and against, UNCLOS III has been repelled by the Convention as the Tribunal set:

> DECLARES that, as between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention; and further DECLARES that the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein (1203.B.2)
> […]
> DECLARES that China has breached its obligations pursuant to Articles 279, 296, and 300 of the Convention, as well as pursuant to general international law, to abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decisions to be given and in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute during such time as dispute resolution proceedings were ongoing (1203.B.16.(g),para.2).

However, there have been doctrinal discrepancies in this case, and it must be remembered that, as included in the Preamble recital of UNCLOS III: "matters not

[529] "*ARA Libertad" (Argentina v. Ghana),* as above.

[530] These disputes include: *NML Capital Ltd. vs. The Republic of Argentina,* S.D.N.Y. 03 Civ. 8845 (May. 16, 2006); *NML Capital Ltd. vs. The Republic of Argentina,* Judgment #06, 2728 (Dec. 18, 2006); *NML Capital Ltd and The Republic of Argentina* , UKSC 31, Jul. 6, 2011 (2001).

[531] *The Republic of the Philippines v. The People's Republic of China*, Award on Jurisdiction and Admissibility (Perm. CT. Arb.), case no. 2013/19, 12 July 2016.

regulated by this Convention continued to be governed by the rules and principles of international law." According to Pemmaraju, "UN Convention on the Law of the Sea has very little to offer to decide on issues of sovereignty and associated issues of overlapping maritime entitlements," and after a deep review of this case law concluded that "as a practical or pragmatic matter, the Philippines at the end of the day would in any case have to return to the negotiating table to settle its dispute with China and achieve a mutually acceptable solution" (Pemmaraju, 2016, pp. 1 & 42–43).

But after about 40 years of entering into force, very few voices ask for a major revision of the Convention. Another point subject to debate is the concept of the «genuine link» between the ship and her flag State, already analysed. Also, open to debate are issues such as: the use of private armed guards on ships as protection against piracy also reviewed above;[532] the growing concern about climate change and vessels as pollutants; port State jurisdiction over foreign ships; the anti-terrorist actions in ports and at sea; the immunities, responsibilities and exemptions of sovereign immune vessels; or the question of ice-coved areas, included in Art. 234 of UNCLOS III, since with the melting of the polar ice, a Northern Sea Route for commercial shipping is opening and bringing up new controversies.

Military uses of the sea in peacetime have also been an object for dispute, especially in the context of Middle East tensions, or during the Cold War. In the Corfu Channel affair,[533] two British destroyers struck Albanian mines, the explosion of which caused damage to these vessels and heavy loss of life. Lombok and Malacca straits are areas involved in civil and military controversies (Roach, 2005), and another example of disagreement took place in China's EEZ on 5 December 2013, between the Chinese fleet and the USS Cowpens.[534]

Regarding the military uses of the EEZ of another country, when UNCLOS III was drafted, there was no consensus on clarifying this question, and Art. 59 does nothing to contribute to legal certainty. First of all, it is unclear whether the Convention applies only in peacetime or whether it also applies in the event of warlike tensions without a declaration of war, as in most cases today (Duvauchelle Rodríguez, 1993). For Dupuy and Vignes, military drills on an EEZ would fall within the «other internationally legitimate uses» of the sea related to these freedoms, such as those linked to the operation of ships, aircraft and submarine cables and pipelines under UNCLOS III Art. 58 (Dupuy & Vignes, 1986), but it is unclear whether these freedoms include the testing of weapons, or the placement of anti-submarine detection devices in the Exclusive Economic Zone of another State. For his part, Stephen Rose considers that most States interpret Art. 58 to mean that legitimate uses of the sea include the conduct of military exercises without informing the coastal State, i.e., that

[532] See the *Enrica Lexie* case above.

[533] *Corfu Channel Case* (*United Kingdom v. Albania*), as above.

[534] The incident was reported by David Alexander and Pete Sweeney (Reuters) (electronic resource). Available at: *https://www.reuters.com/Article/us-usa-china-ships-idUSBRE9BC0T520131214 (accessed on 12 November 2022.*

the rights and jurisdiction of the coastal State in that area do not include the right to obtain notice of or authorise military exercises or manoeuvres (Rose, 1990).

Hot pursuit is permitted *mutatis mutandis* in the EEZ under Art. 111 using warships or other government-authorised vessels, but does not apply to warships of another State, as they enjoy «complete immunity» under Art. 95. In other words, UNCLOS III does not provide for the possibility of a vessel refusing to comply with a law enforcement request while sailing in the EEZ of another State. Strictly speaking, its refusal does not remove its right to remain in the EEZ, since that right does not depend on the right of innocent passage but on its right to freedom of navigation (Cave de la Maza, 1998; Duvauchelle Rodríguez, 1993). It should also be noted that Art. 60 states that the installation of permanent elements is the exclusive competence of the coastal State in the EEZ, and also includes "installations and structures which may interfere with the exercise of the rights of the coastal State in the zone". (60.1.c). On the other hand, according to Arts. 56 and 58, the coastal State and third States must take due account of each other's rights and duties.

On the controversial issue of whether the coastal State could oppose the installation of acoustic detection networks on the seabed, such as the Sound Surveillance System (SOSUS) and similar anti-submarine barriers as those deployed by the Soviets in the Arctic and North Atlantic, examples of the military use of the oceans, this would go against Art. 60.1.c above, since it would affect exclusive economic use and would also go against the free navigation of submarines which are neither excluded nor obliged to surface in the EEZ. Art. 20 on surface navigation refers only to territorial waters.

In conclusion, and accepting a remarkable legal uncertainty maintained over the decades, a wide range of military activities may continue to take place in the EEZ of another State, provided they meet the requirements of not constituting a threat or use of force and with due regard to the rights of other States to use the sea, including those of the coastal State in its EEZ, while respecting the rules of international law and other treaty obligations (Cave de la Maza, 1998; Dupuy & Vignes, 1986; Duvauchelle Rodríguez, 1993; Rose, 1990). In agreement with the authors and despite UNCLOS III (Arts. 88, 141, and 301) “the major naval powers do not regard any of these Articles as imposing restraints upon routine naval operations” (Churchill & Lowe, 1999, pp. 426–427, 431).

But the issue is different when it comes to the often-debated Taiwan Strait. In this case, since Taiwan is not an UN-recognised State, it could be argued that the territorial waters around the island and those off the mainland are both Chinese. As the strait is 110 miles (about 70 nm at the narrowest point) there is still an area in the middle of the strait that is an EEZ, again not high seas, but open to international navigation. In this case (as Art. 37 of UNCLOS III applies), there is a right, even for warships to "enjoy the right of transit passage, which shall not be impeded” (Art. 38) but there is "requirement of continuous and expeditious transit," and in this particular case of the EEZ of a strait, it is forbidden "any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable

provisions of this Convention" (Art. 38). As for article 39: “Ships and aircraft, while exercising the right of transit passage, shall: (a) proceed without delay through or over the strait; (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress.” Consequently, military exercises in this case are not allowed. As far as territorial waters are concerned, warships, and other government ships operated for non-commercial purposes, cannot be seized, because they enjoy immunity, but they can be requested "to leave the territorial sea immediately" (Art. 30). With regard to the request that these warships in the EEZ may receive from the coastal State to provide assistance in case of distress at sea, it should be borne in mind that the conventions (SAR, SOLAS, UNCLOS III) exclude warships, but it seems reasonable that over and above these legal exclusions, and within their capabilities according to the manoeuvres they are carrying out, they should contribute to the rescue, within the universal principle of respect for life and human rights.[535]

Other maritime jurisdictional conflicts may occasionally rise (Martins Pereira da Silva, 2018), as in the *Mox Plant case* for a dispute concerning the international movements of radioactive materials, and the protection of the marine environment of the Irish Sea.[536] On 25 October 2001, Ireland instituted arbitral proceedings against the United Kingdom pursuant to Article 287, and Article 1 of Annex VII, of UNCLOS III. The case concerned discharges into the Irish Sea from a Mixed Oxide Fuel ('MOX') plant located at Sellafield nuclear facility in the United Kingdom, and related movements of radioactive material through the Irish Sea. The case is again interesting because of the clash between regional agreements and UNCLOS III law.

The UK argued that there could be an alternative, binding regional agreement. However, UNCLOS III is an integral part of the EU legal framework, and in this regard the Convention establishes in Article 293(1): "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention." In addition, and according to Art. 288.2 “A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.”[537]

The UK gave an assurance that there will be no further maritime transport of radioactive material to or from Sellafield and both parties were ordered to cooperate

[535] As “it is common practice for governments to have warship act in the manner consistent with this obligation” (United Nations Office on Drugs and Crime, 2020, p. 10).

[536] *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p.95.*

[537] It has already been mentioned in the comment to case law *The Republic of the Philippines v. The People’s Republic of China*, that any previous rule against UNCLOS III is repealed by this Convention.

in studying and improving scientific knowledge and monitoring of the effects of the MOX plant for the Irish Sea. On 15 February 2007, Ireland formally withdrew its claim against the UK (Hague Gateway to Justice). It was not until 6 June 2008 that the Tribunal legally dismissed the case and terminated its proceedings.

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7.3. Extraterritorial Actions on Migrants, Universal and Creeping Jurisdiction

One of the positions that should at least be considered contradictory is the narrow consideration (as seen in the above case law) that certain rights (particularly respect for human rights, asylum-seeking and non-refoulement) only apply in territorial waters, but at the same time, intercepting actions may be extended to the high seas, where the only jurisdiction to be applied is that of the flag State. It is at odds with Art. 89 of UNCLOS III: "No State may validly purport to subject any part of the high seas to its sovereignty," and Art. 92, which with very few exceptions (and this is not the case) confirm that a vessel on the high seas "shall be subject to its [flag State] exclusive jurisdiction," in addition to ancient admiralty law of that flag State rule.

The *Sale v. Haitian Centers Council,*[538] case, briefly mentioned in the refoulement section, is being brought here again as a notable example of extraterritorial action by the USA. After Jean-Bertrand Aristide —Haiti's first elected president— was overthrown in a military coup, many Haitians fled their country in boats for fear of political persecution.

The US Coast Guard, according to a presidential executive order,[539] interdicted a large group of Haitians on the high seas, where those found on board who had «credible fears of political persecution» were being held in Guantánamo, without access to legal support, while those who failed their asylum interviews were sent back to Haiti, facing the danger of persecution.

The U.S. Supreme Court reversed the judgement of the Court of Appeals based on the argument that Art. 33 of the 1951 Geneva Convention is silent regarding extraterritorial application, under the above-mentioned consideration that only individuals who have already arrived on a State's soil are protected, establishing, thus, a geographical limitation for Art. 33, something that arouse great debate (D'Angelo, 2009; Llain Arenilla, 2015; Wise, 2013). The issue about Art. 33 has already been commented on in a previous section, but the question of extraterritorial action is pertinent here. If jurisdiction, according to this positioning, is limited only to territorial waters, on what basis is it justified to act and interfere with a vessel on the high seas, seize the passengers, evaluate their claims and asylum requests on board and refoul them? Under what argument, once in Guantánamo (consequently *de facto* under USA control and also *de jure* as the facility there flies the US flag and is legally

[538] *Sale v. Haitian Centers Council,* as above

[539] Presidential executive order No 1287 issued by President Bush, establishing that refoulement was not limited by section 243(h) of the Immigration and Nationality Act of 1952, [U.S. Congress. (1952) United States Code: Immigration and Nationality, 8 U.S.C. §§ -1483 Suppl. 5 1952, known as the McCarran–Walter Act] or Art.33 of the 1951 Geneva Convention.

established by leasehold) were deprived of legal support? In his dissenting opinion, in this case law, Justice Blackmun concluded:

> The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death. That is a modest plea, vindicated by the treaty and the statute. We should not close our ears to it.[540]

This extraterritorial action has been qualified as a «legal black hole» for civil and political rights (Wilde, 2005). The practice by sovereign States of seeking to extend territorial jurisdiction over maritime spaces beyond what is permitted by international customary or treaty law is frequently known as «creeping jurisdiction» (Knauss, 1985; Molenaar, 2021).

But there are also other examples where European authorities have taken similar extraterritorial action. In *Medvedyev and others v. France (Winner case)*[541] The *Winner*, a Cambodian-flagged ship was stopped by the French navy on suspicion of transporting drugs "off Cape Verde, several thousand kilometres from France" (§13). A French commando took over the *Winner*, which was escorted under military guard to the port. Coercive measures were maintained throughout the voyage due to hostility shown by the *Winner* crew. Charges were brought for violation of Article 34 of the ECHR. As per the ECtHR, France exercised full (*de facto*) jurisdiction: "from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction" (§ 67). The Court stated that control may be done by own armed forces or "through a subordinate local administration."[542] The Court added that the special nature of the maritime environment does not justify the existence of a zone of no law, in which individuals are deprived of a legal system (§ 178).

The case law *Xhavara and others v. Italy and Albania,*[543] was rendered in the late 1990s, after Albanian and Italian authorities signed an agreement to stem the high flow of migrants from Albania to Italy. In the so-called Otranto Strait tragedy, on 28 March 1997, the *Sibilla*, an Italian navy vessel in an action of blockage, 35 miles off Italy, collided with the Albanian vessel *Kater i Rades,* suspected of migrant smuggling, resulting in the capsize of the vessel and the death of more than 80 migrants, including children.

Although out of territorial waters, the case was judged under Italian Jurisdiction where both captain and master were held responsible for shipwreck and multiple manslaughter. In this case, the ECtHR considered the action to fall under Italian Jurisdiction. A decisive element for this decision was the bilateral agreement between the States. The case was dismissed by the ECtHR under the argument that: "there

[540] *Sale v. Haitian Centers Council, a*s above. Certiorari to the United States Court of Appeals for the Second Circuit. No. 92-344, October term, 1992, p. 155.

[541] *Medvedyev and others v. France* [GC] as above.

[542] Referring to *Loizidou v. Turkey* [preliminary objections], no. 15318/89, § 62, ECHR 1995-II.

[543] *Xhavara and others v. Italy and Albania* [Fourth section], no. 39473/98, ECHR 2001-I.

was no reason to believe that the investigation carried out by the Italian authorities had been inefficient or biased. The applicants were also able to join the criminal proceedings as civil parties and attend the hearings."[544] As per Xernou: "This dictum cannot, however, lead us to the conclusion that States have obligations under the ECHR towards all ships, no matter how tenuous the link with their activities" (Xernou, 2016, p. 64). As per *ratione loci*, the ECtHR has established that any person on board a European flagged ship or a ship or land placed under the effective control of State agents, is a person within the jurisdiction of that State and thus under the protection of the ECHR.[545] This extraterritorial jurisdiction as a result of keeping effective control has been stressed by the UN Committee Against Torture in the case above commented on in *J.H.A. v. Spain* (Marine I), "the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law,"[546] and also by a relevant case law by the ECtHR (European Court of Human Rights, 2018; Igiriogu, 2012), some of these illustrative cases follow:

In the case *Hirsi Jamaa and others v. Italy,*[547] the applicants were part of a group who left Libya aboard three boats with the aim of reaching the Italian coast. They were intercepted "[on the high seas] within the Maltese Search and Rescue Region of responsibility"[548] by the Italian Revenue Police (Guardia di finanza) and the Coastguard. The migrants were transferred onto Italian military ships and returned to Tripoli. The applicants alleged that during the voyage the Italian authorities did not inform them of their real destination and took no steps to identify them. The Italian Minister of the Interior stated that the operation to intercept the vessels on the high seas and to push the migrants back to Libya was the consequence of the entry into force on 4 February 2009 of bilateral agreements concluded with Libya and represented an important turning point in the fight against clandestine migration. The Italian Government argued that the push-back actions on the high seas were justified by the law of the seas. An application against the Italian Republic was lodged with the Court under Articles 3, 4, and 34 of the ECHR. The Grand Chamber of the ECtHR reviewed extensively the jurisprudence for this question.[549]

[544] *Xhavara and others v. Italy and Albania* (as above), [information note] no. 26, § 4, ECHR, 2001-I.

[545] As established by ECtHR in several cases law, in addition to *Hirsi Jamaa* case, as above (§ 74). See *Bankovic and others v. Belgium* [GC], no. 52207/99, § 75, ECHR 2001-XII. Also, and related to Iraq war, *Al-Skeini and others v. UK* [GC], no. 55721/07, § 136–137, 2011-VII; *Al-Jedda v. the UK* [GC], no. 27021/08, ECHR, 2011-VII; and *Rigopoulos v. Spain*, no. 37388/97, ECHR 1999-I. The case *Őcalan v. Turkey*, no. 46221/99, ECHR 2005-V, related to Turkey's acquisition of custody over the PKK leader Őcalan in Kenya prior to bringing him back to its own territory for trial is another example of jurisdictional extension.

[546] *J.H.A. v. Spain*, as above (para 8.2).

[547] *Hirsi Jamaa and others v. Italy* as above.

[548] *Hirsi Jamaa and others v. Italy, facts*, para. 1.

[549] The Chamber cited in this case domestic law (Italian navigation code, bilateral agreements between Italy and Libya), international and European law (1951 Geneva convention [Art. 1, 33 § 1], UNCLOS III [Arts. 92,94,98], SAR Convention [Subparagraph 3.1.9. of the Annex to the SAR Convention], The Palermo Protocol 2000 [Art. 19 § 1], Resolution 1821 (2011) of the Parliamentary Assembly of the CoE, CFRE [Art.19], 1985 Schengen Agreement [Art. 17], Regulation (EC) No 2007/2004, Regulation (EC) No 562/2006 [Art.3], Council Decision 2010/252/EU).

The Court reiterated "the absolute character of the rights secured by Article 3, that cannot absolve a State of its obligations under that provision" (§122, para. 2). Additionally, it set out that "protection against the treatment prohibited by Article 3 imposes on the States the obligation not to remove any person who, in the receiving country, would run the real risk of being subject to such treatment" (§123). This principle can also be found as an EU fundamental right, since non-refoulement is «shrined in Article 19» of CFREU (§13) as of the Chamber wording: "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[550]

Also, the Grand Chamber clarified that "Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya" (§129). The Grand Chamber ruled that applicants "were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities" (§81). The Italian border control operation of «push-back» on the high seas, coupled with the absence of an individual, fair, and effective procedure to screen asylum-seekers, constituted a serious breach of the prohibition of «collective expulsion» of aliens and consequently of the principle of non-refoulement.

The Court concluded that, while the UN Organised Crime Convention[551] allows States to intercept and take appropriate action against vessels reasonably suspected of smuggling migrants, no provision allows for an extension of the right of refoulement that States are prohibited from exercising, adding that only a misinterpretation of the rules aimed at ensuring the protection of persons could justify exposing these persons to an additional risk of ill-treatment by handing them over to the countries from which they have fled (§ 78). The ECtHR added that it is not enough to get assurances from the Libyan authorities that the Convention will be followed, but Italy had the obligation to provide applicants with access to asylum procedures in Italy.[552] According to Xernou, "Given that Libya is not a contracting party of the ECHR, nor has it signed the [1951] Geneva Convention, Italy's responsibility was even greater" (Xernou, 2016, p. 57).

In another case, unrelated to rescue but related to extraterritoriality, *Loizidou v. Turkey,*[553] the claimant, a Cypriot from Kyrenia, acquired, prior to the Turkish

Additionally soft law was always reviewed: UNHCR press release on 7 May 2009, Letter of 15 July 2009 from Mr Jacques Barrot, Vice-president of the European Commission, The report of the CoE's Committee for the Prevention of the Torture and Inhuman and Degrading Treatment or Punishment (CPT), the report of Human Rights Watch, and data from the visit to Libya by Amnesty International, together with other sources describing the situation of human rights in Libya, Somalia and Eritrea.

[550] Charter of Fundamental Rights of the European Union, as above. Title II – Freedoms. Article 19 - Protection in the event of removal, expulsion or extradition.

[551] United Nations Convention against Transnational Organized Crime and the Protocols Thereto, (as above).

[552] After several (interested) requests, and additional technical problems related to conflicts with UNCLOS III Art. 87, Libya finally notified the creation of its SAR zone to IMO, as of July 2017, extending 74 nautical miles.

[553] *Loizidou v. Turkey* [GC], no. 40/1993/435/514, ECHR 1996-XII.

occupation of Northern Cyprus on 20 July 1974, some plots of land, having agreed to exchange part of the property for a flat in the real estate development to be built on the land. The Turkish authorities repeatedly limited the progress of the project and access to the property, including the arrest of the claimant for a few hours after a demonstration for her rights. Based on Art. 2 of ECHR, the ECtHR ruled out that "the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory" (Recitals, para. 2).

Thus, there is a settled doctrine that *de facto* control goes along with *de jure* responsibilities, as also seen is the case of *Al Saadoon and Mufdhi v. UK.*[554] The applicants (two Iraqi nationals) were arrested by British forces in Basra and their custody transferred to the Iraqi authorities. The issue of the British jurisdiction over the detainees and the possible violation of Art. 3 among other articles of the ECHR was analysed. The Court rendered an opinion in favour of the defendants (in relation to some, not all of the articles invoked) and payment to the applicants jointly of forty thousand euros.

This distinction between *de jure* and *de facto* jurisdiction is reflected again in the case of *Ilaşcu et al. v. Moldova and Russia.* [555] The application mainly concerns acts committed by the authorities of the «Moldovan Republic of Transdniestria,» a region of Moldova which proclaimed its independence in 1991, but which is not recognised by most of the international community. The applicants alleged that they had been convicted by a Transnistrian court which was not competent, that they had not received a fair trial, and that after their trial they had been deprived of their possessions. In addition, they alleged that their detention in Transdniestria was not lawful, alleging non-compliance with a number of Articles of the ECHR. The Grand Chamber held that both Russia, through effective control and decisive influence over the Transnistrian authorities, and Moldova —despite not having effective control over the territory but holding territorial sovereignty only to the extent of its ability to assume its positive obligations— could be responsible for possible violations of the ECHR in Transnistria.

Questioning arises with respect to exclusive and uninterrupted control, i.e., whether an operation to provide humanitarian aid and medical assistance, carried out by unweaponed State vessels, and limited in duration to a few hours, fulfils such a requirement. The ECtHR has established three categories of extraterritoriality: control over an area, control over an individual outside national territory, and activities of diplomatic and consular agents abroad (Xernou, 2016, p. 67).

There has been some argumentation to consider that the extension of jurisdiction to the high seas based on the argument of «effective control» does not

[554] *Al Saadoon and Mufdhi v. UK* [Section IV], no. 61498/08, ECHR 2010-X.

[555] *Ilaşcu et al. v. Moldova and Russia* [GC], no. 48787/99, § 333, ECHR 2004-VII. See also *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 & 18454/06, § 109, ECHR 2012-X. *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 100, ECHR 2016-II.

automatically imply an extension of sovereignty to the high seas[556] and, consequently, the legal compliance with human rights obligations. This was the case in the *Sale v. Haitian Centers Council, Inc,* judgment,[557] but, as commented on above, this sentence has been criticised not only by academics and international organisations but even within the Court itself with the dissenting opinion of Justice Blackmun. Behind futile arguments, it is unquestionable that Art. 89 of UNCLOS III set out the issue very clearly: "No State may validly claim sovereignty over any part of the high seas", and consequently there can be no push-back on the high seas by another vessel, whether civilian or weaponed; "the non-refoulement principle does not include any geographical restrictions" (Attard, 2020, p. 233). This position, like the aforementioned Guantanamo jurisdiction limitation, is nothing more than an unjustified imposition of political and military power over international law. The US's own failure to fully integrate into UNCLOS III is another example of reserving actions based on force over law (*plus de vi quam de iure*).

However, the ECtHR Grand Chamber decision in *Banković v. Belgium*,[558] where against the applicability of the European Human Rights Convention to the NATO bombing of Serbia: "the Court concludes that the impugned action of the respondent States does not engage their Convention responsibility" (§ 84). A remarkable aspect of this case is that, while it holds that the concept of jurisdiction governing the applicability of Convention obligations is primarily territorial, it is recognised that in exceptional circumstances an extraterritorial extension of jurisdiction could trigger such obligations. The reasons why the circumstance in this case of undeclared war falls into this category is another unanswered question. Legal systems do, however, allow for extraterritorial jurisdictional extension (universal jurisdiction), but only in certain and very specific cases.

The foregoing leads to no other conclusion than that, except in those few cases, clearly defined by law, any extraterritorial action is not legally justified. International law does not allow action against migrants in international waters, blocking their navigation, harassing them, or promoting the diversion of their course or any other push-back action that may pose a risk or disrespect human rights. Migrants (whether in their own boats or pateras, or rescued, e.g., by NGO boats), who apply for international protection must be disembarked without delay in a place of safety. According to the rules, a review of the case must be carried out there (on land) by the appropriate personnel to determine when international protection is appropriate and when they can be legally expelled. Any other action is contrary to international agreements, international maritime law and human rights. Although surveillance may begin off the territorial waters, interception must start only when crossing the maritime border. The navigation of a boat with migrants, as that of any

[556] With the unconcealed intention to get around Article 89 of UNCLOS III.

[557] *Sale v. Haitian Centers Council*, as above. Note that, in any case, the US is not a party to UNCLOS III.

[558] *Banković v. Belgium* [GC], no. 52207/99, as above.

other vessel, may not be obstructed either on the high seas or in the EEZ given that they enjoy freedom of navigation (UNCLOS III, art. 87).

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7.4 Overview of Courts, Tribunal, Arbitration, Avenues, and Instruments for Rescue at Sea Related Claims

This section focuses on the legal avenues for sea rescue claims. Throughout the many centuries that the *Lex Mercatoria* and other already mentioned rules were applied, the administration of justice customarily took place at two different levels. The first place was at the ship itself (basically restricted to disciplinary measures for seafarers); the second place was at port courts (mainly, as mentioned, for liability issues related to freight). The legal framework of salvage grew basically linked to economic questions of freights.[559] As for the currently general rule for claims, it should be remembered that, the domestic rule must be exhausted and see "if an effective remedy exists in the domestic judicial system for the alleged breach" (Xernou, 2016, p. 68), before bringing a claim before an international court.

An extensive comment on law of the sea related jurisprudence, including arbitrations, case law of the Permanent Court of International Justice (PCIJ), International Court of Justice, International Tribunal for the Law of the Sea, among other jurisdictions, are discussed and listed in the monographic work directed by (Forteau & Thouvenin, 2017, pp. 1283–1295) which extends to different issues from territorial waters, nuclear weapons, oil platform, war crimes, and other conflicts, some as complex as the *Enrica Lexie* case. Also, a complete reference for cases and materials related to the law of the sea may be found in another key reference (Sohn et al., 2014). The issue of prompt release of vessels and/or their crews (chapter 1, pp. 21–94) and provisional measures (UNCLOS III, Art. 290, chapter 2, pp. 95–154) is covered by (Karaman, 2011). For exhaustive review of international law cases see: (Harris & Sivakumaran, 2015). The avenues, in our particular case of rescues, may be broadly classified as maritime vias and human resources claims:

1/ The maritime-based UN via: Once domestic remedies have been exhausted, ─and except in very unlikely cases that may give rise to a claim in other courts not specialised in maritime affairs due to some exceptional circumstance─ in case of alleged breach of maritime salvage duty (UNCLOS III, Art. 98), if no agreement is reached, *the State Party*, according to UNCLOS III, Art. 287, has four external vias available, as summarised by (Vrancken & Tsamenyi, 2017, pp. 33–35):

a) the International Tribunal for The Law of The Sea (ITLOS).

b) the International Court of Justice (ICJ).[560]

[559] Although it must be recognised that among the inherent usages of medieval international trade there was the possibility of suing in the courts of other ports, and in this regard the law to be applied was already a very important issue, recourse to external courts was seldom used in the Middle Ages (Frankot, 2007). May this be either because the shipowners were subject, as burghers, to the port of origin, because they were not totally aware of the details of other legal procedures, or because they did not believe that they could litigate on an equal footing with local merchants.

[560] Sea-related jurisprudence of this Court is basically related to maritime delimitation, (Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (C*osta Rica v. Nicaragua* 2001), (*Peru v. Chile, 2014*), Territorial and Maritime Dispute (*Nicaragua v. Colombia*, 2012), etc., although there have

c) General Arbitral Tribunal, as established in Annex VII.[561]

d) Special Arbitral Tribunal as established in Annex VIII for certain disputes.[562]

It must be noted that the law of the sea established in UNCLOS III is an agreement between States. Also, UNCLOS III establishes: "States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means" (Art. 279), so some friendly solution through mediation or other vias should be the first step. International courts and tribunals called upon to adjudicate disputes under UNCLOS III are bound by Article 293 of this Convention, according to which the applicable law is constituted by the Convention and, most notably, by other rules of international law that are not inconsistent with it (Ndiaye, 2019, p. 261). The International Tribunal for The Law of The Sea (ITLOS) was initially designed to resolve disputes between States, but individuals and commercial companies are not totally deprived of *locus standi* and can also bring their claims before ITLOS in certain cases.[563]

Discrepancies between States must first consider what the United Nations Charter has established: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" (Art. 2.3). This principle is further stressed in UNCLOS III,[564] and "Apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure" (Art. 281). The development of international instruments is complemented by national judicial systems, which must act in coordination and collaboration.[565] Additionally, it is important to consider, particularly for its jurisdiction to judge individuals, the International Criminal Court (ICC) that sits in The Hague.

On 10 December 2003, the International Foundation for The Law of The Sea (IFLOS), also residing in Hamburg, was established, mainly dedicated to teaching activities. It includes a prestigious Summer Academy for international law of the sea

been also issues including the obligation to negotiate access to the Pacific Ocean (*Bolivia v. Chile, 2018*). They are, so far, all unrelated to rescue. The contribution of the International Court of Justice to the development of the law of the sea —including the detailed analyses of cases law of *Nicaragua v. Honduras, Nicaragua v. Colombia, Malaysia v. Singapore and Romania v. Ukraine* — is analysed by (Sepúlveda Amor, 2012). Note that this avenue is limited only to disputes between States.

[561] It is relevant to clarify that Art.13 of UNCLOS III Annex VII, establishes the application to entities other than States Parties: "the provisions of this Annex shall apply *mutatis mutandis* to any dispute involving entities other than the State Parties."

[562] Established in UNCLOS III Art.1 of that Annex VIII: 1) fisheries, 2) protection and preservation of the marine environment, 3) marine scientific research or 4) navigation including pollution from vessels and by dumpling. Section 2 applicability has some limitations (Art. 297). Again, this via is unrelated to rescue.

[563] For the history of Articles 20 and 21 of the Statute of the International Tribunal for the Law of the Sea, their link with Art. 288 of UNCLOS III, and the issue of *locus standi* of natural persons see: (Wolfrum, 1999).

[564] Art. 279 of UNCLOS III (settlement of disputes by any peaceful means), and Arts. 281 & 283.1. Part XV, Sections 2 & 3, (Articles 286–299).

[565] In Spain, the collaboration with the ICJ is established by an Organic Law (LO 18/2003 of December 10, "BOE" Nº. 296, of 11 December 2003, pp. 44062 to 44068).

studies. It is not a court, although it could provide some advisory documents or expert reports under request.

There are other very unusual avenues to be explored in case of very specific cases, affecting trade, or investment, such as the World Trade Organization (WTO) via or The International Centre for Settlement of Investment Disputes, but they are unlikely to have grounds to be used for claims related to rescue at sea. These institutions are not specialised in sea jurisdiction.[566]

2/ The human rights via. There are several UN Committees for claims. One of them is the UN Human Rights Committee, with competence on violations of civil and political rights. It is an expert body of the UN to review the International Covenant on Civil and Political Rights (ICCPR) and petitions of States only. As for a natural person claim for not providing assistance at sea, using a UN committee avenue, it must be remembered that "the decisions of the Committees are not binding upon the states parties and cannot be enforced without their consent" (Xernou, 2016, p. 53).[567] However, it is still an avenue to consider as was in the case law *J.H.A. v. Spain* bringing the case before the UN Committee against Torture (CAT).[568]

For Europe the vias are the ECtHR (Strasbourg Court),[569] the Court of Justice of the European Union (CJEU), with relevant case law widely commented on above, and the European Ombudsman. These are pragmatic (soft) arrangements, which may be better geared to a particular political sensibility, but "this practice seems to be at odds with the principles developed by the Court of Justice that prevent the Member States from adopting international obligations that encroach upon existing or foreseeable legislation" (Santos Vara, 2019). It remains to be shown whether in the number of returns of irregular migrants and in the time frame of elaboration and implementation, these non-binding instruments offer any advantage over the legal («hard») ones. A trend from «hard» to «soft» agreements has also been observed (Wessels, 2018).

Although such instruments are not legally binding, they set out the framework for cooperation in several fields (Santos Vara, 2019). How these nonbinding instruments could be used in a particular claim must be considered individually. They may provide doctrinal useful argumentation. Subsidiary private civil claims resulting from an alleged breach of law in the case of assistance to persons in distress at sea

[566] More about these and other international tribunals —including human rights courts, criminal courts and tribunals, courts of regional integration agreements, claims and administrative tribunals, etc.— may be found in (Becker, 2018; Boisson de Chazournes, 2012).

[567] The claim for UN Human Rights Council submission is an electronic resource available at: *https://www.ohchr.org/en/hrbodies/hrc/complaintprocedure/pages/hrccomplaintprocedureindex.aspx (accessed on 19 April 2021).*

[568] *J.H.A. v. Spain* as above. Note that in this case, the Committee declared itself competent to hear and pass judgement upon and that the dismissal was not *ratione personae* (J.H.A. was a natural person) but for lack of *locus standi.*

[569] The complete list of cases of the ECtHR related to immigration is an electronic resource available at: *https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf (accessed on 18 April 2021).* There is also the possibility of finding the case law by a keyword list available in four languages at: *https://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c= (accessed on 18 April 2021).*

are beyond the scope of this dissertation, which focuses on public law. It should be considered that in common law countries (e.g., UK, and USA) the base for jurisdiction remains service of a writ upon the defendant with the country, even if the presence of the defendant is purely temporal and coincidental.

There may also be a strategy of considering a claim against the flag State if faults are detected in the rescue vessel that could result in a faulty rescue. In this regard, and as a general rule, it is a duty of the flag State to regulate the proper requirements of the ship for its safety (including seaworthiness), salvage equipment (as per SAR regulation) and the proper qualification of personnel on board[570] (see UNCLOS III, Art. 94), but it is the responsibility of the shipmaster, not the flag State, for the salvage itself. As has already been mentioned, the role of the shipmaster is that of a State vector and as such is responsible in his/her obligation to respect established procedures and human rights conventions that apply on the basis of flag State, *per ratione loci* or for other reasons, and therefore, the initial remedy in this regard should be a domestic claim against the master in the jurisdiction of the flag State.[571] It is difficult to see how a claim initially directed at the flag State can succeed, especially when in many cases it is a matter of flags of convenience.

However, in the case of *Velásquez-Rodríguez v. Honduras*[572] it was held that even if the wrongful act was not directly imputable to the State, as executed by a private person [the shipmaster], the State may still be involved in international responsibility if it has failed in its positive duty "to prevent the violation or to respond to it as required by the Convention" (Attard, 2020, p. 204), or in wording of the case itself "to prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[573] This means that the existence of a norm is not enough. The State must intervene proactively to prevent, investigate, and punish any violation of applicable human rights. The shipmaster is the actor of the flag State, but the State must fulfil its obligations, including the establishment of procedural measures and monitoring.

This was clearly established in the *Bakanova* case[574] where Lithuania was condemned for a breach of the Convention [ECHR], for poor investigation by the shipmaster into the death of a crew member. "The Court accordingly finds that there has been a procedural violation of Article 2 of the Convention as regards the failure of the Lithuanian authorities to conduct an effective investigation into V.B.'s death" (§ 72). However, the shipmaster, in his/her duty of rendering assistance, is not alone. In

[570] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention). IMO. Adoption: 7 July 1978; Entry into force: 28 April 1984; Major revisions in 1995 and 2010.

[571] Note that The Committee (CAT) accepted the *J.H.A. v. Spain* case before exhausting domestic remedies.

[572] *Velásquez-Rodríguez v. Honduras.* Inter-American Court of Human Rights (IACtHR) Series C No 4 (29 July 1988).

[573] *Velásquez-Rodriguez v. Honduras,* (as above), para 166.

[574] *Bakanova v. Lithuania* [4th Section] no. 11167/12, ECHR 2016-V.

addition to the support of the flag State, and according to a Resolution,[575] the shipmaster should continuously receive assistance from the coastal and/or the SAR State[576] in the seas under their competence. Even on the high seas, other States, and their vessels (in addition to the flag State) must seek and provide alternative assistance to the shipmaster within their possibilities, in the event that the master is unable to carry out the rescue due to the limitations of the vessel. In the rescue "States must ensure that people who fall within their *de jure* or *de facto* jurisdiction are not subject to torture or inhuman and degrading treatment or punishment. In this respect, the shipmaster plays a key role" (Attard, 2020, p. 213). This aspect has no exceptions.[577] This makes circumstances such as the 'left-to-die-boat' (26 March 2011) incident, in which fishing boats, a helicopter, and several military ships ignored the distress calls, resulting in 61 boat people fatalities, particularly worrying.

Depending on the suffering inflicted, the human rights courts distinguish between torture and inhuman and degrading treatment. In the case *Ireland v. The United Kingdom*[578] the suffering was not considered torture. Acts of rape and violence, particularly sexual, has been considered repeatedly as torture by the Court as in *Aksoy v. Turkey,*[579] *Aydin v. Turkey*,[580] or *Raquel Martín de Mejía v. Perú.*[581] If the punishment is aimed at obtaining information or confessions, it is often considered an aggravated form of inhuman treatment sanctioned by the courts as in «the Greek cases» *Denmark v. Greece*[582]; *Norway v. Greece*;[583] *Sweden v. Greece.*[584]

The ECtHR has defined the concept of degrading treatment, as one that "humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of

[575] Resolution MSC167(78) as above.

[576] Resolution MSC167(78) as above, para. 5.1.4.

[577] Depending on the suffering inflicted, the human rights courts distinguish between torture and inhuman and degrading treatment. In the case *Ireland v. The United Kingdom,* no. 5310/71, ECHR, 1978-I [final 10/09/2018] the action was not considered torture. Acts of rape and violence particularly sexual has been considered repeatedly as torture by the courts: See *Aksoy v. Turkey,* no. 21987/93, ECHR, 1996-XII and also, Aydin *v. Turkey,* no. 57/1996/676/86625, ECHR 1997-IX; *Raquel Martín de Mejía v. Perú,* Case 10.970, Report No 5/96, Inter-American Commission on Human Rights, OEA/Ser L/V/ii 91 Doc 7 at 157, 1996), etc. If punishment purposes the procurement of information or confessions, it is generally considered an aggravated form of inhuman treatment sanctioned by courts (see *The Greek Case of the «old» HCtHR*: *Denmark v. Greece,* App. no 3321/67, *Norway v. Greece* App. no 3322/67), *Sweden v. Greece* App. no 3323/67 and Netherlands v. Greece Ap. 3344/67. "It would be difficult to argue that the shipmaster has caused ill treatment by not supplying adequate food or water if such resources were unavailable or limited" (Attard, 2020, p. 221).

[578] *Ireland v. The United Kingdom* [3rd Section], no 5310/71, §2, ECHR 2018-III: "In a judgment delivered on 18 January 1978 ("the original judgment"), the Court held […] that the said use of the five techniques did not constitute a practice of torture within the meaning of Article 3".

[579] *Aksoy v. Turkey* [GC], no 21987/93, ECHR 1996-XII.

[580] *Aydin v. Turkey* [GC], no 57/1996/676/866, ECHR 1997-VII.

[581] *Raquel Martin de Mejía v. Perú*, Caso 10.970 Informe No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 168 (1996).

[582] *Denmark v. Greece,* no. 3321/67, ECHR 1967-IX.

[583] *Norway v. Greece*, no. 3322/67 ECHR 1967-IX.

[584] Sweden v. Greece, no. 3323/67 ECHR 1967-IX.

breaking an individual's moral and physical resistance."[585] However, it would be difficult to argue that the shipmaster has caused "ill treatment by not supplying adequate food or water if such resources were unavailable or limited" (Attard, 2020, p. 221).

The avenues for claims are summarised in the next table:

Table C7.1
Overview of initial claim vias in case of a vessel failing to provide assistance for distress at sea.

Location	Vessel	Jurisdiction to claim	Bases for claim
High seas	Merchant vessel w/ flag	Flag State w/ signed Convention	UNCLOS Arts. 94 and 98.1 / SOLAS Reg. 331/SAR 2.1.19, etc.
High seas		Flag State without signed Convention	Customary law (Admiralty law)
High seas	Flagless vessel	Shipmaster nationality (if known)	UNCLOS Art 97. If the ship comes from territorial waters coastal State could apply (hot pursuit, Art 111).
EEZ and Contiguous Zone	Merchant vessel w/flag	Flag State	The coastal State exercise 'sovereign rights' over the marine resources of the seabed and the water column only.
Territorial waters	Merchant vessel w/flag	Flag State or Coastal State depending on circumstances (internal waters, etc)	If the ship does not render assistance in territorial waters, its passage is no longer innocent. The coastal State can make an injunction based on Art 25 + Art 21.4 of UNCLOS. Also, in case of consequences for the coastal State, or if the action 'disturbs the good order of the territorial sea' (e.g., dead bodies, dangerous wreckage) (Art 27).
Territorial waters	Flagless vessel	Coastal State	Ships has no nationality (UNCLOS 92.3)
Any	Warship and state-owned	None	Dubious case. Excluded by Conventions.

Note. Source: Authors' work.

In preparing the procedural aspects it may be worthwhile to consult doctrinal aspects of human rights specifically related to the law of the sea (Cacciaguidi-Fahy, 2018; Ndiaye, 2019; Treves, 2010). For the international law related to migrant smuggling see (Gallagher & David, 2014),[586] and (Attard, 2020) and the UNODC document: Model Law Against Smuggling of Migrants[587] containing mandatory and optional "provisions that the Protocol requires or recommends that States introduce in their domestic legislation" (p. 1).

Note that for EU countries the "usual ground for jurisdiction is the habitual residence or domicile of the defendant in the particular case". For criminal jurisdiction, the international law permits upon a number of grounds" (Shaw, 2017, p. 488).

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[585] *Pretty v. the United Kingdom* [4th Section], no. 2346/02, § 71, ECHR 2002-IV.

[586] Unfortunately, the book was just out of print at the time of the Central American migration events on the southwest border of the United States in 2014, the massive migration wave to Europe in 2015 and the migrations to Indonesia, Thailand, and Malaysia in the summer of the same year, consequently these events are not included in the text. However, a large amount of valuable case law is included (pp. XVII -XXX).

[587] UNODC: Model Law against the Smuggling of Migrants (electronic resource). Full text available at: *https://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf (accessed on 16 April 2023).*

CHAPTER EIGHT: MIGRANTS AND GLOBAL GOVERNANCE

Some compelling ideas on global governance have been exposed in the introductory chapter. They have plain application to the migrant issue. Migration is a global problem and requires a global approach, working together, and using collective power. However, agreements between parties require fair play on both sides. For example, corruption on one side impacts on the other, lack of respect for human rights, even on one side, is enough to cause suffering and even death of migrants. This must be taken into account when signing agreements with third countries as was the case with Libya. Global governance, as has been said, stands for sharing ethical principles, freedom, peace, justice, mutual respect and, above all, respect for life and other human rights recognised in treaties.

This chapter, devoted entirely to global governance, will address two main issues: firstly, statistics on migration flows focused in Europe. They will give an idea of the magnitude and dynamics of the migration phenomenon. The second section seeks to answer the question of to what extent citizens' and politicians' beliefs on migration are close in Spain, i.e., whether the latter's actions, especially with regard to rescuing migrants in distress at sea, are supported by public opinion. The question now is not of analysing the fulfilment of obligations acquired after the signing of international treaties, already discussed, but of analysing citizens' support for actual immigration policies. To this end, a pilot survey has been designed and carried out and its technical details included in **Appendix III**, with a summary of results to be discussed later in this chapter.

8.1. Statistics on Migration Flows

As for migration flows, the worldwide estimated figures[588] evidenced (by the end of 2019) 79.5 million (M) of forcibly displaced people (fleeing their homes), including among them 40% of children, with 68% belonging to five countries only: Syria (6.6 M), Venezuela (3.7M), Afghanistan (2.7M), South Sudan (2.2M), and

[588] The figures presented here are illustrative, as there are differences between sources and, even more, they do not correspond exactly to the same year, but to a mix of 2018 and 2019 data. Figures from 2020-21 were not analysed due to the impact of COVID-19 pandemic in trends. Even being approximate, they provide a good idea of the relative magnitudes. The sources where to obtain accurate date are included, so that the exact numbers reported for each corresponding period could be checked. For constantly updated information including figures in the map of the Mediterranean Sea, an electronic resource available at: *https://data2.unhcr.org/en/situations/mediterranean (accessed on 14 June 2023).*

Myanmar (1.1 M). In that year 26M had the status of refugees and 5.6 M were returned to their countries of origin or transit.[589] Regarding Europe, these figures are, obviously, prior to the Ukraine war which has driven migration to the EU to previously unthinkable levels.

As for Europe, data for 2018 show a migrants' flow of around 2.2 M people influx and 1.2M outflux of the EU (the outflow figure has remained between 1.2M and 1.4M since 2015), with a net positive balance of over 1M people. According to the information published by the European Commission, including information from Frontex and UNHCR for 2019, the net migration flow in Europe was about 1.5M with 2.5M arrivals and 0.9M departures (figure C8−1) an appropriate reference year as it is prior to the disruption caused by the pandemic and the war.

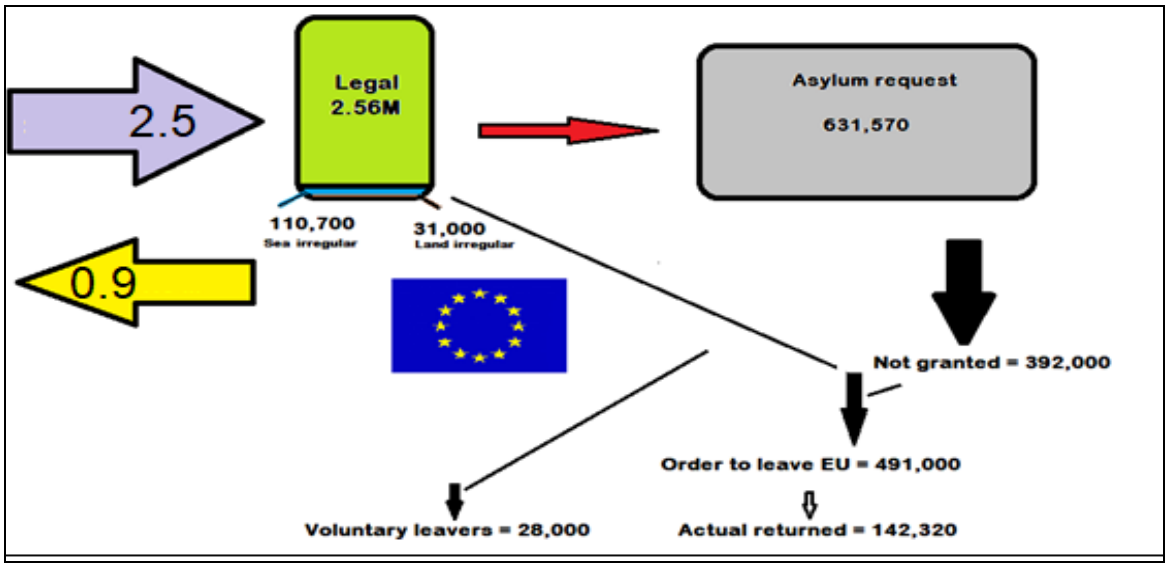

Figure C8–1. Estimated numbers of migrants and fluxes in/out of the EU in 2019. Source: author's computation with different sources.

Frontex reported about 125 thousand(K) irregular border crossings in 2020, 86.3K by sea and 38.8K by land (12% less than those in 2019 of 142K). Data for 2021 indicates that out of 1.92 M of migrant entrances, 199.9K crossed borders irregularly, with 112.6K using maritime routes (this represents only about 5.9 % of total migrant entries into Europe).[590] When analysing figure C8−1, comparing the asylum requests in excess of 631K with the irregular entrance of 141.7K (110.7K by sea), it becomes evident that the majority (77.6%) of those requesting international protection have entered Europe legally.

Figure C8−2 depicts the changes between 2021 and 2022 in the number and percentage of irregular (wrongly labelled as «illegal») border crossings in

[589] The UN Refugee Agency. Figures at a glance (electronic resource). Available at: *https://www.unhcr.org/figures-at-a-glance.html (accessed on 7 May 2021).*

[590] European Commission. Statistics on migration to Europe. Overall figures of immigrants in European society [1 January 2021] (electronic resource). Available at: *https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_es (accessed on 14 February 2022).*

Europe. However, these data need to be taken while considering that the Covid-19 pandemic altered the previous migration fluxes.

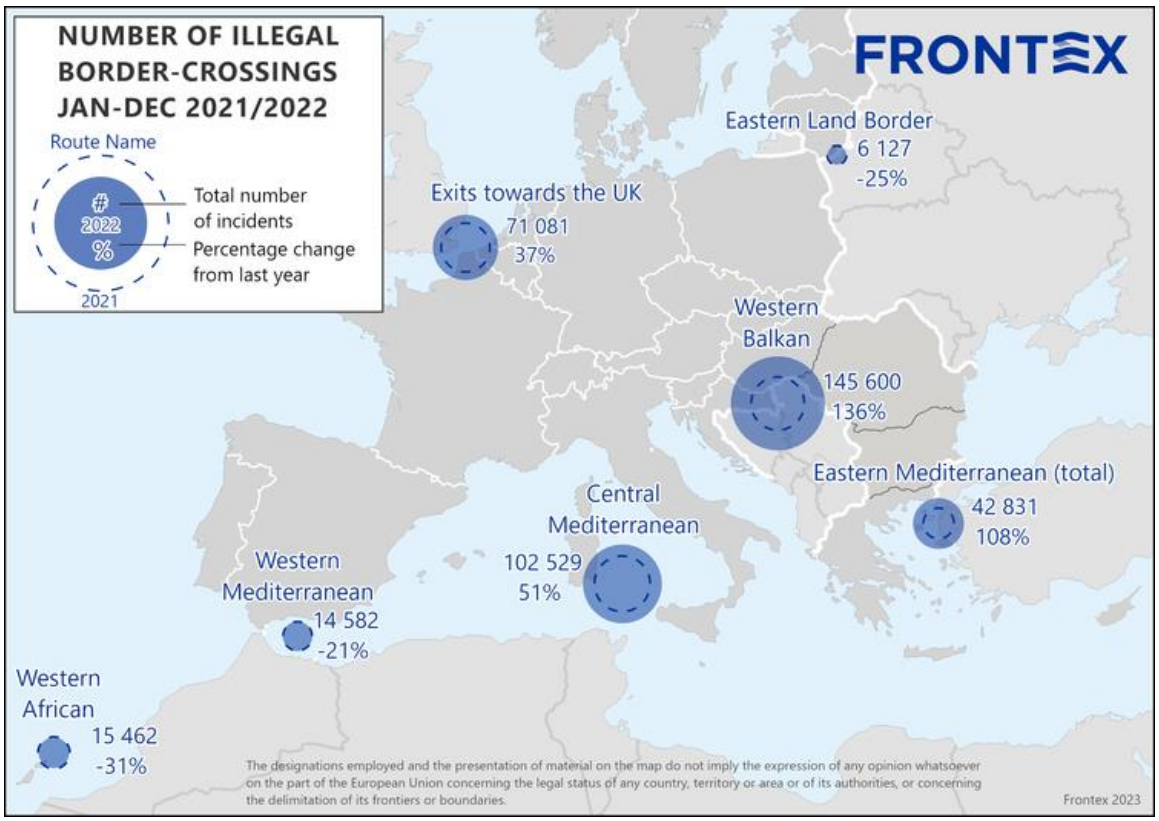

Figure C8–2. Variation of border crossings between 2021 and 2022 according to Frontex. The change has to take into account the high decrease in movements during 2021 due to the Covid-19 pandemic. Source: Frontex.[591]

As becomes clear from the data, the idea, undoubtedly spread with political intent, that there is a huge African migratory flow arriving by sea and draining the social resources of EU countries is completely inaccurate. It spreads nothing but a racist message. Not a single complaint has been aired about white migration from Ukraine, which accounts for 4.8M refugees in only about one year, i.e., more than double the total of previous annual inflows into Europe.

Figure C8−3 presents information on irregular border crossings by nationality with reference to 2020. As seen, only about 50% are North African migrants, but even in this case not all cross by sea. Moroccan migrants' land route, for example, is very notable.

[591] Frontex: EU's external borders in 2022: Number of irregular border crossings highest since 2016 [press release] (electronic resource). Available at: *https://frontex.europa.eu/media-centre/news/news-release/eu-s-external-borders-in-2022-number-of-irregular-border-crossings-highest-since-2016-YsAZ29 (accessed on 14 June 2023).*

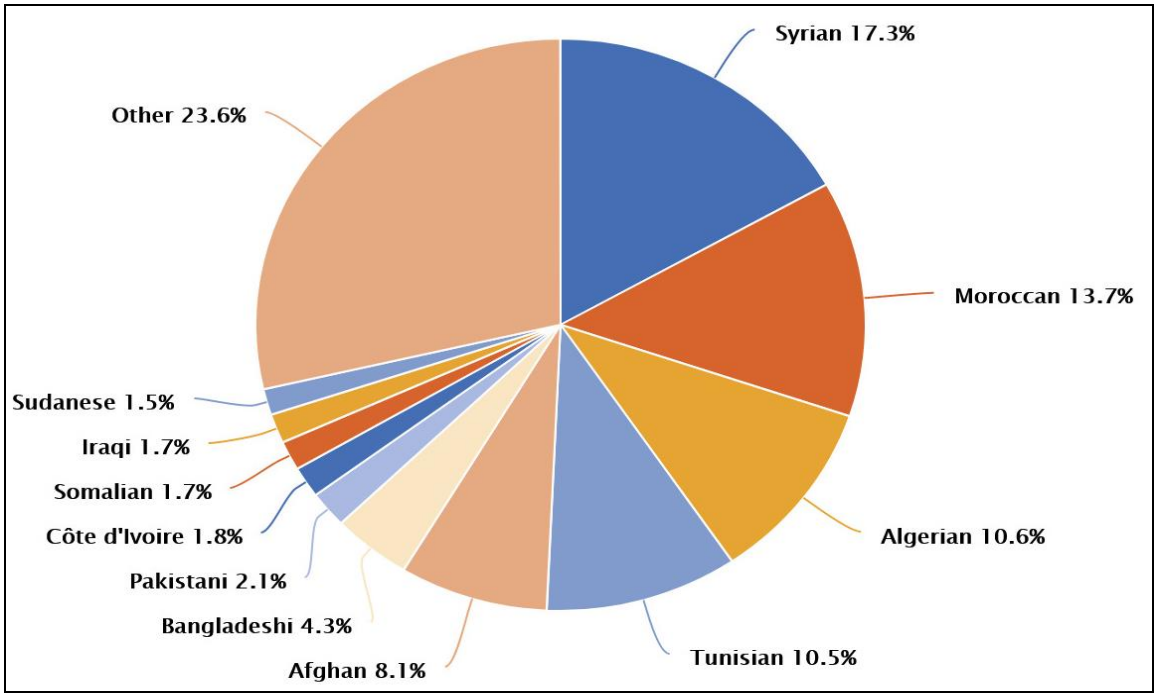

Figure C8–3. Irregular border crossing in Europe by nationality, 2020 data. Source: EU statistics.[592]

There have been important changes in the vias of entrance. Eastern Mediterranean entrances were reduced notably after 2015. The change in that tendency is depicted in figure C8−4, released by the Council of the European Union.

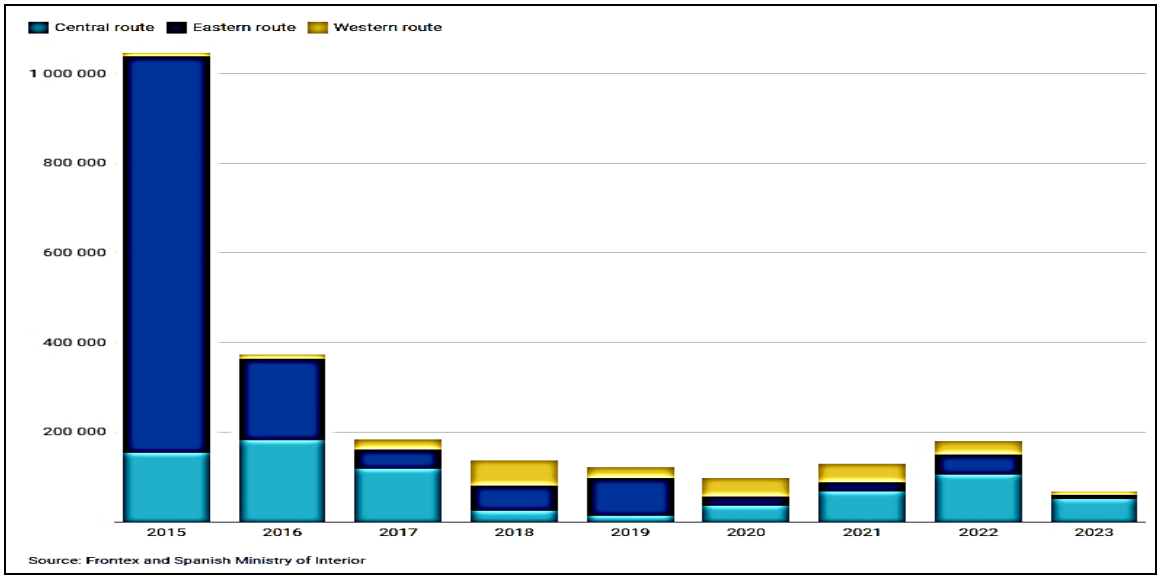

Figure C8–4. Yearly irregular arrivals (2015-2023) to Europe. Western route includes also Western Africa (Canary) route. Data up to April 2023. Source: Frontex and the Spanish Ministry of Interior.[593]

[592] European Commission. Statistics on migration to Europe. Overall figures of immigrants in European society [1 January 2022] (electronic resource). Available at*: https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en (accessed on 12 June 2023).*

Note that the EU−Turkey statement was announced on 18 March 2016. The data are also presented as monthly ranges in linear format in Chart C8−5.

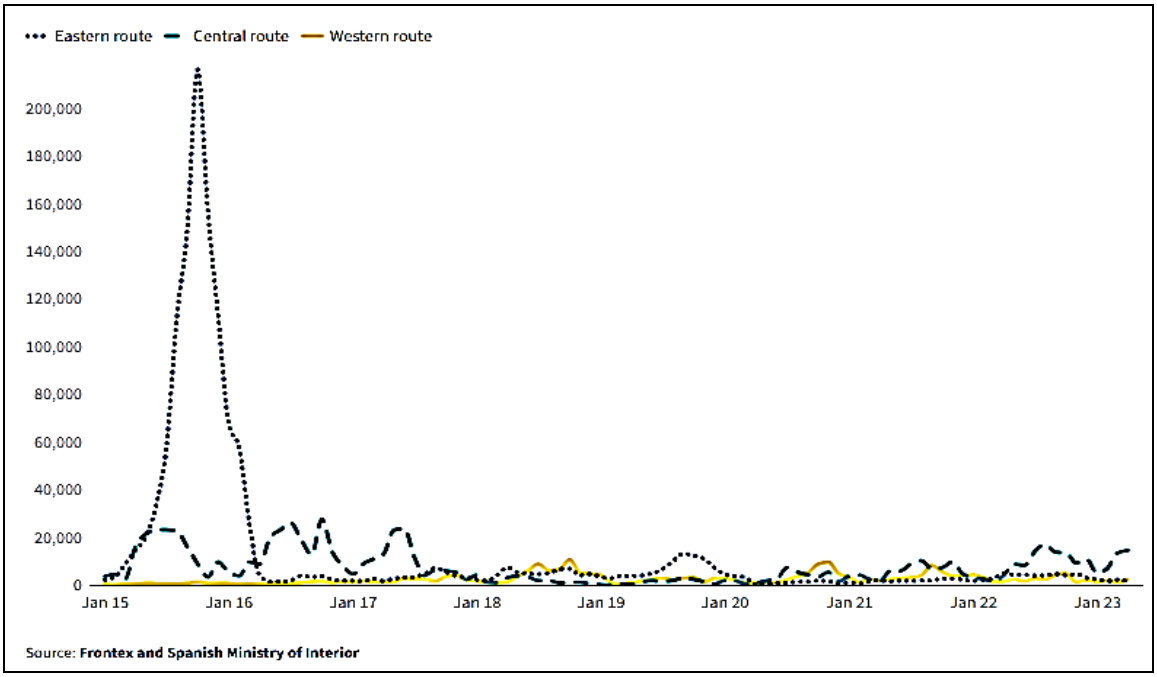

Figure C8–5. Monthly irregular migrant arrivals (2015-2023) to Europe (data up to April 2023). Western route refers to Western Mediterranean plus Western African routes. Source as in previous figure.[594]

The maritime route is of limited importance in terms of percentage of migrants' entrance, but it is the most lethal. Out of 45K migrant fatalities worldwide in two decades, more than 20K of those deaths were in the Mediterranean Sea, and the figure rose to 5,136 deaths in 2016. The Mediterranean has become the world's deadliest migratory route.[595] It should also be noted that many cases of missing persons in the Mediterranean Sea remain unrecorded. "Such dreadful numbers, underlying terrible realities, are not only statistical data. Above all they reveal human dramas, exposing policy failure of the greatest magnitude" (Basilien-Gainche, 2017, p. 327). Figure C8–6 summarises the historical record of deaths in the Mediterranean Sea. As seen, it accounts for an average of about 2K (registered) per year. Many of those who drowned were never found.

[593] Council of the European Union. Infographic - Migration flows: Eastern, Central and Western routes by Frontex and the Spanish Ministry of Interior (electronic resource). Available at: *https://www.consilium.europa.eu/en/infographics/migration-flows/ (accessed on 9 June 2023).*

[594] Council of the European Union. Infographic - Migration flows: Eastern, Central and Western routes by Frontex and the Spanish Ministry of Interior, as above.

[595] For an authoritative analysis on the issue (up to September 2014) see the IMO report by Brian & Laczko, (eds.), 2014.

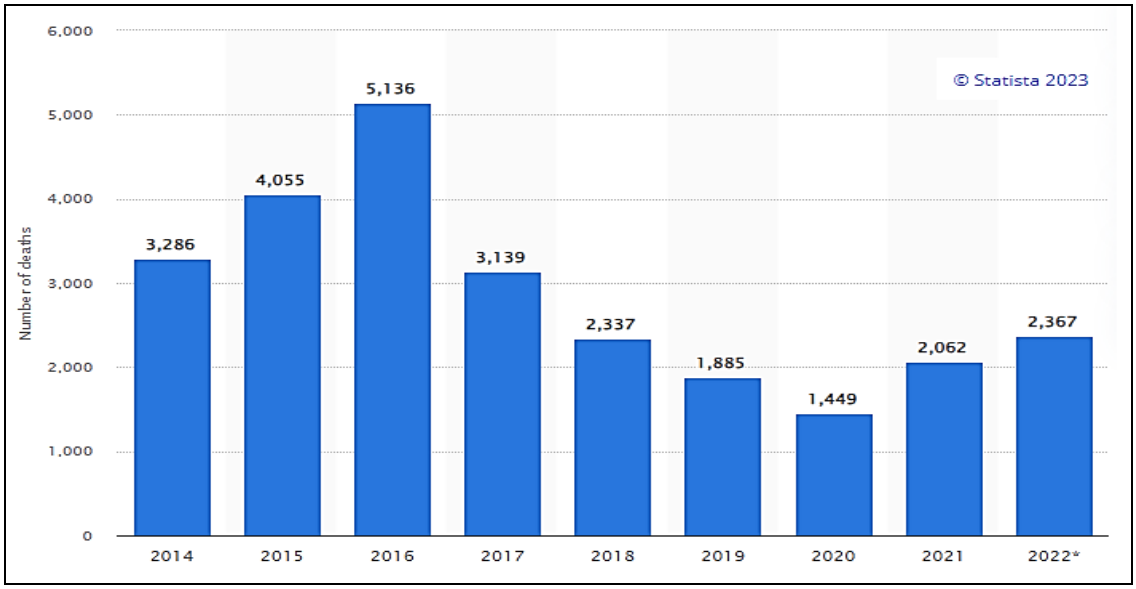

Figure C8–6. Death/missing in Mediterranean Sea. Data for 2014 to 2022. Data are estimative. Source: Statista.[596]

Worldwide migrants' mortality in a year (2014) picture is presented in map form (figure *C8–7)*. The source is different, and there is a small difference in the figure for the Mediterranean Sea as compared with the previous source. In any case, this value is about 3.1-3.3K.

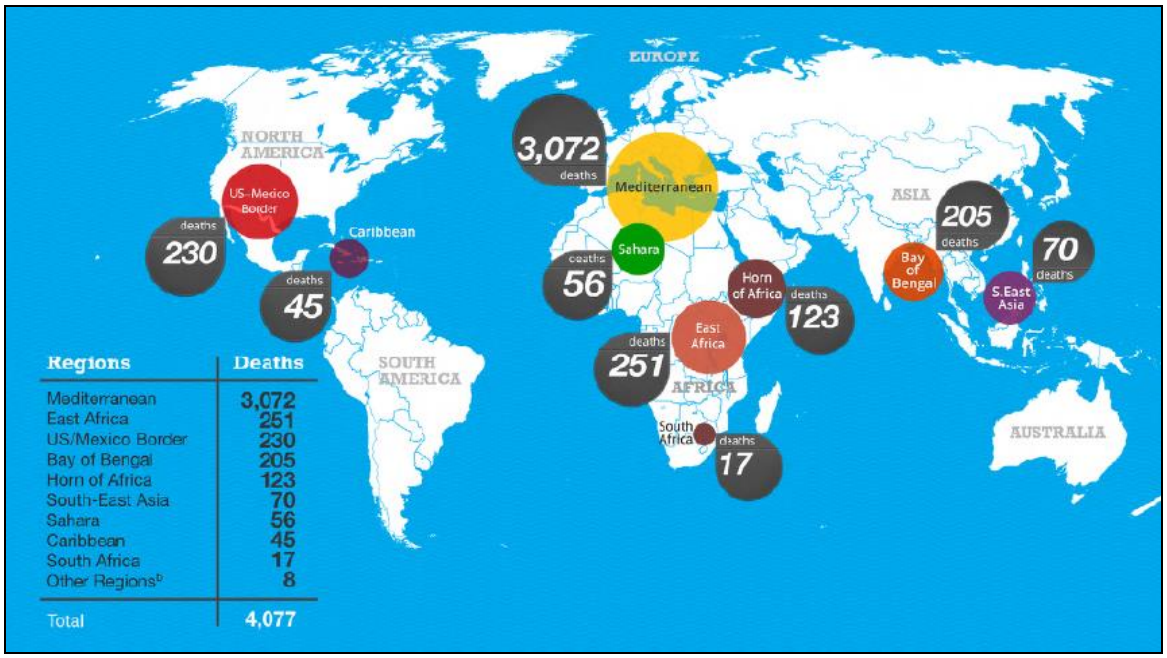

***Figure C8–7*.** Migrant deaths by geographical location, 2014 (up to September. Source: IOM report (Brian & Laczko, 2014).

The distribution by region of death (2017) is presented in figure C8–8.

[596] Number of recorded deaths of migrants in the Mediterranean Sea from 2014 to 2022 (electronic resource) Available at: *https://www.statista.com/statistics/1082077/deaths-of-migrants-in-the-mediterranean-sea/ (accessed on 14 June 2023).*

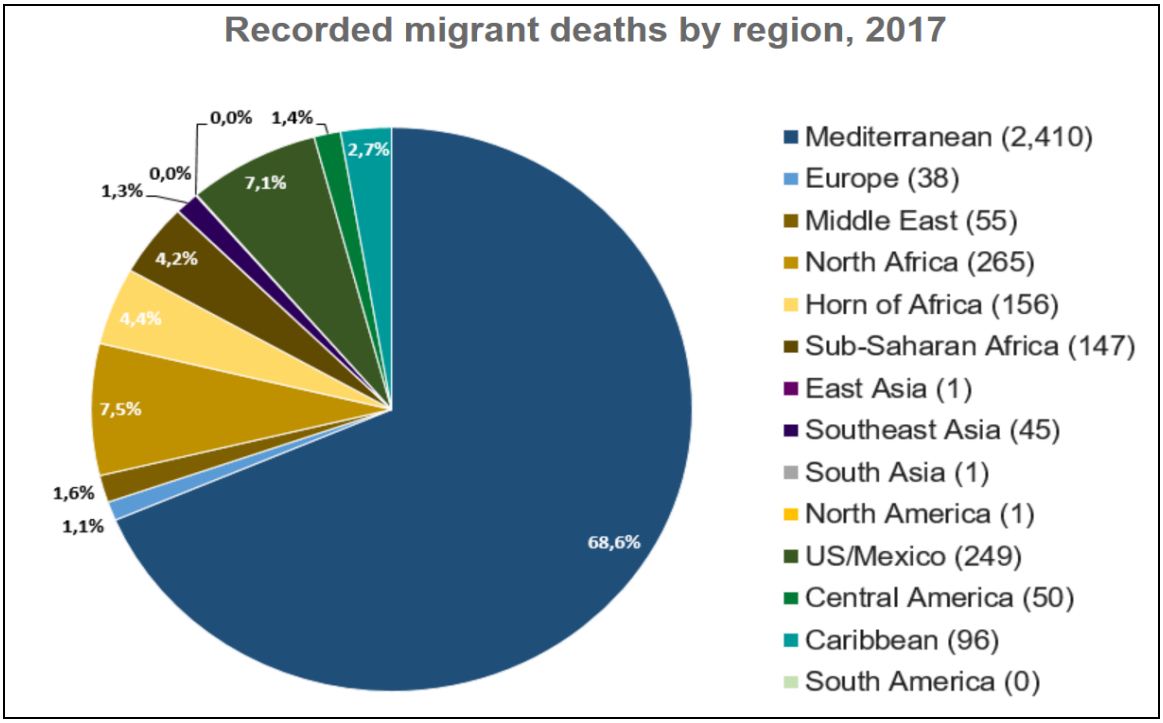

Figure C8–8. Migrant deaths by region 2017 (up to August 28). Source: IOM's Missing Migrants Project.[597]

Data over a longer period may prove to be more informative. At a global level, 56,093 deaths have been recorded since 2014 (up to 9 June 2023). The depicted geographical distribution by region of origin during this period is presented in figure C8–9. Yearly death average for the Mediterranean Sea is again about 3K.

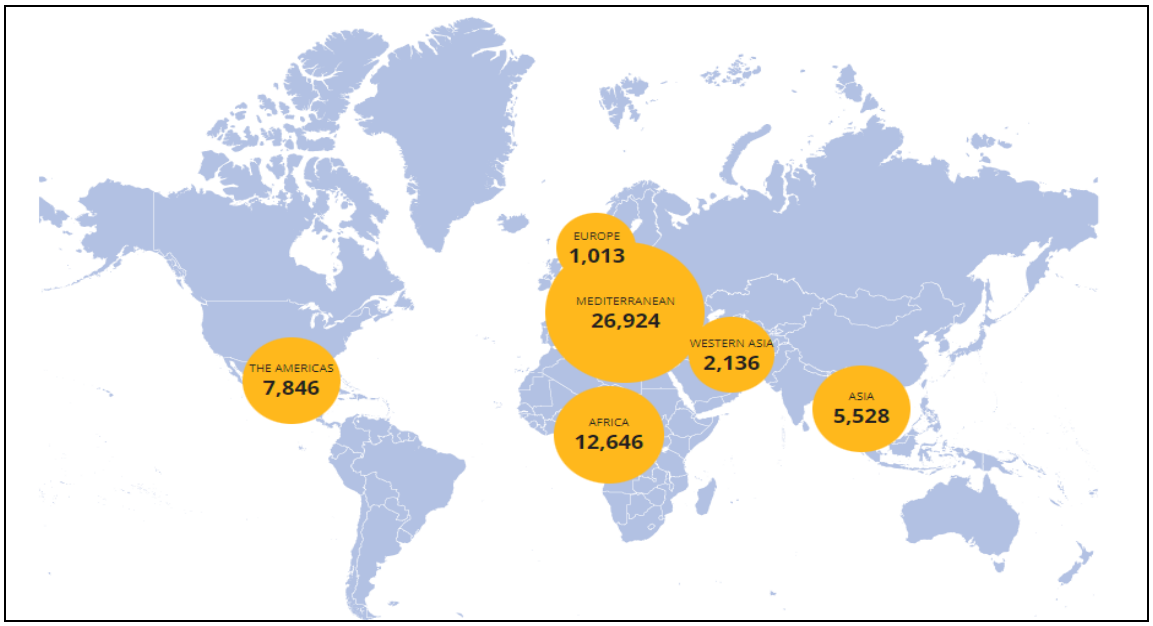

Figure C8–9. Regional distribution of 56,093 migrant deaths since 2014. Source: IOM's Missing Migrants Project.[598]

[597] IOM's Missing Migrants Project (electronic resource). Available at: *https://missingmigrants.iom.int/latest-global-figures (accessed on 30 August 2021).*

Comparative analysis of the EU budget for the immigration and Frontex programmes shows a huge increase in the latter, despite lower proportional figures for the sea route (figure 8−10).

Table 2: Initial and current commitment allocation of certain migration-related spending of the current 2014-2020 Multiannual Financial Framework (EUR millions, current prices)

Instrument/programme	Initial allocation 2014-2020	Current allocation 2014-2020
AMIF	3,137	6,654
ISF	3,764	3,882
Emergency support EU	-	647
SIS	69	91
VIS	69	81
EURODAC	1	1
FRONTEX	628	1,638
EASO	109	456
EUROPOL	654	753
Total	**8,431**	**14,201**

Source: Draft general budget 2015 (for all of Fin Prog (initial) and 2014); Draft general budget 2016 (for 2015); Draft general budget 2017 (for 2016): General Introduction, Financial Programming. Technical update of financial programming 2019-2020 (30 January 2018) for 2017-2020 and reference amounts.

Figure C8–10. Comparative allocation of migration-related expenditures in the EU. Source:[599]

The next figure (C8−11) shows a remarkable increase in the percentages of Libyan and Tunisian interceptions (orange bars), with 8% in 2016 v. 49% in 2019.

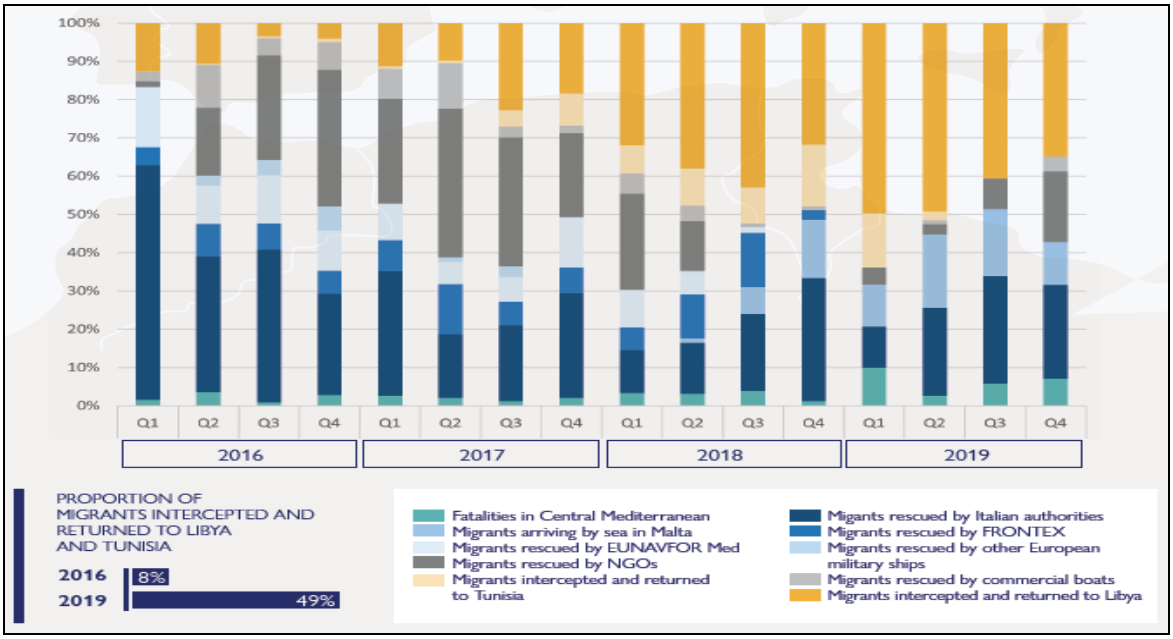

Figure C8–11. Shift in proportion of migrants intercepted/rescued by European, North African, and non-governmental actors in the Central Mediterranean, 2016–2019.[600]

[598] IOM. Missing Migrants Project (electronic resource). Available at: *https://missingmigrants.iom.int/ (accessed on 14 June 2023).*

[599] EU funds for migration, asylum, and integration policies. Budgetary Affairs (electronic resource), p. 15. Available at: *https://www.europarl.europa.eu/cmsdata/147324/20180516-migration-funding-study-updated.pdf* (*accessed on 12 September 2021*). This reference also includes information (Annex 1) on immigration into EU28 countries by country, 2008-2017.

Between 2000 and 2016, an average of 7,000 people crossed the Western Mediterranean, but the number increased notably in the following years. In 2017, 21,546 people arrived in Spain by the Western route. In 2018 that became the most used of the trans-Mediterranean routes with over 56,191 arrivals. More than 50 % of them used the Canary route (figure C8–12).

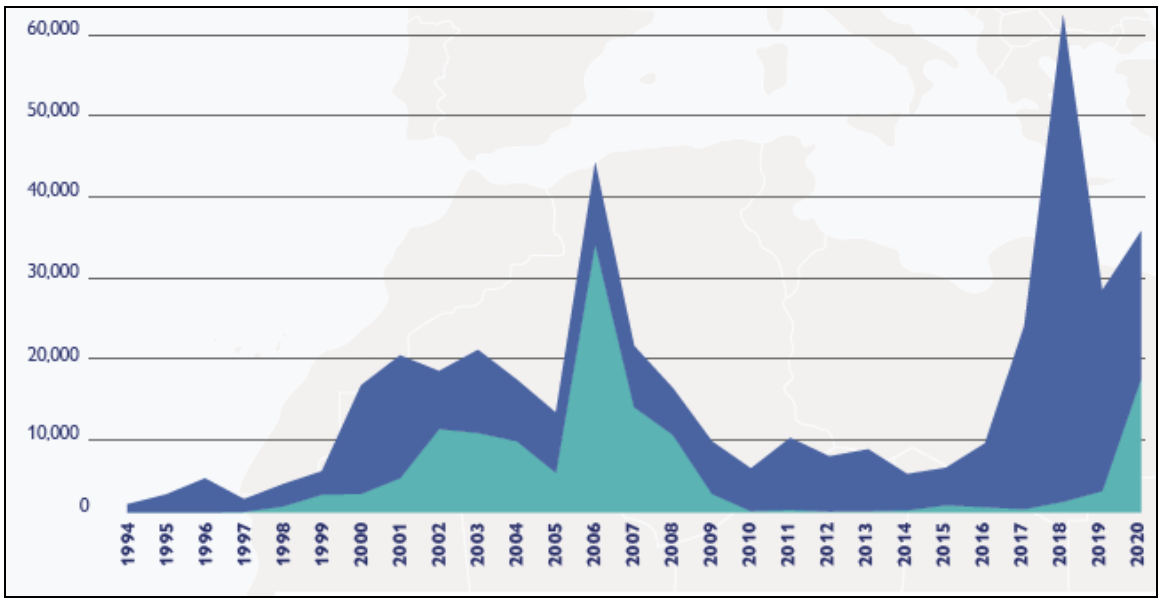

Figure C8–12. Irregular migrants to Spain since 1994: Spanish Ministry of the Interior (2020) & (IOM, 2021). Data on people arriving irregularly in Spain via land routes to Ceuta and Melilla is excluded. This data is not available prior to 2018. Ceuta and Melilla represent about 1,000 entrances each (according to next reference of Spanish Ministry of Interior in this page).

According to National Institute of Statistics of Spain,[601] 750,480 people immigrated to Spain in 2019; of these, 514,260 were of non-EU origin, additionally 84,458 Spaniards returned to the country and 151,762 entered from other EU countries. The most important inflows were from Colombia, Morocco, and Venezuela. The immigration balance in Spain for 2019 was +454,232 people, of whom 393,242 were non-EU nationals. Irregular entry to Spain (excluding Ceuta and Melilla land enters) in 2019 fell to 32,450 persons (4.3% of total immigration).

As for the latest available data (as of June 2023), irregular entries accounted for 41,945 in 2021 (7.32% of total migration) and 31,219 for 2022 (provisional data), i.e., a decrease of 25.6% compared to 2021. As seen, in recent years, the vast majority of immigrants (more than 90%) have arrived legally in Spain, using regular transport.[602]

[600] Source: Italian Maritime Rescue Coordination Centre (MRCC)(2020); Missing Migrants Project; IOM Libya; IOM Tunisia; Forum Tunisien pour les Droits Economiques et Sociaux (FTDES). No data is available on migrant arrivals in Malta between 2016 and 2017. Data for 2020 is excluded as no data on rescues by various European and non-governmental actors is available from the Italian MRCC.

[601] The National Institute of Statistics of Spain provides a wide range of information in electronic format. Available at: *https://www.ine.es/ (accessed on 12 June 2023).*

[602] Ministerio del Interior. Informe quincenal. Inmigración irregular 2022. [Ministry of the Interior. Fortnightly report. Irregular immigration 2022] (electronic resource). Available at

The number of illegal pateras, or similar boats, recorded for 2019 was 1,192. If these values represent the true totals, it means an average of 27 persons per boat. The number of recorded deaths in the Mediterranean Sea in 2020 was 1,449. The Western Mediterranean Sea averages about 250 deaths per year corresponding to those migrants in search of Spanish territory.

In terms of international protection, throughout 2019, Spain registered 118,446 applications. It should be noted that this figure is 3.65 times higher than the number of irregular entries. Only 10.676 where from Africa (9%); the 96,389 applications from American countries represented 81.4%. Refugee status was granted in 1,659 cases, subsidiary protection in 1,569 cases and protection for humanitarian reasons in 35,235 cases.[603] According to Spanish regulation, Venezuela does not qualify as a country in a conflictive situation. This matches with the Venezuelans as receptors of the 99.7% of the protection grants for humanitarian reasons.

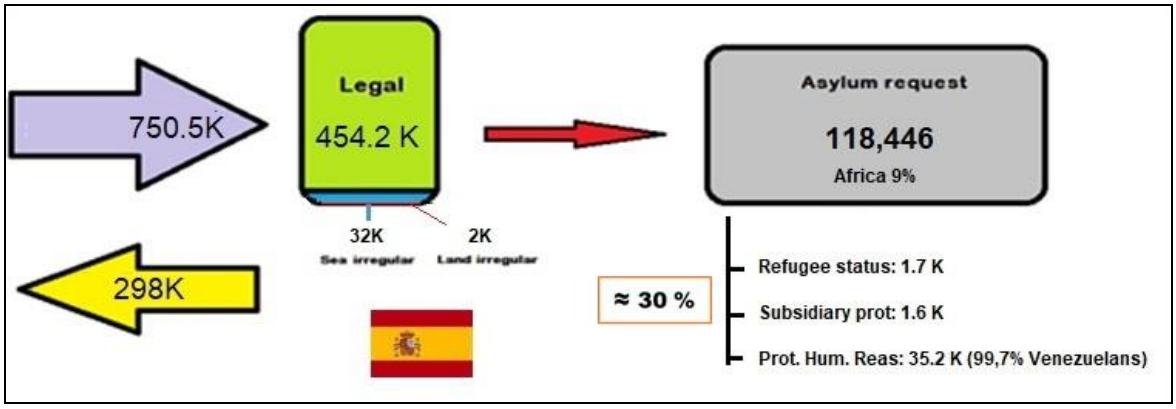

Figure C8–13. Estimated numbers of migrants and fluxes in/out of Spain in 2019. Source: author's computation with different sources.

The facts are clear. It can be considered that approximately 2.5 M migrants enter Europe annually, of which only 120−200K cross borders irregularly, which consistently represents less than 10% of the inflows. Approximately 3K of them per year die in the attempt. More than 600K protections are requested; the majority (over 75%) of those requesting international protection have entered Europe legally. About 60% were not granted. There were about 500K return orders issued, with execution only carried out on 142K (30% of the cases). Additionally, around 28K persons left the EU on a voluntary basis.[604] When

https://www.interior.gob.es/opencms/export/sites/default/.galleries/galeria-de-prensa/documentos-y-multimedia/balances-e-informes/2022/24_informe_quincenal_acumulado_01-01_al_31-12-2022.pdf (Accessed on 25 January 2023).

[603] Annual migration statistics in Spain are recorded in the migration database of the Ministry of Interior as an electronic resource. Available at: https://www.interior.gob.es/opencms/es/servicios-al-ciudadano/tramites-y-gestiones/oficina-de-asilo-y-refugio/datos-e-informacion-estadistica/ *(accessed on 9 May 2023).*

[604] Migration Data Portal. Migration in Europe (electronic resource). Available at: *https://migrationdataportal.org/regional-data-overview/europe (accessed on 8 May 2021).* Complete information for each member State, and also data from outside the EU is available in the 480 pages report: Atlas of the Migration EUR30534 (electronic resource). Available at:

analysing the fluxes by country, Latino-American migrants totalled almost 40% of those granted refugee status. The only African country with a significant number of concessions was Morocco. Subsidiary protection was basically granted to Syrian migrants.[605] For Spain the pattern is similar: out of the 750K migration entrances, only about 30−40K used the maritime route, again about 5% of the total. Of the about 120K applications for international protection only 9% were from African applicants.

The policy of blocking access to the coasts of Member States and hot returns, evidenced in above figure 8.11, with the excuse of pressure and consumption of social resources dedicated to migration, in violation of human rights and the international law of the sea, can in no way be justified by the reality exposed by the figures. Maritime entries and applications from Africa represent a practically irrelevant percentage of the total. Better control of the granting of visas and a more active policy of effective expulsion of persons without the right to international protection would produce much better economic returns and come within the legal framework.

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8.2. Citizens Views on Immigration. A Pilot Survey

The second part of this chapter examines respondents' answers to a survey, details of which are given in Appendix III. This fieldwork was carried out to evaluate the degree of knowledge and positioning of Spanish citizens in relation to the true migration data, as well as the perception of the need to make legal changes to the immigration regulations currently in force.

This survey has some limitations since the very nature of this research project is about law and global governance. It is not intended to be a precise and exhaustive sociological analysis, which would require a much more extensive organisation and resources out of the hands of a law doctoral candidate.

The data sets collected —with the precision used for the sample size calculation (CI 85%, d = 0.055)— have a preliminary pilot character but may serve in future studies as a previous reference. Taking into account the absence of statistical differences in age, gender, level of education and work activity between the sample and the Spanish population, the inferential aspect seems to be well resolved and, consequently, the sample can be considered statistically representative of the national population as a whole.

Only 19 respondents out of 147 (12.9%) provided (bar 7 in Q_5 of the appendix III) the correct answer to the question on how many migrants they estimate arrived in Spain in 2019. The following answer (Q_6) on the percentage of

https://op.europa.eu/en/publication-detail/-/publication/078d8a2f-433b-11eb-b27b-01aa75ed71a1/language-en (accessed on 8 May 2021).

[605] Note that the year chosen for the analysis was 2019. Figures are prior to Covid-19 pandemic and also to the war in Ukraine.

irregular entrance is even worse, as only 2% gave the right answer of about 5%. The consistency of (Q_6) is checked with (Q_{12}), on the entry of undocumented migrants, where the correct answer was given in only 29% of cases, and in (Q_{15}) where 78% answered that there are too many illegal immigrants arriving in Spain.

The main conclusion that can be drawn from these cross questions is that Spanish citizens are completely unaware of the true magnitude of migration and irregular border crossing, attributing to the latter a magnitude that it does not have. This much higher perception of irregular entries than is actually the case matches with the consideration that irregular immigration is a serious problem for Spain (only 20% do not consider the problem to be serious) (Q_{11}), and extending the problem to immigration in general, as shown in (Q_7): A majority of 54% believes that Spain has an immigration problem.

A series of questions explore the racist and xenophobic component of the population, which, according to the responses, is not a relevant aspect. Thus, 77% of respondents agree on the legal arrival of migrants (Q_8); only 18% of respondents consider legal migrants to be a problem for the country (Q_9) —a question set to cross-check previous answer— 47% versus 27% do not think there would be a problem if all migrants were legal (Q_{20}), and 72% do not consider that the entry of migrants should be completely banned (Q_{21}).

Solidarity towards migrants is evident in question (Q_{24}) with 75% in favour of greater involvement in the protection of migrants by Spain and the EU. Also, in (Q_{25}) with 74% of respondents in favour of helping migrants in their countries of origin. The percentage is different when it comes to aid for illegal immigrants in Spain, although 44% are in favour of solidarity with their drama, as compared to 32% who are of the opposite opinion (Q_{16}).

Altogether, the idea that emerges from the survey is that, in contrast to the real figures, there is a belief that most immigration arrives through irregular border crossings, creating a serious problem in the country, not because immigrants are not accepted but because of their irregular status. The answer (Q_{14}) virtually split between those considering that there are too many people coming to Spain and those with the opposite opinion.

According to (Q_{19}), the main reason for those not accepting irregular migrants is the consumption of public resources and aids that could be allocated to national citizens, but not because they could bring diseases (Q_{17}) or bring customs and religious uses that could generate problems in Spain (Q_{18}). Only 10% of the answers were not in favour of the entrance of migrants to work as to provide funds for healthcare and pension (Q_{10}).

With regard to actions, and the view of the perception of the problem of irregular border crossings, 64% of respondents considered that migrants are victims of mafias (Q_{13}), and 94% thought that the fight against migrant smuggling should be intensified (Q_{23}). 58% considered that irregular migrants should be returned immediately to their countries of origin (Q_{22}).

As for how the problem is seen in a close culture (Italy) the next figure 8–14 shows some relevant data.[606]

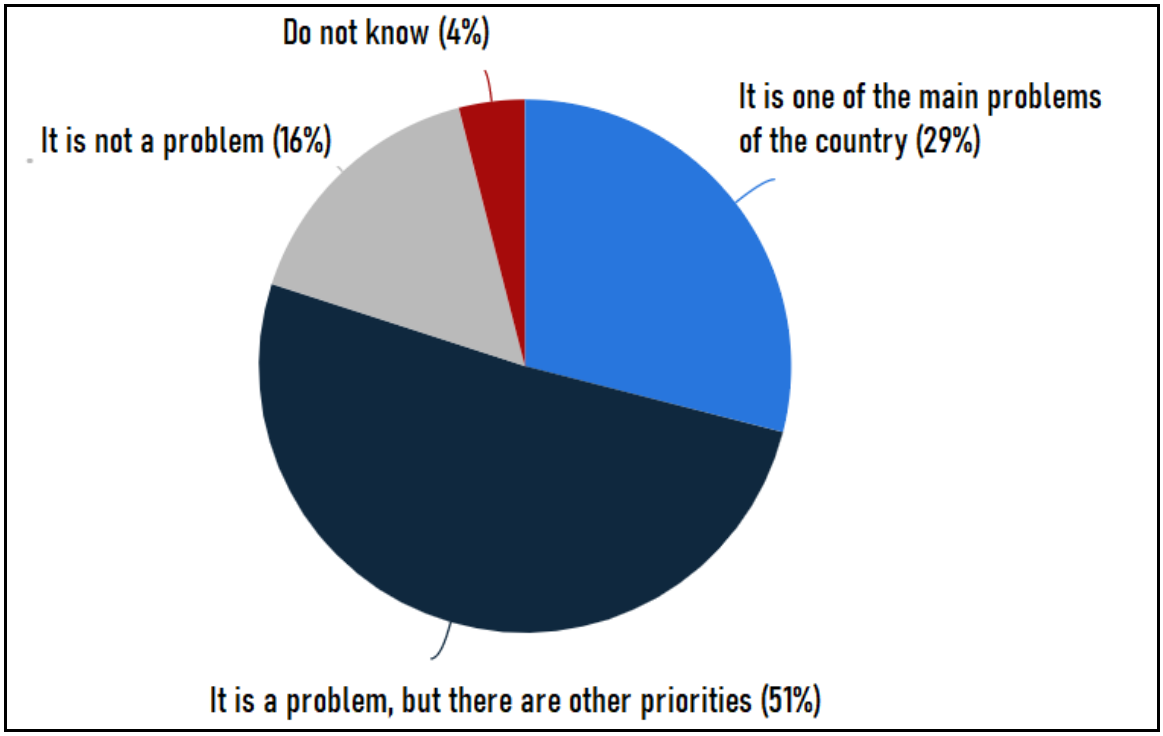

Figure C8–14. Immigration problem as seen by Italians. Source: Statista Research Department (2021).[607]

Based on the survey responses and the comparative analysis with Italian data, it can be concluded that *the* real figures of the immigration problem are unknown to the majority of the population, who do not show a racial or cultural rejection, nor a significant fear of crime or health risks related to immigrants. Nor do residents see a problem in the reception of immigrants who enter legally to work and contribute with their taxes to the support of the welfare programmes. This aspect is remarkable, considering that Spain has the highest unemployment rate in the EU (13.5% March 2022). The consideration for migrant protection and fight against migrant smuggling are also relevant aspects of the survey.

Figure C8–15 presents data from Italy for comparison of some of the items:

[606] For more on Italian migration see: (Bertacchini et al., 2019; Terlizzi, 2019). For an extensive report on Italian immigration see Italy_Report_ISMU_2021 (electronic resource). Available at: *https://ec.europa.eu/migrant-integration/library-document/ismu-foundation-2021-migration-report_en (accessed on 4 December 2022).* Note that there is a significant difference in Latin America migration as compared to Spain.

[607] Statista. How relevant is the immigration topic in Italy at the moment? (Electronic resource). Available at: *https://www.statista.com/statistics/1081949/opinion-on-immigration-as-a-problem-in-italy/ (accessed on 23 September 2021).*

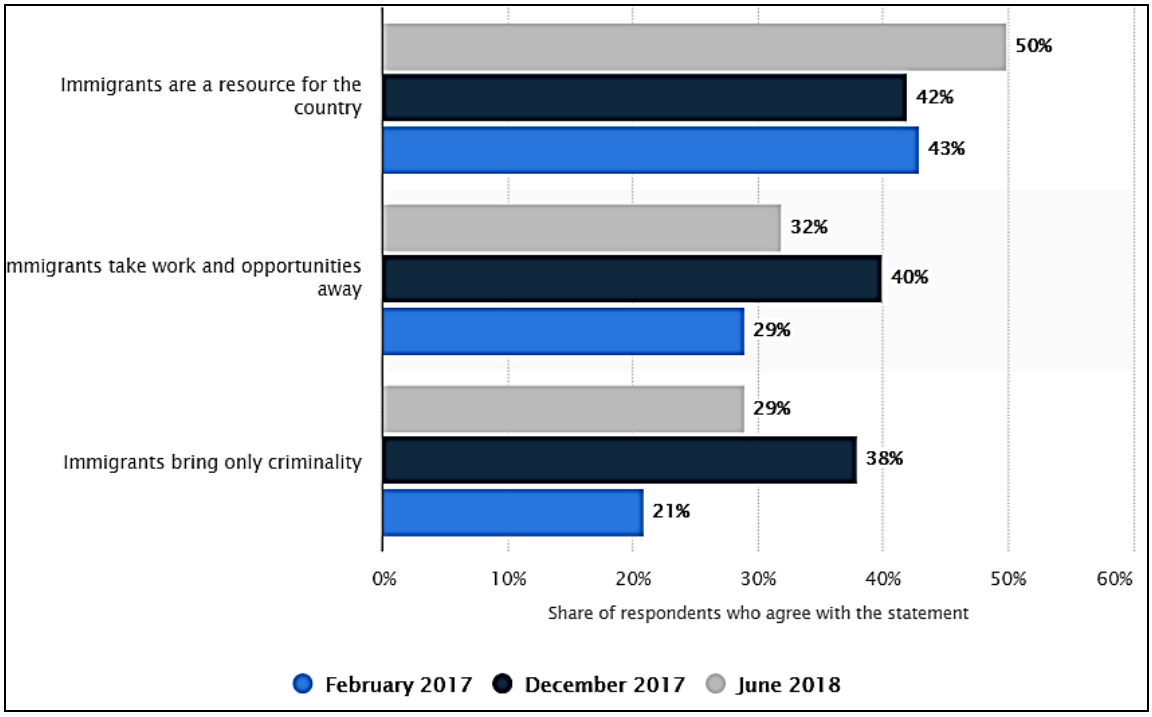

Figure C8–15. Italian Survey: Answer to question: do you agree with the following statements concerning immigration? Source Statista Research Department (2020).[608]

It would be worth analysing in the future whether this ignorance of the population and the linking of irregular entry with an illegal action that leads to migrants being considered as potential criminals is in some way disseminated, maintained or promoted by those media that are sympathetic to certain extreme right-wing political approaches.

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[608] Statista. Do you agree with the following statements concerning immigration? (Electronic resource). Available at: *https://www.statista.com/statistics/815055/opinion-on-immigration-in-italy/ (accessed on 23 September 2021*).

DISCUSSION

> One of the main legal problems raised by the implementation of border surveillance operations coordinated by Frontex is that participating Member States have interpreted the applicable rules differently both in relation to the detection and interception of vessels as well as, more importantly, in relation to search and rescue situations (Santos Vara & Sánchez-Tabernero, 2016, p. 66).

As seen in the previous chapters, the key element of the debate is not so much whether there is a legal framework for maritime salvage, but how it is interpreted by different States. Before going into the answers to the research questions, it is useful to establish the researcher's personal position, which not only makes no sense to keep hidden, but will help to follow the legal reasoning of the discussion.

Firstly, to offer all the sympathy and solidarity in the protection and integrity of people in distress at sea, in line with the international law, and as stressed by the CoE Resolution «left-to-die boat»[609] "applying zero tolerance towards lives lost at sea [...] including disembarkation, fully consistent with international marine law and international human rights and refugee law obligations", and "abolish factors which dissuade private vessels from carrying out rescues"[610] This objective of zero tolerance for lives lost at sea does not prevent the researcher from reaffirming that both irregular border crossing and the criminal activity of illegal migration carried out by migrant smugglers are not legal, although their general consideration as an administrative offence in the first case and as a crime in the second are very different. A first related scrutiny is whether respect for human rights should take precedence over any regulation by the State as a sovereign body with the capacity to legislate and enforce the law.

Although it is true that the UNCLOS III remains silent in relation to human rights, it does not mean that those rights are not applicable at sea. This

[609] Resolution 1999 of the Parliamentary Assembly of the CoE: The «left-to-die boat», as above.

[610] Resolution «left-to-die boat» as above, as above. Points 5, 5.1.1.

Convention cannot be applied in disregard of the rest of the legal framework of international law and was not intended to establish human rights already established by other international agreements. Even more, these principles could be considered as indirectly included in Art. 88: “The high seas shall be reserved for peaceful purposes.” Failure to provide life-saving assistance constitutes at least a non-peaceful act, even if it only takes the form of non-physical violence. Furthermore, UNCLOS III specifies (in the part relating to the Area): “[...] necessary measures shall be taken to ensure effective protection of human life. To this end the Authority shall adopt appropriate rules, regulations and procedures to supplement existing international law as embodied in relevant treaties” (Art. 146).

Additionally, human rights apply after its Art. 292 (applicable law): “and other rules of international law not incompatible with this Convention.” International human rights agreements are not incompatible with UNCLOS III. Even more, according to the UN Charter: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail,” [611] According to Papanicolopulu: “human rights are a vector for further development of the law of the sea, along the jurisdictional framework set out in the UNCLOS” (Papanicolopulu, 2014, p. 532).[612] Consequently, the long tradition of providing assistance to persons in distress at sea, subsequently sanctioned by the UNCLOS III, SAR and SOLAS Conventions, stems from a duty of mutual protection of the human beings and, in addition, to its moral underpinning, binds all States that are members of the United Nations that have signed the UN Charter, whether or not they are signatories to the other Conventions.

A similar doctrinal position is expressed regarding the Universal Declaration of Human Rights[613] by Bevilacqua: “[I]n order to protect civil, political, economic and social rights, it would be necessary, first of all, to protect live” (Bevilacqua, 2009, p. 154). The basic right to lie also applies at sea as contained in one more quotation: “which shares a common objective with the duty to assist persons in distress at sea [a right at odds with] returning boats carrying migrant and asylum seekers to the hight seas“ (Komp, 2017, p. 222) and emerges alongside the moral and legal obligation to rescue, followed by the right to asylum and not to be refouled to a country where they could be subject to torture, ill-treatment or risk to life.

[611] Charter of the United Nations and Statute of the International Court of Justice, as above. Art. 103. It has already been mentioned that different conventions or agreements protect life: HDHR (Art. 5); UN Charter (Art. 1.3); EU Charter (Art. 6); ECHR (Art. 2); ICCP (Art 6); etc.

[612] Papanicolopulu probably intended to indicate Article 55 where human rights are mentioned: (c): “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

[613] The Universal Declaration of Human Rights, as above.

Doctrinally, the preservation of life ─and consequently, as its derivative, life-saving action─ take precedence over other norms that States may establish contrary to this basic and fundamental right.

Secondly, the issue of hot return. Procedures must be reviewed on a case-by-case basis, once the application for international protection, if any, has been analysed by the competent authority on shore. The classification of a rescued person as an economic migrant and, consequently, the legal possibility of return cannot be established on board. In Frontex operations this procedure must be respected either in territorial waters or in the waters of a third State, as stressed in the «left-to-die boat» Resolution:

> [E]nsure that Frontex makes the protection of fundamental rights a priority of its joint operations, and in particular seeks the ability – which is still lacking in the recently adopted regulation – to apply the rules (on search and rescue, disembarkation and non-refoulement) to migrant boats within the territorial waters of third States which clearly cannot meet their international obligations regarding search and rescue at sea or uphold the rights of irregular migrants, asylum seekers and refugees.[614]

Thirdly, the activity of search and rescue is exclusive competence of the State.[615] This brings the debated issue on the role NGOs. Regarding the investigator positioning, once the current regulation has made it clear that maritime search and rescue is within the competence of coastal States, there is no inconvenience, under the law and in good governance, to seek ways to integrate these altruistic private rescue efforts in good faith within the legally instituted system. Since there are well-known legal formulas for collaboration, in the end it all comes down to political positioning, which extends to the degree of leniency for some procedural omissions regarding the NGO's ship clearance or other minor administrative misdemeanours that these organisations may commit in their efforts to save lives.

Fourthly, to implement legal strategies against smuggling and human trafficking criminal organisations. According to a UN Resolution there is concern "[…] about the high level of impunity enjoyed by traffickers and their accomplices as well as other members of organized crime entities and, in this context, the denial of rights and justice to migrants who have suffered from abuse."[616] However, there is concern that a strong policy against smugglers could not decrease significantly the migrant's flux and have unwanted side effects, something that also needs to be considered. In the face of a policy of progressive criminalisation of migrant smugglers there is a position, supported by "interviews with smuggled migrants in the Netherlands and Canada that offer

[614] Resolution 1999/2014 «left-to-die boat» as above, 6.4. As pointed out before, there have been no Frontex disembarkation in third States.

[615] According to SAR 1979, as above: "Parties shall individually or in co-operation with other States establish rescue co-ordination centres for their search and rescue services" (Annex 2, 2.3.1). and reiterated in Art. 98.2 of UNCLOS III.

[616] UN Resolution A/RES/68/179, as above, Recital 5(b).

an alternative, more socially embedded understanding of human smuggling" (Van Liempt & Sersli, 2013, p. 1029). Arguments have also already been made that since migrants want to travel and are willing to risk their lives and economic resources, the deterrent effect may be virtually nil; obstacles to maritime human smuggling may condition a diversion to other, even more dangerous, and inhumane routes. Once more, the problem must be addressed in depth and dealt with transnational solutions based on good global governance.

♦

Once these general positions of the researcher have been set out, it is time to move on to provide answers to the research questions outlined in the introduction. Going to the first research question:

(**Q1): *On the basis of legal developments, can we say that rescue at sea is a historically established obligation that prevails over decisions to the contrary by States and, particularly, in the case of rescue of migrant vessels? What if the State has not adhered to the international agreements on rescue at sea?***

Chapter 1 presents the long historical process up to the current legal framework on which the rescue of persons in distress at sea is based. Its evolution has been clearly related to cargo (i.e., economic questions) as much as to people. This can be recognised in three key clues. Firstly, its development has been linked to trade (*lex, not ius*). The second clue relates to the constant mention on the rights over the cargo that the rescuer vessels might have. Thirdly, there is a requirement of seaworthiness and extraordinary adverse circumstances for the ship to be considered in distress, something that clearly has more to do with the clarification of liabilities, particularly related to the insurance of the vessel, than to human rescue.

Another issue that has taken a surprisingly long time to be established, with an impact in rescue jurisdiction, is the common property character of the high seas, even more considering that this concept was already envisaged in Roman law. This aspect has been overshadowed for centuries, once again, due to commercial disputes manifested in regulations such as the Continuous Voyages, and the desire to control the wealthiness of the sea close to the States. The reluctance to consider the high seas as common property and against the idea of Mare Liberum was reinforced by the role in the Christian world of the supremacy of the Pope as *dominus mundi* and supreme jurisdiction. Hence, the case of *Santa Catarina* and Grotius' formidable defence in that trial of the freedom of the seas, and the recognition of the legal capacity of non-Christian nations with whom ─as this author rightly points out─ trade deals were made and taxes were paid, so that they must undoubtedly be considered to have legal capacity. This was a milestone in international maritime law.

The question of the supremacy of the right to life over State law has been advanced in a paragraph above. It is another polemic point, eventually still in

discussion, particularly for the dominant powers, despite legal provisions.[617] This explains why the USA has not fully adhered to UNCLOS III, and why in cases such as the investigations into human rights violations in the war in Afghanistan, the US has not only rejected the procedure of the ICC, but moreover imposed sanctions on Prosecutor Fatou Bensouda, and on the head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor, Phakiso Mochochoko, implemented by a sweeping executive order issued on 11 June 2020 by President Donald Trump.[618] It follows a sadly growing trend of accepting only those verdicts or outcomes that are favourable and not the other way around. The case *Sale v. Haitian Centers Council,*[619] is another example of the first world power ignoring the basic human resources agreements but is not the only State to ignore human rights.

Entering into the question of the legal obligation of salvage for non-signatory States, it may be useful to consider the sources of law in Spain and in other countries with similar legal systems, and in particular the consideration of international custom as a source of law according to the Statute of the International Court of Justice.[620] As also discussed above, it is a logical derivative of the right to life.

Thus, in answer to the research question, there are at least three legal sources that condition the maritime salvage obligation: customary international law; general principles of law; and jurisprudence, whether or not the State is a signatory to the Conventions (COLREG, SAR, SOLAS and UNCLOS III). Although the precedence of the sources is established differently in each legal system, there is little doctrinal disagreement, at least in the Statute (of the International Court of Justice), that they all have a similar precedence, and even more important, custom as a source of law is unquestionable (Ahmed, 2017; Bederman, 2010; Watson, 1984). There is a long-standing customary law (admiralty law) reinforced by a comprehensive *ius positum* framework of agreements that obliges all vessels, whether on the high seas, territorial waters, archipelagic waters or EEZs, to provide assistance to persons in distress at sea and to treat them in a manner consistent with human dignity. How, when and under what conditions States consider they should act in each case is another question. This weakness stems from the political attitude towards migration, not from the lack of a regulatory framework or academic studies. Migration procedures have been studied by various disciplines and have even been analysed using theoretical computer models based on algorithms and utility calculations using Lagrangian analysis (Nagurney & Daniele, 2021) or quadrant

[617] Art. 103 of the UN Charter and Art. 292 of UNCLOS III, as above.

[618] Human Rights Watch. US Sets Sanctions Against International Criminal Court [Blog Post, 11 June 2020] (electronic resource), available at*: https://www.hrw.org/news/2020/06/11/us-sets-sanctions-against-international-criminal-court (accessed on 15 June 2023).*

[619] *Sale v. Haitian Centers Council*, as above.

[620] Statute of the International Court of Justice, 18th April 1946 (33 UNTS 993), Art. 38.

vector analysis. The preceding paragraphs already begin to unveil the answer to the second research question:

(**Q2): *Is there an accepted definition of a ship in distress at sea and established procedures for ships as to how to proceed?* To what extent a shipmaster, bound to the shipowner by a private law contract, is obliged to carry out salvage work under a public law agreement signed by the flag State?**

The legal concept of a ship in distress has been discussed in section 2.1. It is a definition that has been dragging on for centuries, probably related to the peremptory need to establish it for liability reasons. The key and first element, inherent to maritime rescue, is that rescue is an act on petition, and, in many cases, assistance is not requested for different reasons including the intention, even at great risk, to reach certain territorial waters, or the coast. Again, the issue is not whether there is a legal definition of distress at sea. The key point here is the willingness of those in distress to request the rescue, as it may not happen with boat migrants.[621]

This raises the issue of what to do in case those in distress refuse to be rescued, despite being in grave danger, according to distress definition. It should be borne in mind that these boats are usually controlled by mafias who may even act violently at the approach of a rescuer. This was the case of the *CS Caprice*, which the Maltese MRCC ordered to assist a distressed vessel with 500 people, but as the migrants' intention was to reach Italy, they refused to get assistance until they were finally assured of disembarkation in Italy (Feldman, 2015).[622] In this case, apart from communicating with the relevant authorities through the MRCC and follow instructions, there is little more that can be done than to remain close by, always maintaining the safety of one's own vessel, in order to proceed with the rescue in the event that circumstances change.

The second part of the question makes even more sense taking into account that the acts and/or omissions of the ship are not automatically attributable to the State but to the shipmaster, a private actor, and the usual rules of attribution would apply. Additionally, the potential rescue vessel may be engaged in industrial activities, having manoeuvrability limitations (for example if she is laying an underwater cable, towing sonar or has or has thrown the fishing gear at sea). In order to answer this question, we must take into account that merchant ships, although engaged in a private activity, sail under a flag, and

[621] On 14 June 2023 another migrant boat sank with an estimation of 650 passengers lost at sea. According to preliminary information up to June 15th, deadline for updating information of this thesis, it seemed to be a flagless ship heading towards Italy. Although authorities were alerted, no rescue attempt was initiated. It seems that the Coast Guard attempted to tow the vessel, in what could have been a possible pushback attempt. It has been alleged that the boat refused salvage and rescuing actions.

[622] The difficult and (fortunately) unusual situation of refusal to abandon the boat even when those in charge of the SAR operation believe it to be the only possible option is expanded in a paper published by the U.S. Naval War College Review (Button, 2018).

need to comply with the rules of the flag State in order to be registered and to sail. In addition, the insurer will require compliance with regulation standards to cover the risk to the ship, the freight, and the crew, including proper certification for seafarers.[623]

As the jurisdiction of the ship on the high seas is that of the flag State, the shipmaster, without losing his or her labour law link to the owning shipping company, is also a representative of the flag State (with limited powers) on certain matters and is therefore bound to follow the rules of the State where the ship is registered, which not only relate to salvage, but also to navigation, safety and security of the ship, ship clearance, etc.

Consequently, the answer to the question is yes. Even if the shipmaster is a private actor in the salvage, he/she is obliged to take SAR actions. In the event that the potential rescue vessel may have manoeuvrability difficulties due to nets or trawling devices, cable laying, etc., the salvage obligation remains, as far as possible, within the capabilities of the vessel. Note that, as a general rule, rescue actions must be carried out with «due diligence,» but the obligation does not go beyond making the means available. Regarding liability, the ship's master is primarily responsible; for salvage actions, the ship's master has autonomy even over the owner, charterer, or company.[624]

Another grey area that has possibilities to grow in legal disputes is related to unmanned Autonomous Marine Vehicles (MAVs) operating on the surface, or even underwater, with varying levels of remote control. It is unclear to what extent compliance with international standards apply. MAVs could be used for legitimate purposes, but also in criminal actions, including the hypothetical possibility of migrant smuggling. It is foreseeable that certain mafias, frequently engaged also in drug and other criminal activities, will use such surface or underwater vehicles with computer-programmed routes to transport drugs, other illegal goods, or even people. Obviously, these watercrafts are unlikely to comply with any salvage obligation.

A final consideration still within the discussion on ship's obligations is the economic facet, a major setback in the salvage decisions of shipowners and masters today. The delays and additional costs faced by the salvor ship disrupt the commercial and strategic business plans of shipping companies, may reduce the incentives of masters, and may lead them (e.g.,) to consider alternative routes to minimise the risk of encountering a distress situation requiring rescue. Compliance with the rescue obligation is far from complete and universal, both for ships and their flag States. Turning now to the State side, we come to the third research question:

(Q3): ***What are the limitations of EU asylum policies that should apply to (rescued) migrants arriving on the shores of Member States?***

[623] STCW Convention, as above.
[624] IMO, Resolution MSC. 78/26/Add.1, as above, Annex 3, Regulation 34-1.

The weakness of Dublin III Regulation and the New Pact on Migration and Asylum has already been discussed. Although the Maastricht Treaty gave the EU asylum competences, and the subsequent development of the CEAS, a harmonisation of policies between Member States is still a matter with many shortcomings. Between 2015 and 2016 nearly two million applicants for international protection arrived in Greece and Italy and the rule of the first host State was overwhelmed. As result, Europe began to fortify itself with more fences, border controls and a lack of consensus among Member States on what to do with migrants and how much further to devalue reception conditions, but there was consensus on the restrictive entrance policy of signing up with third States to curb migrant arrivals.

It will require some time to evaluate the impact of the new EUAA, approved in 2021,[625] and how the core idea to contribute to an efficient and uniform asylum policy will be applied.[626] If migration management were truly centralised in a European agency, there would be no need for a mechanism to determine the responsible State, although for Abrisketa, this would even require a reform of the TFEU[627] (Abrisketa-Uriarte, 2020, p. 242). For the moment, according to still in force Agency Regulation the functions remain limited to "facilitate, coordinate and strengthen practical cooperation and information exchange among Member States on their asylum and reception systems;" "support Member States when carrying out their tasks and obligations in the framework of the CEAS"; and "assist Member States as regards training,"[628] in other words, a new edition of the exhausted Dublin III rules.

It is clear that the current (June 2023) procedure for examining applications and the criteria set out in the Dublin III Regulation is dysfunctional, and it is sufficient to see that only 3% of applicants are sent from one State to another under the Dublin III Regulation. The announced reform of a new Regulation on asylum and migration management is urgent[629] as the New Pact underlines, but from what is known so far, it seems to maintain the criterion of keeping the burden on the Member State of entry and it is mainly focused on a better identification of migrants.

Regarding those rescued at sea, there is one new particularity, the proposal of a new Eurodac category of applicants of international protection for the rescued after a SAR procedure:

[625] Regulation (EU) 2021/2303 of the European Parliament and of the Council as above.

[626] At the close of the bibliographic research period for this thesis (June 2023), news has emerged of an EU agreement on reform, which is making its way to the European Parliament. It is not possible to provide more details at this stage.

[627] TFEU. Consolidated version of the Treaty on the Functioning of the European Union, as above.

[628] Regulation (EU) 2021/2303 of the European Parliament and of the Council as above, Art. 2 (a,c,d).

[629] Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX, as above.

> The new proposal for a Regulation on Asylum and Migration Management provides a responsibility criterion for examining an application for international protection where the application was registered after the person concerned was disembarked following a search and rescue operation (under current rules such persons are covered by the irregular entry criterion). This better reflects in the asylum acquis the obligations stemming from the International Convention on Maritime Search and Rescue […] Therefore, there is a need to have a separate category for these persons in Eurodac instead of registering them as persons who cross the border irregularly (as is currently the case).[630]

However, the main focus of the reform should not remain limited to a better classification and identification of applicants for international protection, but to focus on the major problems of the current implementation of the Dublin III Regulation, i.e., secondary movements, slow processing times and lack of coordination and harmony between the Member States, these topics need urgently to be addressed under the main criteria of solidarity. Another poor solution is the so-called Malta agreement,[631] which followed the meeting on 23 September 2019 between France, Germany, Italy, and Malta, in the presence of Antti Juhani Rinne (Finland) as six-month rotating president of the Council of the EU and the European Commission. It was drafted as a "[j]oint declaration of intent on a managed emergency procedure - voluntary commitments by member States for a temporary predictable solidarity mechanism." Also known as Malta declaration, aims to implement Art. 17 (2) of the Dublin Regulation.

The Malta declaration has been the object of reproval in the academic world. In addition to the small number of participating States under a voluntary character, the main points of the declaration have been analysed by Gatto: The establishment of a temporary allocation mechanism for asylum seekers that includes offering safe havens on a voluntary basis by States signatories to the agreement; an accelerated system of redeployment (relocation within a maximum of four weeks); responsibility of the destination State for international protection and negative repatriation; and, notably, a call for the Libyan coast guard not to be obstructed.

In his rationale, Gatto points out an important drawback: the recipients of the distribution mechanism. It would only affect people rescued in the central Mediterranean by non-governmental organisations, military vehicles, and commercial vessels, thus excluding migrants arriving in large numbers in other countries affected by migratory flows, in particular Greece and Spain. The author also criticises the emergency nature of the lack of a structured, automatic, and long-term system for managing arrivals by sea (the agreement is only for six months, renewable). The last critical issue by the scholar concerns the possible suspension of the agreement and the convening of an emergency meeting,

[630] Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX, as above. Detailed explanation of the specific provisions of the proposal, point 3.

[631] Joint Declaration of Intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism, as above.

which results in the establishment of a paradoxical emergency mechanism (Gatto, 2019).

Additional academic disapproval has been reported by Catani[632] and Frasca,[633] with the following arguments: It is one more in the perpetual list of declarations of intent. It depends on the goodwill of the few signatory countries, without guaranteeing legal obligations when solidarity is a non-voluntary legal obligation, given that it is enshrined in EU primary law as reiterated by the CJEU on the relocation mechanism, unsuccessfully challenged by Hungary and Slovakia,[634] and stated by Advocate General Sharpston in his conclusions in the cases challenged by Hungary, Poland and the Czech Republic.[635] There is weakness in relocation, search and rescue, with a focus of suspicion against NGO-led operations while contacts with Libya are strengthened.

The authors describe the Malta Joint Declaration as too vague, especially on the issue of disembarkation, generic and with serious doubts about respect for the principle of the rule of law. According to Abrisketa, it is one of the dangerous avenues of political action that undermine the basic principles of solidarity and respect for human rights that lie at the founding core of the EU, seeking only to circumvent "el entramado institucional europeo y el control judicial de los actos de la Unión."[636]

Another initiative to be mentioned is the Cecilia Wikström report (2017)[637] ─aimed to establish a permanent system for the distribution of asylum seekers at EU level and legally binding among Member States both for normal times and times of crisis, based on fair and compulsory allocation─ with little success (probably because the report's approach to pursuing the policy objectives and principles is markedly different from the Commission's proposal).

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[632] Catani, A. The so-called "Malta Agreement": Four months later [Blog post 20 February 2020] (electronic resource), available at: *https://respondmigration.com/blog-1/the-so-called-malta-agreement (accessed on 6 September 2021).*

[633] Frasca E. and Gatta F.L. *The Malta Declaration on search & rescue, disembarkation and relocation: Much Ado about Nothing*. In Borders, EU Institutions, Law of the Sea. EU Immigration and Asylum Law and Policy [Blog Post 3 March 2020] (electronic resource). Available at. *https://eumigrationlawblog.eu/the-malta-declaration-on-search-rescue-disembarkation-and-relocation-much-ado-about-nothing/ (accessed on 6 September 2021).*

[634] Judgement of 6 September 2017 [GC]. *Slovak Republic and Hungary v Council of the European Union,* C 643/15 and C 647/15, EU:C:2017:631.

[635] Advocate General's Opinion in Cases C-715/17 *Commission v Poland*, C-718/17 *Commission v Hungary* and C-719/17 *Commission v Czech Republic*, Court of Justice of the European Union, [Press Release No 133/19, Luxembourg, 31 October 2019] (electronic resource). Available at: *https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-10/cp190133en.pdf (accessed on 1 June 2023).*

[636] [the European institutional framework and the judicial control of Union acts] (Abrisketa-Uriarte, 2020, p. 245).

[637] Report A8-0345/2017 on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Cecilia Wikström. Procedure : 2016/0133(COD)

The EU asylum policies towards rescued migrants entering by sea are disproportionately restrictive, building barriers to entry, seeking collaboration with third countries, although respect for human rights is undermined by these agreements, and prioritising the selfish action of territorial protection over human solidarity, violating the essential values of the European Union. This policy stance of restricting access has prompted a series of opposing actions, including the development of rescue programmes by private actors, which raises the following research question:

(Q4): *Is it legally possible for NGO and other civilian-owned vessels to engage in rescue at sea?*

The controversy here arises from two different interpretations of certain points of the law, but at the heart of this dispute lies the question of whether society should take direct action in the face of the state's inability to resolve a situation that causes serious harm and deprivation of basic human rights. Under one side's positioning, although law must be applied, beyond any appeal to morality or abstract reflection on the justice or injustice of the norm, positivism cannot prevail alone. It cannot arrive at a reductionism, as a mathematical formula, because law, contrary to the claims of extreme positivists, is underpinned by morality and politics and cannot be read without making the necessary considerations on such moral and political aspects (Niño, 2014). But the weakness of adopting an extreme regulatory positioning is that the order of precedence of the norms must be considered, and that the UN charter establishes[638] its precedence over any other State regulation. At odds with this, the position strictly assumes what is written in the law and considers that since the responsibility for the rescue lies with the State, in the same way as a private army (or police) is not legally permitted, private rescues are not permitted by law. The debate is served. But it is necessary to add another element to the equation. In a democratic State, government actions should be underpinned by a broad consensus of voting citizens, and this leads to two issues. Firstly, whether the position of those who consider the State's performance to be insufficient can be imposed on the majority of citizens supposedly supporting the government actions, and secondly, why efforts are not focused on the political arena to put pressure on the State to fulfil its obligations rather than demonstrative actions of disobedience and substitution of the State's duty.

In the NGOs' actions in rescue there is an additional factor to be considered. Given the difficulty of large-scale migrant drownings being considered as violations of international law, it has been suggested to shift the focus from migrants to the civil and political rights of the volunteers who come to the rescue, with the intention that this may help to close the accountability gap. Thus, the underlying claim is to articulate and conceptualise a form of disruptive maritime civil disobedience among rescue volunteers, with the intention of denouncing the lack of migrants' rights at sea (Mann, 2020). These disobedience

[638] Charter of the United Nations and Statute of the International Court of Justice, as above. Art. 103.

movements are not restricted to sea rescue. The development of disruptive activism in museums, streets, etc., is increasingly present in our society. The core idea for the organisers is that limited, legal, controlled, and peaceful protest goes unnoticed and does not promote changes in the system. Therefore, it seems utopian to think that movements in a clear political struggle will finance rescue ships to do the work of the State, i.e., to finance part of the State's activity, peacefully and in a way that integrate within the system. The political intent of NGOs is clearly evident in the filming of Frontex vessels allegedly forcing refoulements, and other similar anti-human rights actions.

What is surprising about this whole issue, supposedly motivated by the need to contain the funds dedicated to protection programmes, is the silence regarding asylum seekers who do not arrive by sea. For example, Venezuela leads the numbers of immigrants at both Spanish and European level,[639] who have obviously not arrived on patera boats. This also explains why the number of asylum applications is several times higher than the total number of irregular crossings by sea. We undoubtedly see in this a forced adaptation of the application of the law to suit a concrete anti-immigration political stance, where it is not needed to dig very deep to find the racist layer.

The actions to directly criminalise rescue is not permitted, as the Commission itself declared,[640] since it would be a clear sign of a lack of respect for basic human rights standards, as a fundamental principle in EU law.[641] Subsequently, State actions focused on blocking and requesting compliance with a series of questionable administrative requirements. The first administrative barrier has been to consider that civilian ships cannot be cleared to carry out rescue tasks and, in a new attempt to disguise the restriction, clearance is allowed for the transport of aid material. In this way if the NGO vessel is engaged in SAR activities it is in breach of the clearance declaration. The Communication,[642] a soft law document only, merely raises a series of barriers to action, such as concerns on the large numbers of people in relation to ship capacity, public health and safety issues, proper registration of vessels, sufficient equipment, compliance with relevant health and safety measures and, most controversially, its final naïf recommendation is that NGOs should act in cooperation with national authorities. It has also been stated that NGOs rescuing activities are in breach of the innocent passage right granted by the UNCLOS III.[643] With similar wording, the renewed EU Action Plan Against Migrant Smuggling requests, once more, in regard to the NGOs' vessels, compliance with the «relevant legal framework.»

[639] Before the war in Ukraine that transformed drastically the migration patterns in Europe.

[640] Communication from the EC, 2020/C 323/01, as above.

[641] As mentioned in chapter 3, for Europe included in Article 3 of the ECHR and Article 4 of the Charter of Fundamental Rights of the European Union (CFREU).

[642] Communication from the EC, 2020/C 323/01 as above.

[643] UNCLOS III as above, Art. 17.

The issue of inspections and their conditions and limits have already been discussed in chapter 4, but it is important to highlight two aspects here. The first is that any lack of seaworthiness or safety equipment, and all other requirements commented on in the preceding paragraph, should only be considered after the rescued persons are in a place of safety.[644] The next aspect is to ask what should be done, according to that regulatory reasoning, save only the number of people for whom the vessel has full capacity and abandon the rest? In other words, leave to die at the present moment to prevent a future potential risk of unseaworthiness? But it is also true that all circumstances have a limit, and the first condition of salvage is not to risk the ship itself or its crew.

In case of political will (which seems to be lacking for the time being) there would be no legal objection to incorporating civilian entities into rescue actions by agreement between the parties. In this sense, it is true that the SAR Convention reiterates that the responsibility for search and rescue relies on the parties[645] (i.e., the States), but the SAR Convention, in setting out the basic elements of a search and rescue service, includes the possibility of international cooperation by stating: "processes for improving the service, including planning, national and international cooperative relationships and training". There is nothing to prevent cooperation with an NGO if necessary.[646]

This is the line proposed by the UN, encouraging NGOs and the private sector to participate in international meetings and dialogues with a view to integrating their efforts to reinforce public policies, not to act as a substitute for them:

> Encourages States, relevant international organizations, civil society, including non-governmental organizations, and the private sector to continue and to enhance their dialogue in relevant international meetings with a view to strengthening and making more inclusive public policies aimed at promoting and respecting human rights, including those of migrants.[647]

A political agreement should be fostered to integrate volunteer activities and resource contributions by organisations sensitive to the human tragedy of migrants' distress at sea into SAR logistics and at the very least not to put administrative barriers in their way. This could even include a counter-surveillance agreement to bring transparency to border policies by monitoring and enforcing human rights compliance. It is another matter whether the heads of these NGOs —whose rescue activity has a strong public opinion mobilising content— are willing to abandon this propagandistic role and allocate their private economic resources, always modest in comparison with public funds, to help to carry out an action that fully falls within the competence of the State. Also, whether border agencies would be willing to have a private entity supervising

[644] The Sea Watch case as above, para. 117.

[645] 1979 SAR Convention as above, Art. 2.1.1.

[646] 1979 SAR Convention as above, 2.12.6.

[647] UN Assembly resolution A/RES/68/179, point 8.

and occasionally censuring their activity. Thus, depending on political will, different legal vias could be arranged, from non-acceptance and persecution of NGO actions, official or unofficial tolerance, to full integration into the rescue organisation, under the idea that "The global SAR system, while not perfect and in need of continuous improvement, does provide a means of notification about and response to persons in distress at sea" (Button, 2018, p. 49).

This brings the issue of cooperation at all levels, a key element in maritime rescue. Focusing again on the European rescues, the issue regarding extraterritorial proceedings for rescue and fulfilment of human rights obligations by Member States is rather complex. How to carry on in case of a MRCC that broadcasts a ship distress call and launches a rescue in another search and rescue (SAR) area, which may include territorial seas belonging to another coastal State, or even, a non-EU member State?

A vessel, either military or privately-owned answering to the broadcast, and entering those waters of a third country, will still be considered in innocent passage navigation? Should this not ben conflict with the UNCLOS III?[648] The answer must be sought in the agreements and authorisations that can be established on the basis of the SAR treaty and the standards set at international level by the IMO. The UN promotes the exchange of information between national organisations involved in search and rescue through the International Search and Rescue Advisory Group (INSARAG), and the IMO provides complementary recommendations, regulations, and a general guideline on the treatment of persons rescued at sea, including disembarkation and place of safety, which unfortunately are not always followed. Only after bilateral agreement can that extension out of the territorial waters be legally possible. These cooperations could eventually include the use of autonomous vehicles operating in the air. In this regard, the risk of providing drone information to a third country which can facilitate a push-back operation must be taken into account, particularly when there is a history of repeated violations of human rights (e.g., Libya) (Klein, 2021; Papastavridis, 2020).

(Q5): ***Does maritime salvage also include the legal obligation to disembark?***

The issue of disembarkation has already been discussed in sections 3.2.1 and 5.4 but there are a few points still to be discussed. Firstly, the obligation of prompt disembarkation does not depend on whether the rescuing vessel is governmental or belong to an NGO. In all cases, actions for alleged administrative or other misconduct should be initiated once the rescued persons are in a safe place. Doctrinal disagreements have also arisen as to whether the state has an absolute obligation to provide a place of safety (Abrisketa-Uriarte, 2020; Esteve-García, 2015; Guilfoyle & Papastavridis, 2014). Even accepting

[648] "[T]he prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State", Art 21.h.

that the wording of the law is not as explicit on disembarkation as on other issues, the question must be approached by the fulfilment of the standards together. As there is an obligation to rescue, and the rescuing vessel cannot be a place of safety, and the rescue ship is entitled to disembark early and proceed on its route, there is no other possibility than disembarkation (or transhipment) to a place of safety. The SAR[649] amendments reinforce the obligation of the MRCC to complete the rescue process with the provision of a place of safety by making it sufficiently clear that disembarkation, without differentiation in the case of migrants, cannot be unreasonably delayed.

Let us now consider the impact of disembarkation delays for the rescue vessel and the shipowner. Deterrence attitudes delay merchant ships carrying rescued persons to follow their route, while negotiations or any other coastal State strategy is underway. There are also questions of safety on board and risk of conflicts between rescued persons, risk of fire, or other issues in the safety of navigation and transport.[650] On the other side, the ship may not have enough provisions, or even fuel, for a delay of several days, and rarely has the capacity to provide medical assistance to those rescued, who are not infrequently in critical health situations. Depending on the insurance, some ships may be able to obtain a reimbursement of part of the expenditures incurred in the rescue, but not all, specifically demurrage.[651] In the absence of cooperation from some governments and the resulting problems, companies can sometimes find it difficult to recruit crew officers when the planned transit passes through a frequent salvage area, especially if their working contract penalises them for delays. This has sometimes led to planning sea routes away from the frequent locations of distressed ships and the reluctancy of merchant vessels to disclose their positions (Attard, 2020), adding a further disadvantage for people in distress at sea.

The economic problems of potential salvage vessels and their preventive action are exemplified in the Liberian-flagged *MV Salamis* case. This vessel was requested on 4 August 2013 by Italian Coast Guards to rescue a group of 102 migrants in distress 45 nautical miles off of Libya. In order not to incur additional expenses due to delay, instead of disembarking them in the Al Khums as instructed the *Salamis* continued to its next port of call in Malta but was not granted permission to disembark in Valletta; after intense negotiation it was finally authorised to allow the migrants ashore in the Italian port of Syracuse

[649] Resolution MSC.155(78) as above, Chapter 4, 8.4, “new paragraph 3.1.9, added after the existing paragraph 3.1.8 to the 1979 SAR Convention.”

[650] Sometimes with the smugglers, as commented above in the case of the *Torm Lotte* (section 5.3).

[651] The American Club By-Laws, Rules, List of Components 2019/2020 “Rule 3: Risks and losses excluded: 13 Consequential loss of profit or depreciation arising from the rescue of refugees” (electronic resource) available at:
https://www.american-club.com/files/files/American_Club_By_Laws_Rules_2019-20.pdf (accessed on 16 August 2021).

(Attard, 2020).[652] It is unclear whether the motivation for disobeying the order to disembark in Libya was solely economic, or also motivated by doubts about respect for human rights and the difficulties in applying for asylum in Libya. In any case, what is clear is that the situation of legal entanglements and delays in disembarkation falls on the shipowner and the reduction of the profit margin. An innocent party that, together with the migrants themselves, can bear the brunt of political manoeuvring and lack of compliance with regulations and of respect for human rights.

This brings the question of the shipmaster's autonomy in relation to the instructions provided to the rescue vessel by the MRCC prior to and during the rescue operation. Inconsistencies should be checked; the shipmaster has some options, if a serious difficulty appears in relation to the rescue plan proposed by the MRCC and the assigned place of safety. Notoriously, this place of safety is not defined geographically and does not need to be on land. Virtually all these discrepancies related to instructions to reach a place of safety and disembarkation are related to no other reason but reluctance to accept migrants. "[N]ot all States are prepared to shoulder the responsibility to ensure that he is released from his obligations with 'minimum further deviation to his voyage'" (Attard, 2020, p. 288). Disputes therefore arise such as whether it is in the nearest safe port of the coastal State or in the SAR State where disembarkation should take place. The application of *de facto* jurisdiction even in international waters sanctioned by the ECtHR and UN Convention against torture[653] has, in this respect, represented a major clarifying step forward.

(Q6)*: Is there evidence that tough criminal action against migrant smugglers will reduce irregular migration?*

The criminal aspects related to rescue have been addressed in Chapter 6. Once those rescued are on board, the criminal issues are no different from other circumstances at sea. There are well-established procedures in relation to the various on-board criminal and civil proceedings, and the corresponding role of shipmaster authority. There may be cases of violent behaviour, accommodation difficulties, searches of rescued women, etc., but these are generally not legally controversial issues.

The consequences of a strict policy of persecution of people smugglers are less clear. Several scholars have criticised the military operations such as EUNAVFOR MED, launched to disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean Sea.[654] It has

[652] Watch The MED (2013). Tanker «Salamis» carrying migrants stopped from entering Malta [Blog post, 5 August] (electronic resource), available at: *https://watchthemed.net/reports/view/18 (accessed on 14 June 2023)*

[653] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As above.

[654] Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED renamed SOPHIA when entering its second phase

been considered that efforts by States to restrict immigration frequently failed (Bhagwati, 2003; Castles, 2004; Düvell, 2006). “The argument is that international migration is mainly driven by structural factors such as labor market imbalances, inequalities in wealth, and political conflicts in origin countries, factors on which migration policies have little or no influence” (Czaika & De Haas, 2013, p. 487). It has been stated that migration and people smuggling patterns are hard to change (Camarena et al., 2020). This has become apparent on the US-Mexico border when the tightening of border control had led to movement through alternative routes with almost no reduction in numbers (Gathmann, 2008). In Spain, a similar pattern has been found comparing 2021 with 2022, when analysing the alternative options to the Canary Islands route following the agreements between Spain and Senegal for stricter border control (Vives, 2017). In the Netherlands, with an influx mainly from Iraq, Horn of Africa, and the former Soviet Union, increased crackdown measures have not led to a decrease in the number of irregular entries (van Liempt & Doomernik, 2006).

Again, amid all this evidence the narrow view focused only on irregular entrance barriers. As Basilien-Gainche lucidly points out, migration flows are not stopped by the creation of wire barriers, regulations, radars, or visa requirements, for those who have no choice but to leave their own country fleeing from war, poverty, environmental catastrophes, and political unrest. Obstacles serve only to divert them into ever more perilous routes. The author concludes that “the objectives of the EU and its member States and the means they employ are inappropriate; they only increase mortality rates and consolidate the smuggling and trafficking business” (Basilien-Gainche, 2017, p. 329).

(Q7): *What can be expected from a legal claim for breach of SAR obligations?*

Jurisdictional principles and avenues have been dealt with in Chapter 7 and extracted in table C7.1. The problem with legal claims related to rescue at sea is that most of the obstacles are the result of restrictive State policy that permeates judicial institutions.

Difficulties can arise on the one hand in some flag States, with authorisations that dubiously meet the minimum requirements, in order to obtain financial resources for the corresponding flag fees, in what has become known as «flags of convenience.» There is virtually no interest in monitoring and enforcing non-compliance by their vessels, bringing, additionally, practical difficulties in prosecuting a case of alleged violation of the salvage obligation (Papanicolopulu, 2016). Given that the first claim must be made through domestic channels, if the State itself is unwilling to uphold and implement its international commitments, it would be difficult for a domestic remedy to succeed.

in October 2015). No longer in force. Repealed by Council Decision (CFSP) 2020/471 of 31 March 2020. See also: (Garelli & Tazzioli, 2018).

Another complex situation arises when a coastal State is faced with two conflicting obligations. On the one hand, compliance with international agreements, and on the other, the protection of the territorial sea and the prevention of environmental disasters. As discussed in section 2.3, which included the analysis of several cases where the coastal State, in order to protect itself from collateral effects (e.g., an oil spill), refused to allow into its ports or territorial waters a ship declared in distress. The real situations presented show that the coastal security decision tends to prevail over that of the ship or its crew on the grounds of Resolution MSC. 167(78).[655]

Excluding the avenues established in UNCLOS III,[656] particularly the ITLOS, which are reserved to claims between States, the legal claim for a natural person, most likely to succeed, is the one based on human rights violations. Although the decisions of the UN Committees are not directly binding to the States, it is still one possibility for claims, as in case law *J.H.A. v. Spain,* bringing the case before the Committee against Torture (CAT).[657] As for Europe, considering that the European Convention on Human Rights has been signed by 46 States, the Strasbourg Court seems in practice a better initial approach than the CJEU. The ECtHR has a record of declaring interim measures rather quickly.

(**Q8): *What is the key barrier to maritime rescue development and its possible address?***

Available data from the last years (prior to Ukraine war disturbances), as detailed in Chapter 8, indicates that figures of irregular entrances in the EU move between 120 and 200K, with about two-thirds coming by sea. Considering the legal entrances account for well over 2M, with a net positive balance of about 1 M, it means irregular entrances by sea account only for about 6−10% of total entries. In other words, over 90% of migrants come by regular transport (mostly by plane). This explains why Europe, with less than 200K irregular entrances, has registered well over half a million new requests for asylum per year. But what is even worse, according to Eurostat, in 2019 there were 342.1M orders of expulsion but only 82.7M (24%) were executed.

As for Spain, figures for maritime entrances over the total are even lower (4.3%−7.3% of entrances). Request for international protection from the American countries account for 68% of the total, and only 9% from Africa, with a rejection rate of 87% (2021 data). In that year, with 49.5K orders of expulsion issued, only about 7% were executed. These figures show that the real pressure on public budgets is not due to irregular migrants arriving by sea, but to the lack of control over the entry of migrants with regular crossings, who become irregular, and the inefficiency of expulsion procedures. Despite these figures, policies in Europe seem to focus basically on building up barriers to immigration

[655] Resolution MSC 167(78) as above.

[656] UNCLOS III, as above, Art. 287.

[657] *J.H.A. v. Spain* as above.

by sea, centred on securitisation, and its consequences of «deterritorialisation» or «extra-territorialisation,» and push-back, with the excuse of territorial protection and sovereignty, but “[h]ow can they be considered sovereign if they deny their own responsibilities? Yet, EU State members refuse to be accountable for the violations of human rights that were and are committed during the border surveillance operations performed by Frontex” (Basilien-Gainche, 2015, p. 112).

Thus, the grey area addressed by this eighth research question, and what lies at the heart of this entire dissertation, is the politically and economically motivated human rights violations in case of distress at sea, both in cases of rescue and in cases of push-back, or other outsourcing actions, and a claim of discrimination of migrants entering by sea in comparison to other irregular migrants in Europe. Such securitisation actions are nothing but the failure of national policies on migration: "If national policy makers are perfectly capable of circumventing national pressures to restrict immigration and asylum at the EU level, why should they securitize the issues to achieve what they are already achieving?" (Kaunert, 2009, p. 164).

Migration and asylum policies in the EU are complex issues, impacting on the State's obligations in relation to maritime salvage. New emerging initiatives such as the New Pact on Migration and Asylum raised enough doubts within a few months of its publication to merit an international conference.[658] But no regulation or soft law can by itself drive respect for human rights, when there is no political will. The EU Member States “are reluctant to launch solidarity between each other as requested by the Lisbon Treaty and by doing this, they are indirectly responsible for the deaths of many migrants at sea and for the abuse of their human rights” (Ventrella, 2015, p. 76). The push-back policy runs counter to the right to leave any country, including one's own, which was the subject of much debate during the Cold War period (Markard, 2016). Failure to respect human rights is still sadly present nowadays in our society. It becomes clear that within the EU, positions of different Member States are not uniform.

The political attitudes of some governments (e.g., Italy), on immigration, who claim to express social positioning,[659] are based on considering this maritime flow as a threat to national security and sovereignty, showing a clear hostility to seeking solutions to the problem on the basis of the EU's constitutive principles, i.e., a rational construct entailing a project for civilisational progress. As such, it must permanently incorporate its values and respect for human rights in all its policies (Del Valle Gálvez et al., 2019). These authors conclude that “a

[658] The Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe, coordinated by the Institute for European Studies of the University of Brussels (ULB), in collaboration with the Royal Institute for International relations (9−10 September 2021) under the title: The New Pact on Migration and Asylum: Dead or Alive? Egmont Institute, Petit Sablon 8, 1000 Brussels.

[659] As the survey carried out in this thesis shows, the population magnifies the true impact of immigration by sea on the total public budget (see chapter 8 and appendix III).

new border space south and east of the Mediterranean has been configured for migratory flows, which needs a new policy of external borders for these area, but without losing focus on the fundamental principles and values of the EU" (Del Valle Gálvez et al., 2019, p. 219). The humanitarian vision requires the respect for human rights that States have agreed to promote in the relevant treaties they have freely signed. It is urged to finish with the "fragmentary reading of EU obligations" (Moreno-Lax, 2011, p. 1). In similar terms the authoritative work of Bendel states: "protection continue to suffer from the fact that it offers asylum seekers no safe and legal options to come to EU Member States" (Bendel, 2016, p. 6).[660] What really surprises and does not fit is that border agencies have substantially increased the budget when the total of irregular entries into Europe (by sea and land) represent less than 10% of migrant inflows.

(**Q9):** ***Could outsourcing be a solution for rescue at sea?***

The frequent attempt to create barriers to access is intended to rely on jurisdictional issues and to make disembarkation difficult without concealing a deterrent intent. This is in contradiction with UN initiatives such as those raised at the Djibouti Expert Meeting on 8-10 November 2011,[661] which addressed operational procedures, disembarkation, the creation of a Task Force and Mobile Protection Response Teams to provide support for reception and the Draft Model Framework for Cooperation.

Outsourcing of rescuees is discussed in section 3.3. According to Del Valle et al., two different, although related, concepts have been applied which could be globally included in what the authors define by the neutral term of «de-territoriality.» The first concept is the externalisation of the migration policy. It usually takes the form of a treaty or other arrangement with a third State (on the basis of an «asymmetric relationship») and aims for the third State to increase its border control measures to prevent the outflow of migrants.[662] In this case, such control is carried out exclusively by the third country itself (without prejudice to material or financial aid for this purpose). A second, politically related, option is the (direct) extraterritorial action.[663] This "case should involve the presence of or exercise by Member State public officials of some (effective) border control

[660] In the preface of this reference Günther Schultze **(**Head of the Migration and Integration Discussion Group) quotes: "A common refugee policy based on solidarity, which meets international standards for the reception of asylum seekers and human rights, is not on the horizon" insisting that the EU is not only an internal market and a place where the euro circulates with its fluctuations, but also a community of values inscribed in its treaties and founding documents, values that include the protection of people who have to flee their homes and whose lives are threatened.

[661] UNHCR. Refugees and Asylum-Seekers in Distress at Sea – how best to respond? (Electronic resource), available at: *https://www.unhcr.org/events/conferences/4ede2ae99/refugees-asylum-seekers-distress-sea-best-respond-expert-meeting-djibouti.html (accessed on 25 August 2021).*

[662] For example, the Italian-Libyan agreements 2007–2009. See *Hirsi Jamaa and Others v. Italy* (as above). EU agreements have been done "with countries with a dismal track record in terms of respecting the rights of migrants and refugees" (Baldwin-Edwards & Lutterbeck, 2019, p. 2241) even south of Libya such as Niger, not to say the UK's Rwanda deportation plan.

[663] The action of Spain in Mauritania (see *J.H.A. v. Spain*, the *MC Marine I* case).

activities or functions in areas without State jurisdiction or in the territory of third states, with their consent" (Del Valle Gálvez et al., 2019, p. 118). This brings the issue of jurisdiction, and it must be noted that the ECtHR has even considered subject to extraterritorial jurisdiction, the cases of Al-Skeini[664] and Al-Jedda[665] related to UK troops' liability during the Iraq war.

There are two key legal elements here: the first is to which extent the State really wants to extend its jurisdiction without detriment for human rights, and the second is the interpretation of «effective control.» "The ECtHR makes clear that it will counterbalance the circumvention of human rights and refugee rights obligations by providing a new interpretation [...] of extraterritorial jurisdiction, [...with] a shift to a more functional reading of the effective control test" (De Boer, 2015, p. 118). If the ECtHR maintains this position to avoid undermining the attempt to reduce the level of human rights, externalisation will cease to have much of the hidden meaning with which it is promoted.

The EU has implemented a variant of externalisation policy with the South Mediterranean States promoting their own border control and SAR operations, although per Novotný "Low administrative capacity, «fear of efficiency» and insufficient internal prioritisations of the issue continue to pose challenges to the Afro-Asian segment of the EU policy" (Novotný, 2019b), not to say the serious risk of breach in human rights.

The strategies employed adopted different names, but with the same deterrence aim:

> Outsourcing, externalisation, offshoring or extraterritorialisation of migration management; external migration governance; 'remote migration policing'; 'de-territorialization of border control'; 'politics of extraterritorial processing'; 'neo-refoulement'; or 'limes imperii'. All of these terms refer to the various types of interception measures used by States against asylum-seekers and refugees, measures which are usually developed by the wealthiest States, notably the United States, Australia, Canada and EU Member States. (Del Valle Gálvez et al., 2019, p. 164)

Such attitudes are contrary to the EU's own basic principles:

> This is horrific […] the hypocrisy, the cynicism of those in the European Union, the European Commission but as well […] the European Council […] that are pretending that they are saving lives, they know very well that in Libya there is no such thing as the Libyan Coast Guard, what there are militias, militias operated by all sort of criminals, networks […] they are the ones who are being paid by the European Union to pretend they are fictional Libyan Coast Guard to indeed push back the migrants that are the ones who exploit the migrants, who sell the migrants […] what is tremendous is the complicity of the EU.[666]

[664] *Al-Skeini and Others v. the United Kingdom* [GC], as above.

[665] *Al-Jedda v. the United Kingdom* [GC], as above.

[666] Ana Maria Gomes, European Parliament Member, 25 February 2019 (electronic resource), available at: *https://www.europarl.europa.eu/meps/en/28306/ANA_GOMES/history/8 (accessed on 5 September 2021.*

It is remarkable that after so many years of claims from the academic world and other organisations, about decisions which neglect human rights, there is still an omission in "establishment of a sustainable and fair system for determining the Member State responsible for asylum seekers."[667]

In research conducted at the University of Malta's Faculty of Law which included interviews with relevant law professionals on the island, it is concluded that the trade-off between border protection versus respect for human rights could be improved by moving forward in five avenues: 1/ increased search and rescue cooperation; 2/ EU responsibility-sharing mechanisms; 3/ increased legal channels for migration and voluntary reintegration; 4/ raising public awareness and information sharing; and 5/ cooperation between EU States and States of origin and transit (Yates, 2015). The issue of raising public awareness is particularly interesting, given that citizens' understanding is far from actual migration figures and flows, as the survey included in Chapter 8 and Appendix III shows.

According to (Tzevelekos & Proukaki, 2017), "the duty to protect are the same irrespective of whether jurisdiction is territorial or not" (p. 465) the right to life establishes a duty on the State "to do all that could be reasonably expected", (p. 468) and the obligation (of means not of results) derived from the right of life must be accomplished with due diligence. These aspects of respect for protection of human rights and due diligence "requires a coordinated, multidimensional approach with States of origin, of transit, and of destination" (p. 469) as stated by the UN Security Council:

> …[S]tressing that addressing both migrant smuggling and human trafficking [...] requires a coordinated, multidimensional approach with States of origin, of transit, and of destination, and further *acknowledging* the need to develop effective strategies to deter migrant smuggling and human trafficking in States of origin and transit.[668]

Implementing procedures for the control and detection of future irregular immigrants who enter through legal channels and speeding up expulsion procedures are key elements for an effective containment of public spending. There is also much to be done to reduce the problem at source that motivates migratory flows. The policy of curbing or delaying irregular immigration by sea under the argument of reducing the social burden on States does not make any sense, given the migration figures. It represents a myopic, partial, and completely distorted attitude to the problem. Some comments are now required about governance, including the answer to the last research question:

[667] EASO annual report 2018. Reform of the Common European Asylum System (electronic resource), available at: *https://www.easo.europa.eu/easo-annual-report-2018/111-reform-common-european-asylum-system (accessed on 28 August 2021).*

[668] Security Council 7783RD meeting (PM), SC/12543, 6 October 2016, para. 39: *https://www.un.org/press/en/2016/sc12543.doc.htm (accessed on 01 September 2021).*

(**Q10): *What is the level of public knowledge of the actual migration figures and the percentage of irregular entries by sea?***

This question tries to clarify to what extent Spanish politicians and citizens agree on the EU States' tendency to hinder the disembarkation of irregular migrants. Citizens' thinking creates public opinion and generates policy positions. Citizens' information must not be inaccurate or misleading. Public awareness is necessary for a State to establish plans for collaboration with other States on migration issues, as these problems cannot be solved on the basis of one-State solutions. Global governance is far from being properly applied to the tragic problem of immigration, a problem whose numerical magnitude does not seem to have caught on in society, which has shown itself to be unaware of adequate information.

This point is essential as policy makers cannot develop their plans behind the public's back, and there is growing support for populist anti-immigrant parties and movements that, on the other side, have a generous echo in the media. Rationale and coherence are required. It is not arguable to defend approaches of deterrence overriding human rights backed by the States unless they are accompanied by a political decision to terminate such international agreements which would mean dismantling the whole fabric of the European Union itself. Respect for human rights is at the very heart of the TFEU, so an anti-human rights position has no place either in the EU itself or in a State that is a signatory to the UN human rights conventions.

To this end, a survey has been carried out in three different Spanish regions, under the assumption that citizens could be unaware of the true extent of the figures of the migration phenomenon and that their views could be negatively influenced by the media's repeated focus on irregular maritime migrants only. The media seem to be more interested in reporting the cases of intercepted boats as a growing phenomenon, and certain politically oriented groups add the component of a danger to territorial integrity, and economic sustainability, echoing such concepts on social networks and thereby stirring up loss of values and traditions and diversion of resources that could be used for national needs.

> There is also a 'knowledge gap' regarding the effects that European laws and the activities of EU agencies on irregular immigration are having on the ground, as well as the ways in which the rights of individuals are guaranteed throughout the various phases comprising expulsion processes and procedures. (Carrera & Allsopp, 2017, p. 100)

It seems clear that there is a retro-feeding circle of action between the information transmitted to the media emphasising irregular maritime entries and creating inaccurate public opinion, certain political positions criticising the consumption of resources by the irregular immigrants, and the implementation of political actions contrary to the respect for human rights.

The most important data that need to be made known is that irregular maritime entry accounts for no more than 10% of the inflow of migrants. The main problems lie in the inadequate control of legal entries, the slowness of refugee status determination processes and the low rate of compliance with expulsion orders for those who do not qualify, as discussed in chapter 8 and annex III.

As for the survey, the main conclusion that can be drawn is that there is a great lack of awareness among Spanish citizens of the magnitude of migration, and of the relative percentage of irregular border crossings, attributing to the latter a much greater magnitude than is actually the case. There is a majority view (80%) that migration (with irregular access, wrongly considered to be the main entrance by the majority) is a serious problem for Spain (Q_{11}). On the question of immigration in general, as shown in Q_7, a majority of 54% believe that Spain has an immigration problem. Responses suggest that it is not a question of xenophobia, fear of the transmission of infections, or the imposition of foreign customs and religions. The fundamental fear, expressed in the responses, is that too many public resources will be devoted to the detriment of the needs of nationals.

There is widespread acceptance of legal migration, and the work of legal migrants is considered useful as a positive contribution to increasing the financial resources of the State and the pension system. The responses also show a majority opinion in favour of supporting countries whose circumstances condition the departure of migrants, and also, although in this case a smaller majority (44% vs. 32%), in favour of helping migrants in Spain with difficulties. There is a majority opinion that migrants who cross the border irregularly are victims of mafias (64%), and a virtual unanimity in favour of intensifying the fight against migrant smuggling. It is worrying that 58% of respondents were in favour of immediately returning illegal migrants to their countries of origin, which, once again, demonstrates a lack of awareness of international commitments made in relation to human rights. In any case, the position is consistent with a real lack of knowledge of the migratory flow and its adequate global governance.

It is urgent to establish information programmes that allow society to know the true magnitude of the migratory problem, to inform that more than 90% of immigrants enter the EU through regular channels and that the delay in procedures for establishing refugee status, and above all, the ineffectiveness of expulsion orders, are at the heart of the migratory problem. In this sense, different regulatory options could be considered by including certain questions on the visa form, so that false answers would serve as a legal basis for speeding up the return process.

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CONCLUSIONS

After a long process of international customary law and successive agreements over the last century ─from the pioneering Rescue and Boarding Conventions (1910) to SOLAS, UNCLOS III, or SAR─ the rescue of persons in distress at sea, at least in theory, has a well-established legal framework that incorporates both the actions and responsibilities of the coastal States, vessels, and flag-States.

However, designed rescue procedures for seafarers on regular maritime voyages, who may very occasionally find themselves in distress at sea, are now faced with the challenge of constant rescues due to mixed irregular migratory flows in fragile boats and in conditions of high risk to people, which overwhelm the established organisational framework and endanger human rights.

The policy of the EU and its Member States has been highly ambivalent and a truly effective plan for those in danger in the Mediterranean Sea has not been clearly established. Moreover, there is a worrying tendency to criminalise the entry of irregular migrants by sea, slowing down international protection with the various deterrence measures discussed above.

As a result, potential applicants for international protection find themselves in a situation of progressive precariousness. Several European countries have been promoters of international agreements on human rights, both at the UN (e.g. the UN Charter or the Universal Declaration of Human Rights) and at the very core of European founding law (e.g. the Charter of Fundamental Rights or the European Convention on Human Rights). It is rather surprising that these same countries are reluctant to follow fundamental principles that they themselves have chosen to adopt and promote.

The reception policy for rescued migrants based on the Dublin III Regulation has proved ineffective in receiving these flows of migrants in a proportionate manner between States, with the burden falling on the State of arrival, leading to undisguised policies of blocking access. There is little doubt at present that the EU's legal framework, concerning the entry of irregular migrants, reception, stay and asylum application procedures, requires a clear and thorough overhaul, probably through a centrally organised system. The EU should move towards greater centralisation or federalisation in border management or at least towards a model that includes greater solidarity among Member States. Unfortunately, the political

will to move towards this model does not yet exist. EU migration policies should emphasise mobility (dynamics) rather than barriers, as free movement of people is at the core of the EU common space. Good governance means a comprehensive response to the challenge for the EU and its Member States to improve the policy response and agility of the migration cycle, beyond simple securitisation. Such responses must respect the rule of law and fundamental human rights principles.

Indeed, the research questions of this thesis converge on a situation where the problem is not a legal framework absence for the rescue of persons in distress at sea, otherwise well established, but rather an unwillingness to comply with its obligations, promoting policies of securitisation, outsourcing and the use of creeping jurisdiction. But what is even more paradoxical and discriminatory, if that is possible, is that these blocking actions focus exclusively on what is a minority (less than 10%) of migrants entering by sea. This concentrated blockade on a minor entry route (around 200,000 yearly entries in Europe) of mostly black African migrants implies a political attitude, often with an underlying racist streak. The excellent and uncontested acceptance of some six million whites from Ukraine after the outbreak of the war adds to this racist tone.

When talking about the consumption of public resources —one of the arguments often put forward to justify the blockade— the complete failure of return policies for migrants who have not been eligible for international protection seems to be forgotten. The ineffective procedures of legal entrances and returns maintain a huge pool of irregular migrants remaining in European countries, generating a continuum of claims and legal procedures that also consume public resources. Penalising some migrants for the simple fact that they have crossed the border irregularly by sea, compared to the majority who are equally irregular but have entered legally, is an even greater injustice.

Some States are increasingly implementing strategies involving rescue vessels making disembarkation difficult or delayed, or taking decisions regarding disembarkation or the expelling of migrants that seem hardly compatible with their human rights. Political idealism and the rule of law have been replaced by political pragmatism and a formalistic interpretation and application of the law. As the drama and deaths in the Mediterranean Sea are repeated on a virtually daily basis, it cannot be due but to a clear intention to prioritise security policies, i.e., of State sovereignty and «the inside world» over human rights. This conditions the reluctance of some vessels to operate in areas at risk of encountering migrants, or to pass through them, closing a circle of ostrich-like positions.

Additionally, it also creates an inequality with those migrants in an equally irregular situation who entered through a legal route. As the situation is *de facto* the same, the same legal treatment should apply. The survey presented in this thesis shows that the real figure —of nearly 90% of migrants arriving legally in Europe and then remaining in an irregular situation, applying for international protection and social assistance— is unknown to Spanish citizens, and seems to be of no interest

to the media. The sad truth is that aid to migrants and asylum and residence permits are granted in much greater proportion to irregular migrants who have entered legally than to the relatively few who have entered by sea.

This type of policing creates problems also to the rescuer ships. Disembarkation negotiations create delays, distress on board and a burden for the master, not to mention risks to the migrants and even to the safety and seaworthiness of the ship itself, commercial delays, and increased costs for the shipowner. Legal actions against shipmasters who disembark migrants on humanitarian grounds may have a negative effect on their readiness to rendering future assistance. To create difficulties for the rescue ship that is obliged to its duty is in itself vile. What makes no sense at all is to put the burden of the migration problem on merchant ships that are obliged by law to assist persons in distress at sea. The main provision setting out the obligations of states to assist persons in distress at sea is Article 98 of the United Nations Convention on the Law of the Sea. These obligations prevail irrespective of the type of rescue ship, without prejudice to administrative action that may be taken, if necessary, against the ship, once rescued persons are in a place of safety.

The duty to render assistance is primarily an obligation of the shipmaster as an actor on behalf of the signatory State to the maritime agreements. Hindering vessels that save people by creating obstacles to disembarkation, causing disruption to life on board, traffic delays and economic damage to shipping companies, is against all legal odds. Regardless of the humane considerations for those rescued, it is, to say the least, a discourteous action for the flag State and the ship-owning company.

One element of debate in this regard is the attitude of States towards rescues by civilian vessels, particularly those belonging to NGOs, as well as the recording and reporting of behaviour by Frontex naval forces that goes against international law and human rights. The issue of rescue by NGOs is not easy to solve, since although these civilian resources could perfectly well be integrated into the state SAR system by means of legal agreements, there is no will on their part to «disappear» by being absorbed by the official organisation, since the political action of denunciation and media noise is as important to them as the rescue itself.

These strategies pose a serious legal problem of compatibility with the international protection framework, and the principle of non-refoulement. A notable aspect of this policy is that there would be a legal avenue for it, based on Article 110 of UNCLOS III, given that a flag State jurisdiction is not opposed to any contractual arrangements on cooperation or even power delegation to another State. A number of bilateral agreements have already been signed for the fight against drug trafficking, and a reciprocal system of authorisations for the exercise of jurisdictional competences is certainly not new in international law.

Although this dissertation has focused on Mediterranean waters, securitisation actions are not exclusive to EU Member States. There is also the

issue that not all jurisdictions accept the same conventions. There are countries that have not ratified important agreements (notably the USA or Turkey have not put UNCLOS III fully into force), and in other cases their own laws do not match the wording of the signed convention, as is the case with Panama.

Despite court rulings on the *de facto* jurisdiction and responsibility of States exercising total control over migrants, even on the high seas (or in a third country), human rights and protection policies are repeatedly neglected. Actions not only in territorial waters but even extraterritorially (creeping jurisdiction) are aimed at keeping refugees from reaching their shores and are accompanied by other «deterrent» measures, including the presence of immigration liaison officers in third countries.

Focusing on how rigid border control should be, enforcement actions against criminal people-smuggling organisations ─ the simplest and most intuitive action ─ must be carefully analysed. People who take the sea route are in such a desperate situation that they will seek alternatives, with greater economic cost, suffering and risk to their lives. Although initially there seems to be, as the survey shows, a large majority of opinion inclined towards strengthening the fight against crime, these actions will have to be carefully developed in order not to further aggravate deaths at sea and human suffering. The survey also shows good solidarity among the Spanish population. Actions should not so much be a matter of law as of good governance, although in no way does this dissertation intend to promote that idea good governance means the free entry of irregular migrants across borders.

The suggested way forward is to act on three levels. Firstly, society should be better informed about the reality of the migration problem, so that, in harmony with politicians, actions to respect human rights can be strengthened. Secondly, formulas should be sought to speed up both the process of granting international protection and the return of those who are ineligible. Lastly, improve the control of regular entries that later turn into irregular stays. These three paths could achieve substantial improvements in terms of savings in economic allocations earmarked for social spending, while maintaining human rights and the solidarity commitments of international law.

However, it is clear that there are no quick and easy solutions. This brings us to Ricoeur's concept of practical wisdom, which, unlike Kantian and Rawlsian postulates, encourages us to «invent» the behaviour that best resolves the exception, breaking the rule as little as possible. Aristotelian balance and fairness are part of good governance. Practical wisdom applied to migration should lead to facilitating international protection in a non-discriminatory manner, respecting human rights, and expanding legal immigration channels, while observing the obligations recognised in the UN and European charters, treaties, and conventions.

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APPENDIX I: LEGAL REFERENCES[669]

AI.1. Key Conventions, Treaties, or other International Instruments
(chronologically)

- Convention Of Commerce Between His Majesty and The United States of America of 20 October 1818 (Ratifications Exchanged 30 January 1819).
- Convention Pour L'unification De Certaines Règles en Matière D'assistance et de Sauvetage Maritimes [Convention for the Unification of Certain Rules With Respect to Assistance and Salvage at Sea]. Brussels, 23 September 1910. Entered Into Force On 18 January 1910.
- Convention Internationale Pour la Sauvegarde de la Vie Humaine en Mer [International Convention for The Safety of Life at Sea], London 20 January 1914.
- International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading. Brussels, 25 August 1924, Concluded in The Protocol of Brussels of 23 February 1968 and Amended by the Protocol of Brussels of 21 December 1974 (Nº 23643).
- Charter of The United Nations (Un Charter) and Statute of The International Court of Justice, San Francisco, 26 June 1945, Into Force On 24 October 1945.
- The Universal Declaration of Human Rights, Paris, 10 December 1948.
- Convention and Protocol Relating to the Status of Refugees. (The Geneva Convention), Geneva, 28 July 1951 [Liming the Scope to Europe Prior To 1951] (Into Force 22 April 1954). New York, Assembly Resolution of 16 December 1966, 2198 (XXI) Removing Limitation and Providing Universal Coverage and Protocol of 31 January 1967. Entry into force 4 October 1967 [in accordance with article VIII). Registration 4 October 1967, Nº 8791.
- Geneva Convention on The High Seas of 29 April 1958, Into force on 30 September 1962. United Nations, Treaty Series, Vol. 450, p.11.
- Convention on Facilitation of International Maritime Traffic. Adoption: London 9 April 1965. Entry into force: 9 March 1967.

[669] The list of legal references includes some of the notorious documents related to the dissertation. For a chronological roll of law of the sea related multilateral treaties from 1888 to 2016, with particular case-law focused on Africa, see (Vrancken & Tsamenyi, 2017, pp. xliv–lviii). For an alphabetical table of treaties and other international instruments, with European focus, see (Barrett & Barnes, 2016, pp. xxx–lii).

- International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200a (XXI) of 16 December 1966. Entry Into Force 23 March 1976,
- Vienna Convention on The Law of Treaties (With Annex) No. 18232. Vienna, 23 May 1969.
- OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Addis-Ababa, 10 September 1969. Entry into force 20 June 1974.
- International Convention for the Safety and Life at Sea (SOLAS). IMO. London, 21 October – 1 November 1974. Entered into force 25 May 1980.
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW). IMO. Adoption: 7 July 1978.
- International Convention on Maritime Search And Rescue (SAR). Adoption: 27 April 1979. Entry into force: 22 June 1985. Amended by Resolution Msc.155(78), 20 May 2004.
- Third United Nations Conference on The Law of The Sea (UNCLOS III). Resolution 3067 (XXVIII) Adopted by The UN General Assembly on 16 November 1973. Signed On 10 December 1982 in Montego Bay, Jamaica. Into force since 16 November 1994approved, New York, 30 April 1982. Signed In Montego Bay (Jamaica) On 10 December 1982. Entered Into Force On16 November 1994.
- Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment (Cat). Resolution Of General Assembly 39/46 Of 10 December 1984. Into Force Since 26 June 1987.
- United Nations Convention on Conditions for Registration of Ships. Adopted By the United Nations Conference on Conditions for Registration of Ships on 7 February 1986, Td/Rs/Conf/23. Never Into Force.[670]
- United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome Convention). Rome 10 March 1988. Entered into force 1 March 1992. amended to include unlawful acts against the safety of fixed platforms located on the continental shelf (SUA Protocol 2005), London 14 October 2005. Enter into force 28 July 2010.
- International Convention On Salvage. Adoption: London 28 April 1989. Entry Into Force: 14 July 1996. (Replace Convention Internationale pour la Sauvegarde de la Vie Humaine En Mer [International Convention for The Safety of Life at Sea], London 20 January 1914).
- Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.
- Resolution A/773/18 on Enhancement of Safety of Life at Sea by the Prevention and Suppression of Unsafe Practice Associated with Alien Smuggling by Ships. Adoption 4 November 1993.

[670] The Convention requires 40 signatories whose combined tonnage exceeds 25% of the world total. As of March 2020, fifteen States had ratified or acceded to the Convention (Albania, Bulgaria, Côte d'Ivoire, Egypt, Georgia, Ghana, Haiti, Hungary, Iraq, Liberia, Libya, Mexico, Morocco, Oman, and Syria) and the Convention had been signed, subject to ratification, acceptance, or approval, by further nine States (Algeria, Bolivia, Cameroon, Czech Republic, Indonesia, Poland, Russian Federation, Senegal, and Slovakia).

- Resolution A/867/20 on Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants By Sea. Adoption 27 November 1997
- Resolution A/55/2, United Nations Millennium Declaration. Adoption 18 September 2000.
- Report A/55/383, Of The Ad Hoc Committee On The Elaboration Of A Convention Against Transnational Organized Crime On The Work Of Its First To Eleventh Sessions, 2 November 2000.
- IMO Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants By Sea, MSC/Circ. 896/Rev.1, 12 June 2001.
- Resolution on the Review of Safety Measures and Procedures for the Treatment of Persons Rescued At Sea, A.920(22), 22 January 2002.
- United Nations Convention Against Transnational Organized Crime and The Protocols Thereto. Resolution of the General Assembly 55/25 of 15 November 2000. Into force 29 September 2003.
- Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime. Approved by the General Assembly, New York, 15 November 2000. Into Force 28 January 2004. Treaty Series, Vol. 2241, P. 507; Doc. A/55/383.
- IMO Resolution A 920(22) on Safety Measures and Procedures for the Treatment of Persons Rescued At Sea. Adopted 22 January 2002.
- Resolution A/56/83 of the United Nations on Responsibility of States for Internationally Wrongful Acts, Of 28 January 2002.
- Resolution MSC.167(78). Guidelines on the Treatment of Persons Rescued At Sea. Adoption 20 May 2004, MSC 78/26/Add.2
- Resolution MSC.155(78) Amendments to the International Convention on Maritime Search And Rescue (1979, As Amended), Adoption 20 May 2004
- A/Res/61/80. United Nations Resolution of The General Assembly. Improving The Coordination of Efforts Against Trafficking In Persons. New York 20 December 2006 [on the Report of The Third Committee (A/61/444)] 61/180.
- United Nations Office on Drugs and Crime Model Law Against The Smuggling Of Migrants, New York, 2010 [Funded By The EU].
- A/Res/67/172. United Nations Resolution of The General Assembly. Protection of Migrants. New York, 20 December 2012.
- A/Res/68/179. United Nations Resolution of The General Assembly. Protection of Migrants. New York, 18 December 2013.
- Recommended Principles and Guidelines on Human Rights at International Borders. UN Office of the High Commissioner for Human Rights. New York, 23 October 2014.
- Maritime Safety Committee/Circ.896/Rev.2 on Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Immigrants by Sea (revised 26 May 2016).
- A/Res/71/1. United Nations Resolution of The General Assembly. New York, 19 September 2016. [New York Declaration for Refugees and Migrants.]

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AI.2. Council of Europe and EU Directives, Regulations, and Resolutions

They have been fully included in footnotes.

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AI.3. State Legislation

Real Decreto de 24 de Julio de 1889 por el que se publica el Código Civil. «Gaceta de Madrid» No. 206, de 25/07/1889 [Royal Decree of 24 July 1889 Publishing the Civil Code].

Proclamation 2667 on Policy of The United States with Respect to the Natural Resources of the Subsoil and Sea Bed of The Continental Shelf, of 28 September 1945, 10 Fed. Reg. 12,304 3 Cfr, 1943-1948 Comp., P. 437.

Proclamation 2668 on Coastal Fisheries in Certain Areas of the High Seas, of 28 September 1945, 10 Fed. Reg. 12,304, 3 Cfr, 1943-1948 Comp., P. 68.

Submerged Lands Resolution, of 22 May 1953. Enacting Public Law 31, 83rd Cong./1st. Sess (House Resolution 4198), 67 Stat. 29.

LO 10/1995 del Código Penal del 23 de noviembre, «BOE» Núm. 281, de 24/11/1995. [Organic Law 10/1995, of November 23, of the (Spanish) Criminal Code. «BOE» No. 281 Of 11/24/1995].

USA Antiterrorism and Effective Death Penalty Act, Public Law No. 104-132, 110 Stat. 1214, 24 April 1996.

RD 2393/2004 Reglamento de Extranjería en España [Regulation on Aliens in Spain] of 30 December. «BOE» No. 6, of 7, January 2005.

USA Code Title 46:[671] Shipping. Public Law 10—304, 6 October 2006, 120 Stat. 1485.

Ley 12/2009, De 30 de octubre, Reguladora del Derecho de Asilo y de la Protección Subsidiaria. [Law 12/2009, Of 30 October 2009, Regulating the Right to Asylum And Subsidiary Protection] «BOE» No. 263, 31 October 2009.

Real Decreto 1334/2012, de 21 de septiembre, sobre las Formalidades Informativas Exigibles a los Buques Mercantes que Lleguen a los Puertos Españoles o que Salgan de éstos. [On Reporting Formalities for Merchant Ships Arriving in or Departing from Spanish Ports] «BOE» No. 229, 22 September 2012.

Ley 14/2014, De 24 de Julio, de Navegación Marítima. [Law 14/2014 of Maritime Navigation] "«BOE» No. 180, 25 July 2014.

Уголовный Кодекс Российской Федерации (С Изменениями На 8 Июня 2020 Года) [Criminal Code Of The Russian Federation, Amended 8 June 2020].

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[671] The United States Code was first published in 1926 as a codification in 53 subjects of the general and permanent laws of the United States. Each code has its own normative development. The list is kept up to date by the Office of the Law Revision Counsel of the U.S. House of Representatives. This text complete Code 46 as a positive law, regulating issues related to shipping. As the USA has not ratified UNCLOS III, it is the legislation applicable to US ships.

APPENDIX II: GLOSSARY OF TERMS

The International Organization for Migration has published a complete glossary related to International Migration Law (Perruchoud & Redpath-Cross, 2019). What follows are only some relevant terms of this glossary.

AII.1. Natural or Legal Persons with Responsibility in the Merchant Marine

Merchant marine here includes any watercraft regardless of her size and purpose who is not a leisure, war, weaponed or other State-owned ship. Thus, warships, coastguards, customs surveillance, state anti-drug agencies, police, or other state security force vessels, even belonging to civil agencies, institutions, or organizations, are excluded.

Cadet
A future officer seafarer in training.

Charterer
It is the natural or legal person who hires the ship. May be the importer, the exporter or even the owner.

Chief Engineer (Cf-Eng, 1-E)
A licenced seafarer head of the engineering department of a merchant vessel. He/she needs to meet the corresponding standard of competence specified in STCW.

First mate/First officer/Chief mate (C/M, Cf-M)
A licenced seafarer second in command in a merchant vessel and usually head of the deck department of a merchant vessel. He/she needs to meet the corresponding standard of competence specified in STCW.

Maritime officer (MO)
Usually called mate, is a licenced seafarer with a degree from a marine academy or college, usually educated and trained both as navigator (mate) and engineer. They oversee and coordinate the activities in a vessel. He/she needs to meet the corresponding standard of competence specified in STCW.[672]

Marine Pilot

[672] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers adopted by the International Marine Organization (IMO) as above.

A certified seafarer licensed by the port authority for navigating the vessel safely in and out of the port. Except for class 1 pilots licensed to pilot any ship, all others (classes 2 to 6) must only pilot a vessel of LOA (length overall) corresponding to their class license.

Limited masters

Seafarers with different trainings, requirements and/or STCW certificates, which oversee, coordinate and/or command the activities of usually small or mid-size vessels with distance, ship design, or size restrictions, such as bay tugboats or vessels, cabotage vessels, small ferries, historical or paddle steamers, sport/leisure boats including yachts (usually called in this case skippers), etc.

Seafarer

Any marine or sailor who has been employed by a shipowner to do ship service on board a ship at sea. Any member of the crew of a ship. They are usually divided into four main categories: deck department, engineering department, steward's department, and other. It encompasses a variety of professions and ranks.

Shipmaster (C)

Also, sea captain, mariner master, ships' captain, is a high-grade licenced seafarer in charge and holding the ultimate command and responsibility including order and discipline of a merchant vessel. He/she needs to meet to meet the corresponding standard of competence specified in STCW. The term captain is used restricted to governmental vessels, particularly warships.

Shipowner, disponent owner, managing company, bareboat charter company, demise charter company, time charter or shipping company.

It is the natural or legal person, who equips a merchant vessel (commercial ship) and may be or not the proprietor of the vessel. If it is also the proprietor is called the owner.[673]

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AII.2. Acronyms and Abbreviations

ACP

African, Caribbean and Pacific States.

AFSJ

Area of freedom, security, and justice.

ANAM

Agence Nationale des Affaires Maritimes.

AU

African Union

BALI Process

[673] For this concept under the maritime labour law (MLC 2006) see (Lielbarde, 2018). For a comprehensive list of ship parts and building terms see: F. Forrest Pease, 1918, Modern Shipbuilding Terms, J. B. Lippincott Company. For a recent update including Asian-built ships see : Charlotte Minh-Hà L. Pham (2012), Basic Terminology of Shipbuilding, UNESCO.

Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime.

BIMCO
Baltic and International Maritime Council.

BS
American Bureau of Shipping.

CARICOM
Caribbean Community and Common Market.

CDM
Acronym in Spanish for UNCLOS. Also, Convemar and CNUDM.

CEN
European Committee for Standardisation.

CFREU (also EUCFR)
Charter of the Fundamental Rights of the European Union

CJEU
Court of Justice of the European Union.

CNUDM
Acronym in Spanish for UNCLOS. Also, Convemar and CDM.

COLREGs
Convention on the International Regulations for Preventing Collisions at Sea.

COMESA
Common Market for Eastern and Southern Africa.

CONCAWE
European Petroleum Refiners Association (Trade name).

CONVEMAR
Acronym in Spanish for UNCLOS. Also, CEM and CNUDM

COREPER, (from French Comité des Représentants Permanents), Committee of Permanent Representatives in the European Union.

DOALOS
Division for Ocean Affairs and the Law of the Sea (UN).

DISERO
Disembarkation Resettlement Offers Scheme.

EASO
European Asylum Support Office.

EBCB
European Border and Coast Guard.

ECHR
European Convention of Human Rights
European Court of Human Rights (in case law).

ECtHR
European Court of Human Rights (elsewhere).

ECJ (*informal***)**
Court of Justice, forming with the General Court the CJEU

EHRC

Equity Human Rights Commission (GB)

ELI

European Legislation Identifier

EMSA

European Maritime Safety Agency.

EMSC

European Migrant Smuggling Centre.

EMPACT

European Multidisciplinary Platform Against Organised Crime**.**

EU

European Union.

EUAA

European Union Agency for Asylum

FONASBA

Federation of National Associations of Ship Brokers and Agents.

Frontex

European Border and Coastguard Agency.

GC

Great Chamber of the ECtHR

HCCH

Hague Conference on Private International Law.

HOTSPOT AREA

an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders.

HSC

Convention on the High Seas (one out of the four spin-off of UNCLOS I)

IACS

International Association of Classification Societies.

IBIA

International Bunker Industry Association Ltd.

ICAT

Inter-Agency Coordination Group Against Trafficking in Persons.

ICC

International Chamber of Commerce.

ICCL

International Council of Cruise Lines.

ICCPR

International Covenant on Civil and Political Rights

ICES

International Council for the Exploration of the Sea.

ICGJ

International Courts of General Jurisdiction

ICS

International Chamber of Shipping.

ICSID

International Centre for Settlement of Investment Disputes.

IFLOS

International Foundation for The Law of The Sea.

IFSMA

International Federation of Ship Masters' Associations.

IGO

Intergovernmental Organization.

ILC

International Law Commission.

ILO network

European network of immigration liaison officers.

IMLI

International Maritime Law Institute.

IMO

International Maritime Organization.

INMARSAT

International Maritime Satellite Organisation.

IOC

Intergovernmental Oceanographic Commission.

IOM

International Organization for Migration.

ISA

International Seabed Authority.

ISF

International Shipping Federation.

ISMA

International Ship Managers' Association.

ISO

International Standards Organisation.

ISPS

International Ship and Port Security.

ITLOS

International Tribunal for the Law of the Sea.

LAN

Local Apparent Noon (nautical), Local Area Network.

LIBE

EU Committee on Civil Liberties, Justice, and Home Affairs.

LR

Lloyds Register of Shipping.

LOSC

Law of the Sea Convention (See UNCLOS).

MARPOL

International Convention for the Prevention of Pollution of Ships.

MCA

Maritime and Coastguard Agency.

MSC

Maritime Safety Committee.

MEPC

Marine Environment Protection Committee (IMO).

MMSI

Maritime Mobile Service Identity.

NDICI

Neighbourhood, Development, and International Cooperation Instrument – Global Europe.

NECSA

Navigational Electronic Chart System Association.

NGO

Non-governmental organization.

NI

Nautical Institute.

OECD

Organisation for Economic Co-operation and Development.

OHCHR

Office of the High Commissioner for Human Rights.

OPEC

Organisation of Petroleum Exporting Countries.

PCIJ

Permanent Court of International Justice.

SART

Search and Rescue Locating device.

SEVIMAR-See SOLAS

SIENA

Secure Information Exchange Network Application.

SOLAS

International Convention for the Safety of Life at Sea.

STCW

International Convention on Standards of Training, Certification and Watchkeeping for Seafarers.

TCL

Transnational criminal law.

TEC

European Community Treaty (Treaty establishing the European Community):

TFEU

Treaty on the Functioning of the European Union.

TEU

Treaty on European Union.

TNC

Transnational corporation.

UA

Union Africaine.

UDHR

Universal Declaration of Human Rights.

UE

Union Européenne (see EU).

UN

United Nations.

UNCITRAL

United Nations Commission on International Trade Law.

UNCLOS (III)

United Nations Convention on the Law of the Sea.

UNCTAD

United Nations Conference on Trade and Development.

UNCTC

United Nations Centre on Transnational Corporations.

UNHCR

United Nations High Commissioner for Refugees.

UNHCR Excom

The Executive Committee of the High Commissioner's Programme.

UNIDROIT

International Institute for the Unification of Private Law.

UNODC

United Nations Office on Drugs and Crime.

VCLT

Vienna Convention on the Law of Treaties.

WMU

World Maritime University.

WTO

World Trade Organization.

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AII.3. Legal Maritime Related Terms

With special focus on distress at sea. For a comprehensive glossary of legal maritime terms see (Walker, 2012).

ADV

Abandoned and derelict watercraft. As result of lack of maintenance, weather conditions or criminal actions, a watercraft may drift away. ADVs could potentially obstruct navigation, leak fuel and hazardous materials into the water, and create debris damaging the ecosystems and marine resources.

Agency

European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Regulation (EC) No 2007/2004 (Frontex).

Allision

The act of a moving object striking a stationary object. For example, a moving vessel that runs into a stationary bridge fender.

BOE

Boletín Oficial del Estado (Spanish Official State Bulletin)

Border

A delimiting line determining where the territorial sovereignty and jurisdiction that depend respectively on two neighbouring States begin or end. Also, as a zone or space neighbouring the line of separation between this two States. Despite its name, it also applies to the sea (see territorial sea)

which the breadth of the territorial sea is measured.

CFSP

Common Foreign and Security Policy (EU).

Coastal state

Although frequently referred to, there is no definition at UNCLOS 1982 of Coastal States being a universally understood concept of States with a sea-coastline. However, the concept may be deducted by exclusion of the UNCLOS defined Archipelago States and Land-locked States. According to Børresen, UNCLOS 1982 definition requires for a coastal State to have “an ocean coast with adjacent territorial waters, exclusive economic zone and continental shelf” (Børresen, 1994, p. 148) but a definition expressed in those terms does not appear in UNCLOS 1982.

Demurrage

A penalty charge against shippers or consignees for delaying in load or unload the ship beyond the allowed set time.

Derelict

Any watercraft abandoned and drifting aimlessly at sea.

INSARAG

International Search and Rescue Advisory Group.

Land-locked state

A State which has no seacoast (UNCLOS Art 124.1.a)

LO

Ley Orgánica (Organic Law). A law or system of laws of Parliament usually with special requirements for its approval, as conform the basic foundation of the State, of a higher order than the ordinary acts, existing in some countries (for example, in France, *lois organiques*, or USA [Organic Act Volume One of the United States Code]), sometimes also called institutional acts. Unless otherwise indicated, the LO acronym shall refer to a Spanish Organic Law.

Male captus, bene detentus

Wrongly captured, properly detained. Commonly used about abductions and irregular renditions. “Wrongly captured” refers to the removal of a person from one jurisdiction to another jurisdiction, such as from one country to another country, without bilateral consent. Absent a protest or demand from the originating country to return the person, the person may be “properly detained” and tried in the new jurisdiction.

MPAs

Marine protected areas

Regional Disembarkation Platforms (RDP)

Disembarkation centres for illegal migrants outside the EU.

Terra nullius

Empty land / land of no one. Typically used to refer to a territorial category for land that is not occupied but capable of being occupied.

Transit state

A State with or without a seacoast situated between a land-locked State and the sea (UNCLOS Art 124.1.b)

SAR (SEA)

Search And Rescue logistics including rescue coordination centres (RCC), resources, and procedures to aid persons or sea crafts in potential or imminent distress, promoted by the coastal States (Art. 98 UNCLOS). SAR regions of responsibility (SRRs) corresponding to each RCC are established by the IMO. Personnel may be military, civilian or mix.

SSR

Search and Rescue Region of Responsibility

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AII.4. Merchant Marine Crafts and Terms

As commented above, leisure and sailing vessels including tall ships, have also been excluded, although they may occasionally trade or even cruise commercially.

The classification and registration of vessels is of legal interest, as shipbuilders and Third-Party certifiers remain liable for damages for negligence in the performance of their work (Alcántara, 2008; De Bruyne, 2019). The vessels are usually named based on their function. Vessel groupings used by (United Nations Conference on Trade and Development (UNCTAD), 2018), is as follows: Oil tankers, Bulk carriers, combination carriers, multi-purpose and project vessels, roll-on roll-off (ro-ro) cargo, general cargo, full cellular container ships and other ships including liquefied petroleum gas carrier, liquefied natural gas carriers, parcel (chemical) tankers, specialized tankers, reefers, offshore supply vessels, tugs, dredgers, cruise, ferries, other non-cargo ships.

AIS-SART

Automatic Identification System SART.

Barge

A long vessel with a flat bottom, occasionally self-propelled, used for carrying cargo on rivers or canals.

Boat people

A term originated during the Indochinese crisis about 1975. It now refers commonly to migrants who flee their countries by sea in small and overloaded boats.

BNWAS

Bridge Navigational Watch Alarms System.

Bulk carrier

A ship that carries unpackaged cargo, usually consisting of a single dry commodity, such as coal or grain.

Bunker

Fuel and Diesel oil supplies (word originated from coal bunkers).

C/F

Car Ferry

Coasters

Smaller vessels of any kind for coastal trade (cabotage).

Container ship

A cellular container ship is provided with a net of strong cells built with vertical metal guides, in the holds, and occasionally also on deck, where the containers are securely stowed. In a non-cellular container carrier, the containers are stowed and secured without any specific-built in support structure.

Crew Boat (also support or supply vessels)

A vessel used to transport personnel and various cargo to and from larger vessels or offshore structures.

Cruise (passengers) ship

A vessel with passenger accommodation, designed for leisure travelling with planned itinerary including visiting ports and a length of several days.[674]

CRV

Coastal research vessel

CS

Container ship or Cargo ship

Dinghy

A small boat often carried or towed as an auxiliar (tender) craft by a larger vessel.

DISERO

Disembarkation Resettlement Offers Scheme.

DWT

Deadweight tons.

EPIRB

Emergency position-indicating radio beacon.

ETOPS (ETS)

Emergency towing system (also emergency towing gear) MSC.35(63). Strongpoints and fairleads structures used to tow a ship out of danger in emergencies.

Ferry

A vessel, especially in regular or usual service, to carry passengers, and sometimes vehicles or cargo, along two or more short maritime routes. There may be different types of ferries such as hydrofoils, over crafts, catamarans, etc.

Fishing vessel (commercial)

A vessel for professional fishing and often to keep the catch refrigerated. They may be of different types (seiner, crabber, trollers, factory trawler, etc).

Flag State

It is the country jurisdiction (applicable even to land-locked states) under which any merchant vessel must be compulsorily registered. It defines the nationality of the vessel. Only one registration in a (flag) State is allowed, although the vessel may change to another flag State with a new register. Vessels are subjected to flag State laws.

General cargo (Break bulk cargo)

A ship that carries goods which must be loaded individually, and not in intermodal containers, nor in bulk as with oil or grain. A cargo with a system to transport

[674] The definition of cruise is unclear. Some academics require the trip to begin and end in the same port as to have the consideration of cruise. Other may objections to use the term when passengers join or leave during the trip, etc. (Patterson, 2017, p. 177).

perishable commodities (fruit, meet, etc) refrigerated, (temperature-controlled transportation) is called a reefer.

GMDSS

Global Maritime Distress Shipboard Safety System.

GT

Gross tons.

Host member State

The EU Member State to which a union citizen moves in order to exercise their right to free movement and residence (Art. 2(3) of Council Directive 2004/38/EC).

Inflatable (raft)

A small rubber or plastic boat that can be filled with air.

Lifeboat

A specially designed small boat, either carried on board in a ship, or launched from the shore, used to take crew and passengers to safety in case of vessel's difficulty. If it has an engine is called motor lifeboat (MLB)

Lighter

A vessel, usually a barge type, used to short-distance transport consumables, combustible, or cargo to and from moored vessels, or between them. The process of reducing the large-ship draft by partial transfer of the load, making possible to enter port is called lightering or lighterage.

LOA

Length overall.

LRIT

Long-range identification and tracking.

LSA

Fire severity index (Land Surface Albedo).

MS (M/S)

Motor ship (exchangeable with MV)

MRCC

Maritime Rescue Coordination Centre.

MT (M/T)

Motor tanker

MV (M/V)

Motor vessel (exchangeable with MS)

Non-cargo research vessels

Vessels designed for hydrographic and oceanographic research. Vessels in this group perform naval, fisheries, polar, oil, or another type of research.

Non-cargo ships for sea works and installations

Vessels used for cable laying, or dredge, and similar surface or underwater works, taking the name of the function (cable laying ship, dredger, icebreaker etc).

Patera

Although the dictionary accepted meaning is usually an ancient Roman bowl used in rituals, a saucer-shaped decorative element, or a planetary crater, here it means a small boat or used for illegal migration, typical of West Mediterranean illegal sea border crossing.

Raft

A non-self-propelled fixed or mobile floating structure usually made of timber. If is not fixed it may be moved along with paddles or poles, or towed.

Ro-Ro cargo (roll-on roll-off)

Vessels designed to carry wheeled cargo, such as cars, trucks, semi-trailer trucks, trailers, and railroad cars, that are driven on and off the ship on their own wheels or using a platform vehicle, such as a self-propelled modular transporter.

Ships and boats

The difference is a semantic dilemma with an open forum on the net.[675] Aside of submarines, and ferries which are usually considered boats, regardless of their size, the most used rule to differentiate them is: a ship can carry a boat, but a boat cannot carry a ship. There are some characteristics which may help to solve the dilemma. A boat usually has only one deck while a ship has more than one deck above the water line. A ship has a through fitted deck, whereas a boat has one at least partly open cockpit and may be completely open. On a boat, seafarers activity happens on the deck while in a ship the activity takes place mainly inside. On a boat the centre of gravity lies below the freeboard, while on a ship it is found above it. A ship will heel outward during a turn, a boat will turn inward during a turn. You can row a boat; you cannot row a ship. A boat is a watercraft for inshore or costal navigation. A ship is an ocean-going designed vessel. A boat heels the direction of its turn. A ship heels away from the direction of its turn. A boat can be lifted out of water for repairs while a ship needs a drydock. Taking all this in mind, although seamen hate providing a size or weight as definition, with the logical exceptions and reserve, a boat would probably not exceed 30.5 m (100 feet) LOA, with a weight of less than 150 Tons gross (deadweight tons, DWT).

Tanker

A ship used for transporting large quantities of gas or liquid, especially oil.

Tug (tugboat)

A vessel provided with a powerful engine, used to help in mooring and berthing operations either by towing or pushing big ships.

Vessel

A watercraft bigger than a rowboat. As for Regulation (EU) no 656/2014 of the European Parliament and of the Council of 15 May 2014, establishing rules for the surveillance of the external sea borders in the context of operational cooperation

[675] Guardian.Co.UK. What is the difference between a boat and a ship? [Blog post, ND] (electronic resource), available at: *https://www.theguardian.com/notesandqueries/query/0,,-197783,00.html (accessed on 25 November 2021)*

coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union a vessel means “any type of water craft, including boats, dinghies, floating platforms, non-displacement craft and seaplanes, used or capable of being used at sea” (Art 2 (9)).

Watercraft

A generic term for vehicles used in water, including boats, ships, hovercrafts, and submarines.

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AII.5. Maritime Zones

The delimitation of the territorial sea between States with opposite or adjacent coasts as regulated by UNCLOS III, and open to bilateral agreements or else to “the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured” (Art. 15).

The following figure presents the solution adopted in the Strait of Gibraltar with a complex mix of territorial waters.

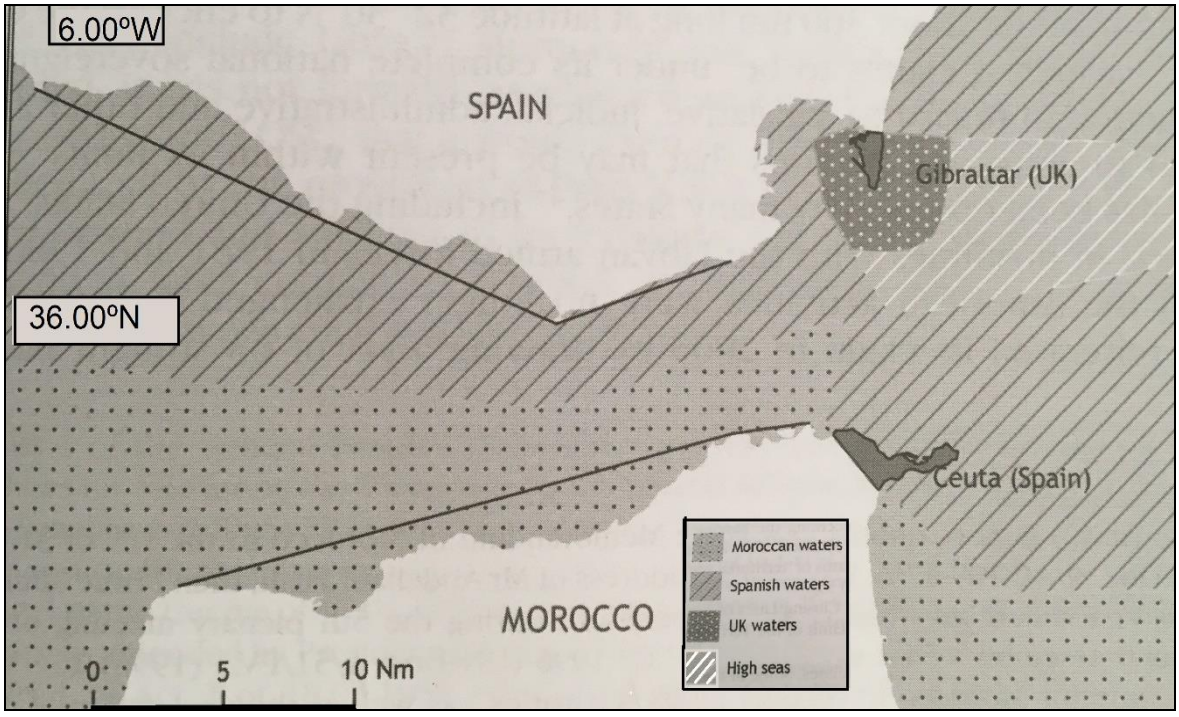

Figure AII−1. Territorial waters in the Strait of Gibraltar. Source: Modified from (Vrancken & Tsamenyi, 2017, p. 115).

By contrast the delimitation of the EEZs and continental shelves requires an agreement based on international law “as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”

UNCLOS III, Art. 74.1 & Art. 83.1.[676] Following (Vrancken & Tsamenyi, 2017, pp. 14–23) there are nine possible maritime zones:

1. Archipelagic waters

The waters belonging to an archipelagic State, as defined by UNCLOS III, Part IV, Articles 46–54, and recognised as sovereign State by the UN.

2. Continental shelf

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance (UNCLOS III, Part VI, Art 76).

3. Contiguous zone (UNCLOS III, Section 4)

A zone of the high seas contiguous to its territorial sea, where the coastal State my exercise control to prevent infringement of tis customs, immigration or sanitary regulation and punish infringement of the above regulations committed within its territory or territorial sea. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

4. High seas

All parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State (UNCLOS III Part VII, Art 86).

5. EEZ

Exclusive Economic Zone, an area beyond and adjacent to the territorial sea not extending beyond 200 nautical miles, subject to a specific legal regime (UNCLOS III, Part V, Art 55–74).

6. International seabed area

Defined as «the Area» consists of the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (UNCLOS III, art.1.1.1).

7. Internal waters

Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State (except rules applied to archipelagic waters) (UNCLOS III, Art. 8).

[676] The same text is repeated in two Articles of the Convention, the former for the EEZ and the later for the Continental Shelf. The EEZ delimitation is not free of controversies, particularly if the subsoil is rich in resources. For the controversy between Cyprus and Turkey and more on the EEZ issues of East Mediterranean Sea see: (Gafarlı, 2019). For the problematic of EEZs and their delimitations in semi-closed seas, such as the Mediterranean Sea, see (González Jiménez, 2007).

8.Straits

One of the international waterways (together with canals and rivers) or narrow channels of marginal sea or inland waters connecting high seas of an EEZ with high seas or another EEZ where international shipping has the right of passage (UNCLOS III, Arts. 37 & 38).

9. Territorial Sea or **waters**)

Water over which a state claims to have jurisdiction, including internal waters.

Water under jurisdiction of a State up to a limit not exceeding 12 nautical miles determined in accordance with the Convention (UNCLOS III, Secc. 2, Art. 3).

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APPENDIX III: SURVEY

AIII.1. Purpose

This survey aims to obtain information on the degree of knowledge and positioning of the Spanish residents in relation to the migration issue. To avoid bias, the foreign resident population has been included for the calculation of age, gender, employment, and education, but not for the questions relating to immigration. The main results have been previously commented on in Chapter 8. The answers to the corresponding immigration-related questions are shown in full in this appendix. As an investigation on Social and Juridical Sciences, it was not intended to carry out mathematically and statistically exhaustive and complex methodology, which would require a much more extended organisation and means than are reasonably available and fit in a doctoral project in Rule of Law and Global Governance. Data collected, even with the limited precision used, may be useful as a prime for future studies.

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AIII.2. Methodology

The questionnaires have been distributed by volunteers in places of general open access such as supermarkets, hairdressers, bakeries, rental housing offices, or health care facilities. Participation was anonymised, voluntary and unpaid. Twenty-five questions have been included in the questionnaire, of which the first four are descriptive, broken down by year of birth, and mutually exclusive options for gender (three options), educational level (three options), and source of income (four options). They have been included to analyse bias selection with respect to the target population.

An (even) 10-point Likert (agree-disagree) scale was used (Anderson, 2020; Croasmun & Ostrom, 2011; Likert, 1932; Russell & Cohn, 2012) for the 21 remaining questions relating to immigration, instead of the frequently used (odd five or seven) points option, although later the answers were grouped for graphical description as usual in Likert tables of five points. For data entry a self-designed grid was used, computing the results with advanced Excel functions, macros, and graphics, programmed in Visual Basic, or using the statistical application for Java® SPSS® as appropriate.

Geographical distribution: Three regions with different characteristics of Spain (Galicia, Valencia, and the Balearic Islands) to infer a representation of the whole country. Universe: Population of 18 years of age or over, of Spanish

nationality (those with the right to vote). Non-nationals have been asked not to answer the questionnaire, although their gender, age, level of studies and work activity are included, as these data are not disaggregated between national and non-national populations in the official statistics. They were only included as far as testing the sample representativity of the Spanish population as a whole.

Fieldwork timeframe: questionnaires administered between 15 September and 15 December 2020. Data entry and data processing performed by the author, using a spreadsheet with macros and SPSS statistic software.

Inferential data: Data for comparison: Spanish population (2020, INE[677])

Table AIII.1

Spanish population 2020

Total population Spain 2020	47,450,795
Total Non-nationals	5,434,153
Non-Nationals aged ≥18	4,464,689
Nationals aged ≥ 18	34,684,877
Total ≥ 18 yo.	39,149,566
Men	48.6%
Women	51.4%
% of Non-Nationals ≥ 18 yo	11.4%
Average age men (all) ≥ 18 yo	49.24
Average age women (all) ≥ 18 yo	51.44

Note: Author's computation with data from INE 2020

Level of education:

Table AIII.2

Level of education. Spain (2019)

Primary studies only	38.6%
Up to secondary studies	22.7%
Up to tertiary Studies (University/Polytechnic)	38.7%

Note: Source: Ministry of Education[678]

As for the labour profile, the next table summarises the information used as reference.

[677] Instituto Nacional de Estadística [Spanish Institute of Statistics] offers open data on the web free of cost.

[678] Panorama de la Educación 2020. España en comparación con los países de la OCDE. Indicadores de la OCDE 2020 [Education 2020 at a glance. Spain compared to OECD countries. OECD 2020 indicators] (electronic resource) available at: *http://blog.intef.es/inee/2020/09/08/panorama-de-la-educacion-2020/ (accessed on 20 September 2021).*

Table AIII.3

Residents in Spain in 2020 aged 18 yo and more by activity and work.

Total population	34.70		
Active population	21.48		62%
Employed	18.18	85%	
Unmployed	3.30	15%	
Inactive population	13.22	100%	38%
			100%
Inactive			
On pension	8.50	64%	
Other subside	0.40	3%	
Students/ Other inactive	4.32	33%	(University 1.5)
	13.22	100%	
Active (and employed)			
Self employed	2.71	15%	
Salaried work 1st-level educ.	3.47	19%	
Salaried work 2nd-level educ.	8.72	48%	
Salaried work Univ-degree/Directors.	3.28	18%	
	18.18	100%	

Note: Data from INE, EPA, Social Security databases. Adapted for population ≥ 18. (1%) Non-National on pension obtained from UGT trade union.

Sample size data: Sample error: Random criterion, confidence level (85% two sigma), worst case scenario (p = q = 50%), margin of error in the total sample ± 5.5% (d = 0.055).

$$n = \frac{N * Z^2 * p * q}{d^2 * (N-1) + Z^2 * p * q}$$

N = 39,149,566
Z (85%) = 1.435
d = 0.055
p = q = 0.5
It results in a sample size (n) = 170

To assess the inferential aspect of the sample as representative of the universe of the general resident population (representativeness of the sample with respect to the Spanish population aged 18 or over), the following parameters were computed: 1/ Comparison of percentage of foreigners. 2) Average age by gender. 3/ Gender proportion. 4/ Level of education. 5/ Source of income (labour profile as: unemployed/pension; nonqualified labour; qualified labour; directors/executives). Inference analysis to test if the sample is representative of the population of Spanish residents aged 18 or over.

Nationality (n= 172)
Non-nationals: sample = 12.2%; population = 11.56 %

Statistic *Z*

$$Z = \frac{\%Sample - \%population}{\sqrt{\%populaton * (1 - \%population)}/_{n}}$$

Z non-national = 0.266322524; *p*-value = 0.369512; 0.789990828 (two tails)

Age (*n* = 168):
Men: sample = 49.71; population = 49.24
Women: sample = 51.1; population = 51.44
Statistic t student (assuming normal distribution)

$$t = \frac{\bar{x} - \mu}{s/\sqrt{n}}$$

Where $\bar{x}$ is the average of the sample, μ the average of the population, *s* the sample standard deviation and *n* the size of the sample.

For age of men *t* = 0.333774311; *p*-value = 0.369512.
For age of women *t* = -0.218389543, *p*-value = 0.413848

Gender (*n* = 171):
Men: sample = 48.3%; population = 48.6%
Women: sample = 51.2%; population = 51.4%

Statistic *Z*

$$Z = \frac{\%Sample - \%population}{\sqrt{\%populaton * (1 - \%population)}/_{n}}$$

Z men = –0.016218404; *p*-value = 0.987060153 (two tails)
Z women = 0.016218404; *p*-value = 0.49350077 (two tails)

Level of education (*n* = 168):

Level 0-2: sample = 22.6%; population = 38.6%
Level 3-4: sample = 33.3%; population = 22.7%
Level 5-8: sample = 44.0 %; population = 38.7%
Statistic chi-square

$$\chi 2 = \sum \frac{(f observed - f\ theoric)^2}{f\ theoric}$$

χ^2 = 0.12307744 (2 degrees of freedom); *p* value = 0.9403

Labour activity (*n* = 165)
The data is summarised in the next table.

Table AIII.4
Labour profile. Spain (2020)

	Spain		Sample
	(n) Millions	(%)	(%)
Inactives+ Unemp.	16.5	48%	47%
Self employed	2.7	8%	11%
Workers without qual.	3.5	10%	15%
Qualif. Workers + Directives	12	35%	27%
Total	34.7	100%	100%

Note: Source: See footnote in Table AIII.3.

χ^2 = 0.054733053; *p*-value 0.99 (3 degree of freedom)

Statistics conclusion: the inferential analysis shows that there is no significant difference between the data of the sample and that of the population, thus it must be considered that the sample is a true statistical cluster sampling representing the entire Spanish population.

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AIII.3. Results

There is a difference of opinion on the best way to process data obtained with a Likert scale. Likert items are discrete, ordinal, and limited in scope. Data collection with the Likert scale does not allow for the assumption that the distribution is normal and therefore neither the mean nor the standard deviation are appropriate statistics.[679] Data represented in bars, pie charts and the median are included.

The next table presents data from the 21 questions (Q_1–A_{25}) related to migration:

Table AIII.5
Summarised statistics of the questionnaire

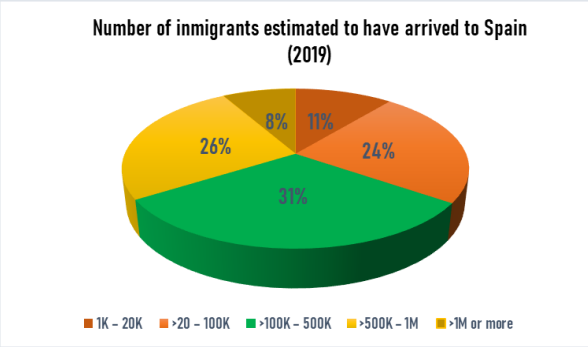
Qn in survey►	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Mode	5	9	10	10	1	10	10	8	10	8	10	5	10	5	10	8	1	10	10	10	10
Median	5	8	7	9	2	8	9	7	7	6	8	5	6	5	7.5	6	2	8	10	8	8
Valid (n)	147	147	150	149	151	151	150	149	149	148	147	146	147	148	148	148	147	145	148	147	146

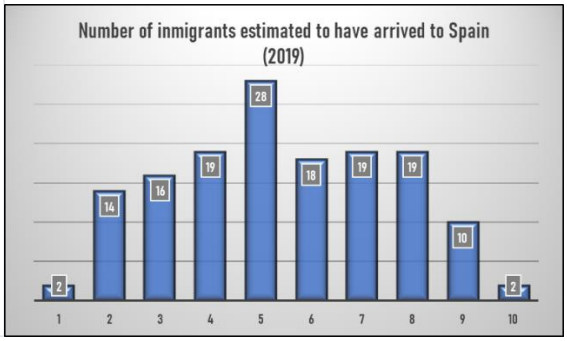
Note: Author's computation.

[679] *https://blog.hubspot.es/service/escala-likert (accessed on 20 September 2021).*

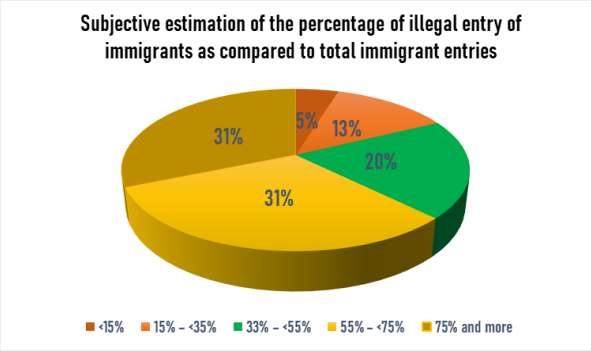
Each of the 21 questions follows, both in bar diagram (10) and as a pie chart (5).

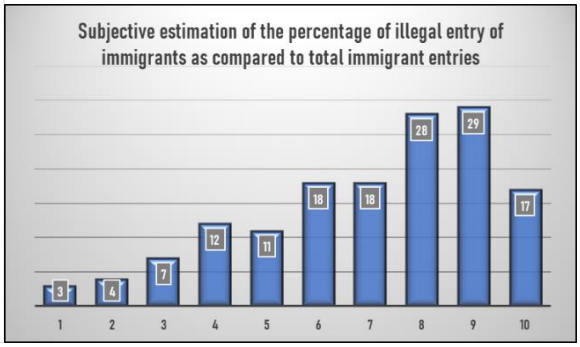
Q_5 About how many migrants do you think that arrived in Spain in 2019?



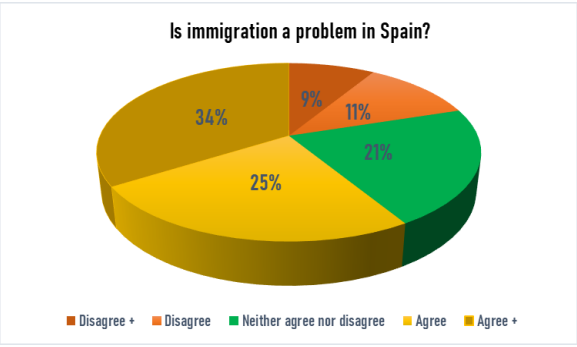


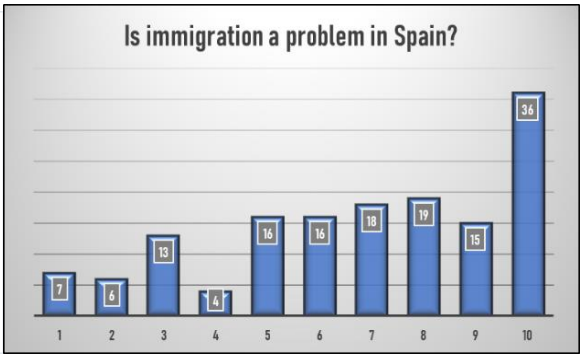
Q_6 About how many of them have arrived, in your opinion, illegally (border crossing)?



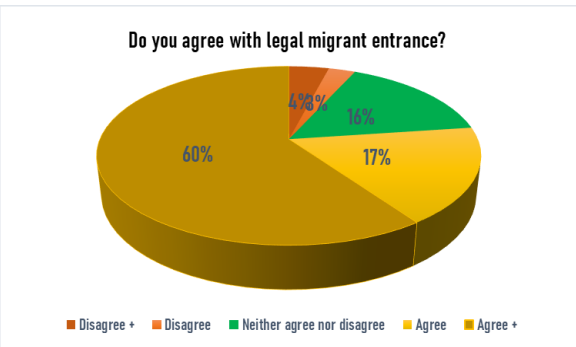


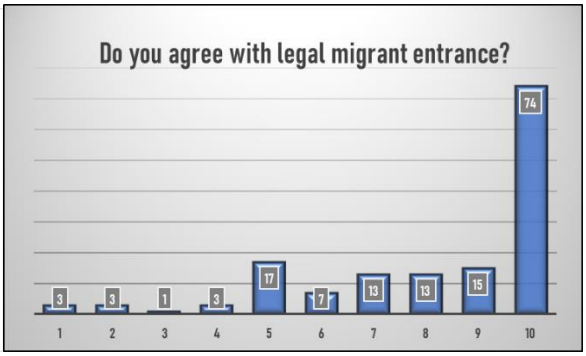
Q_7 Do you believe that immigration is a problem in Spain?



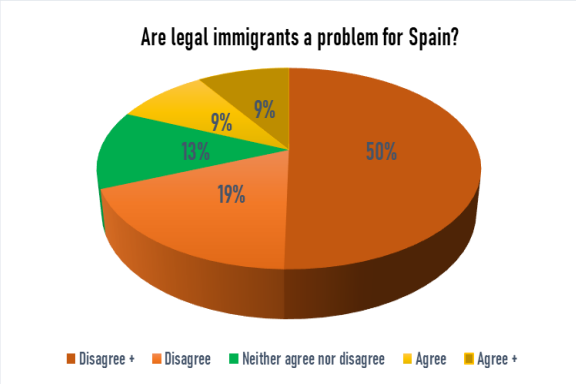


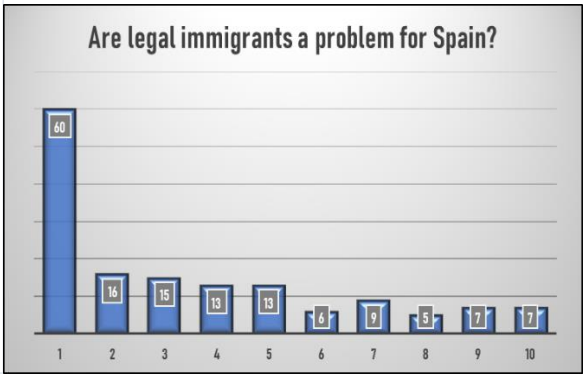
Q8 Do you agree with the arrival of migrants as long as they come legally?



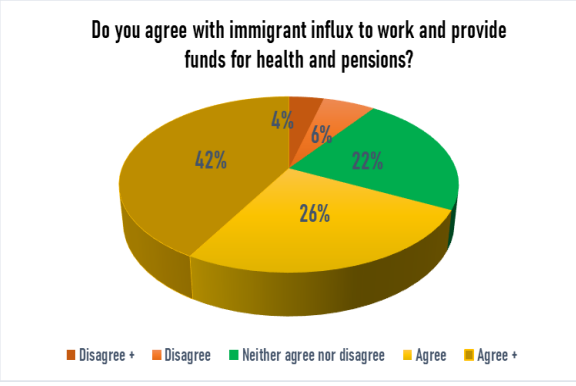


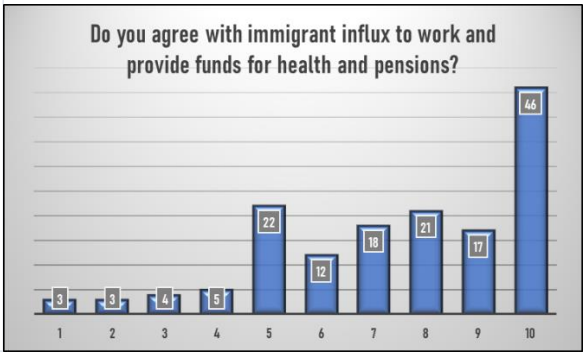
Q9 Do you think that legal migrants are a problem for the country?



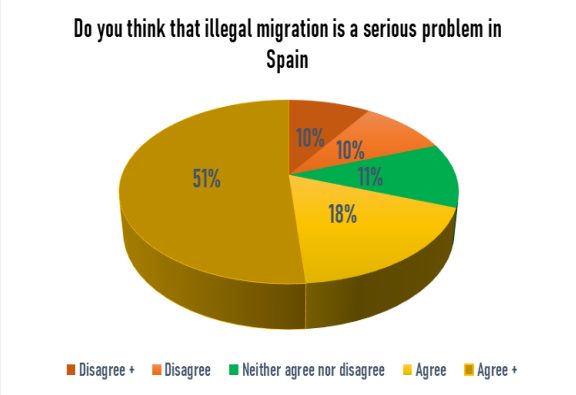


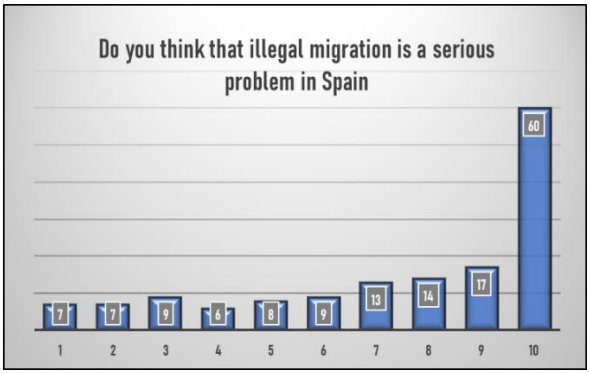
Q10 Do you agree with immigrant influx to work and provide funds for health and pensions?



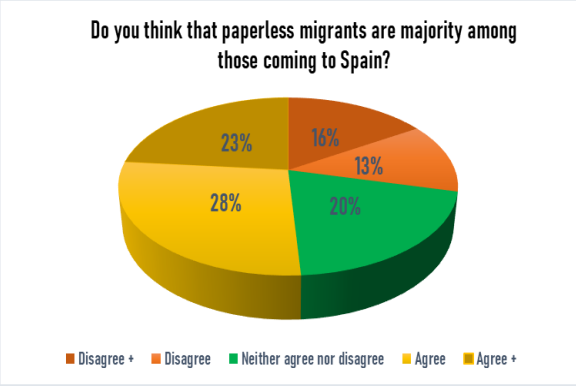


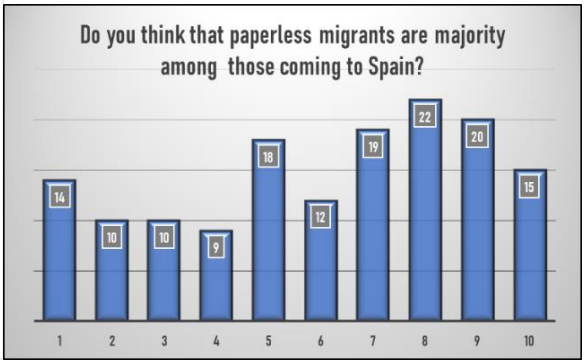
Q11 Do you think that illegal migration is a serious problem in Spain?



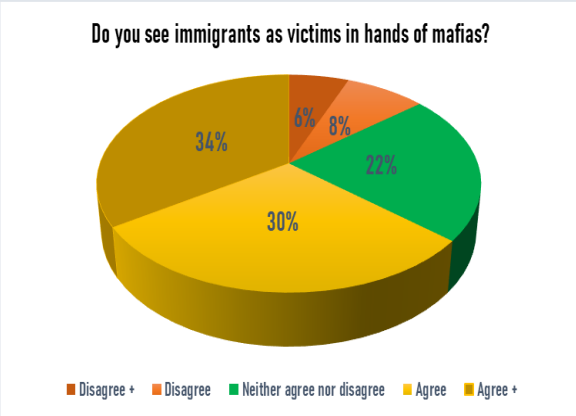


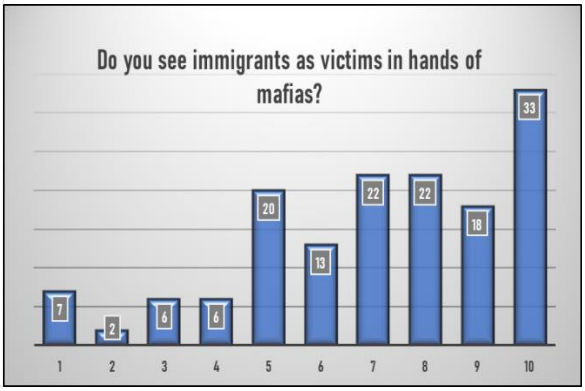
Q12 Do you think that paperless migrants are majority among those coming to Spain?



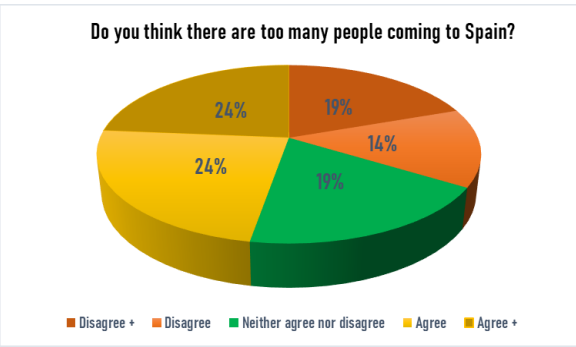


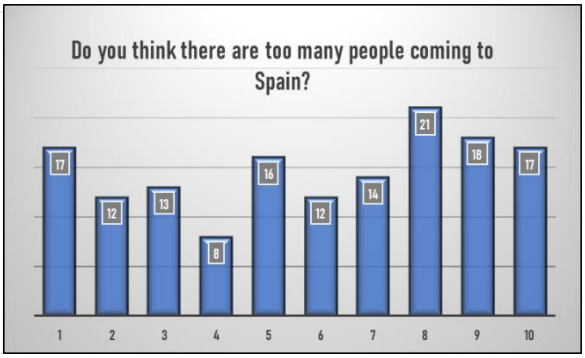
Q13 Do you see immigrants as victims in hands of mafias?



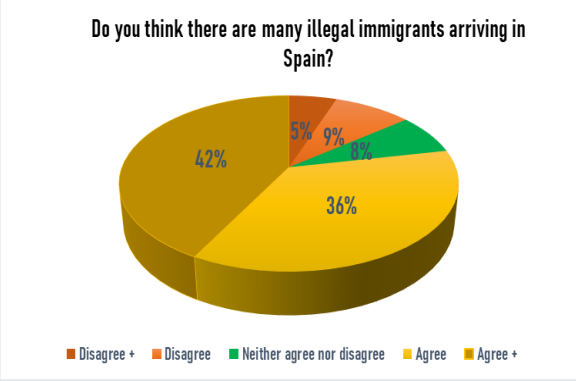


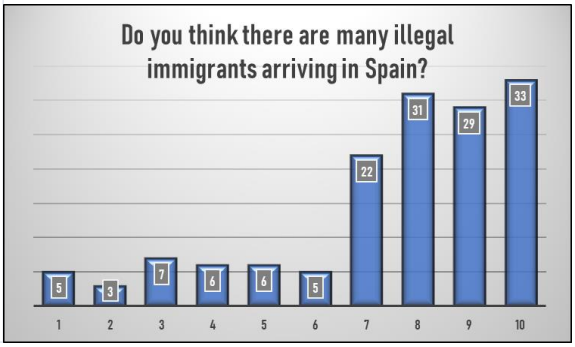
Q14 Do you think there are too many people coming to Spain?



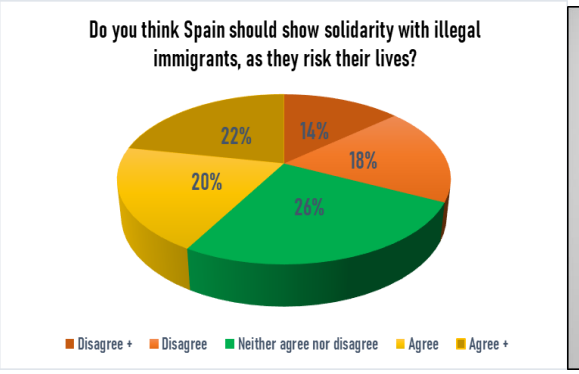


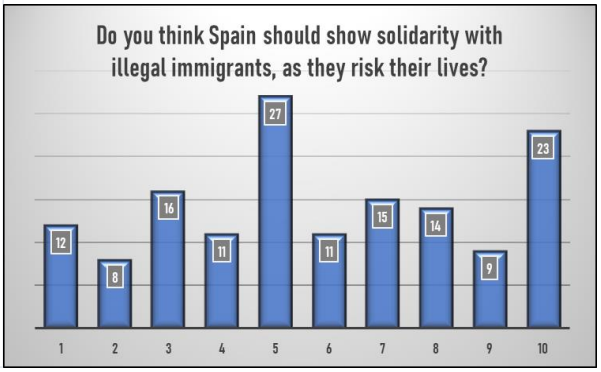
Q15 Do you think there are many illegal immigrants arriving in Spain?



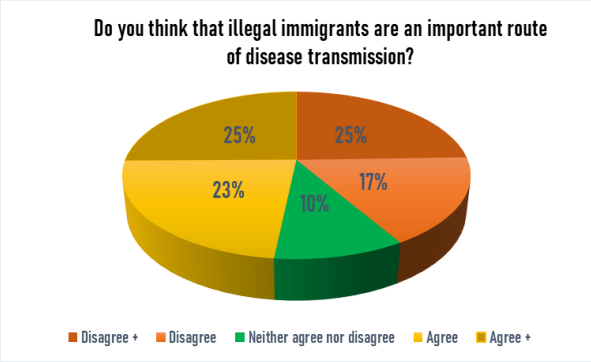


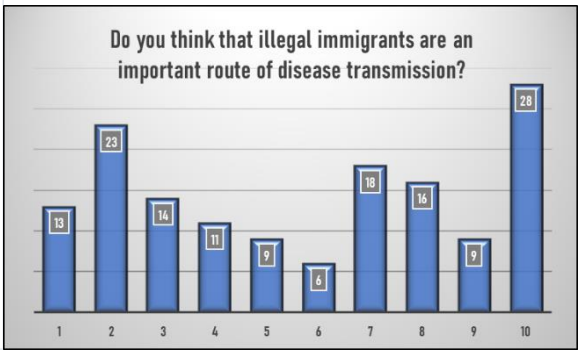
Q16 Do you think Spain should show solidarity with illegal immigrants, as they risk their lives?



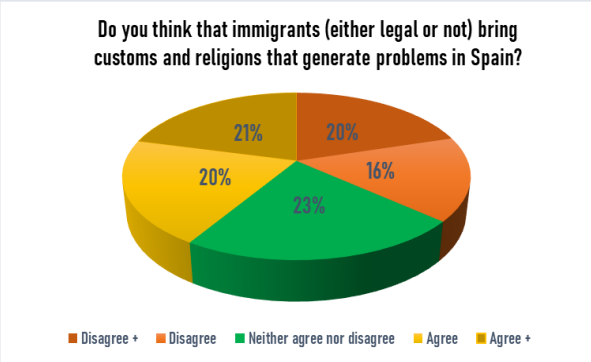


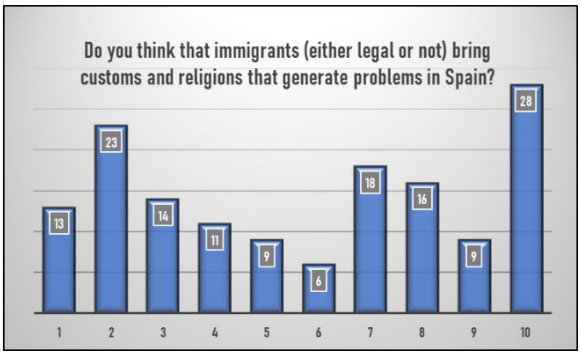
Q17 Do you think that illegal immigrants are an important route of disease transmission?



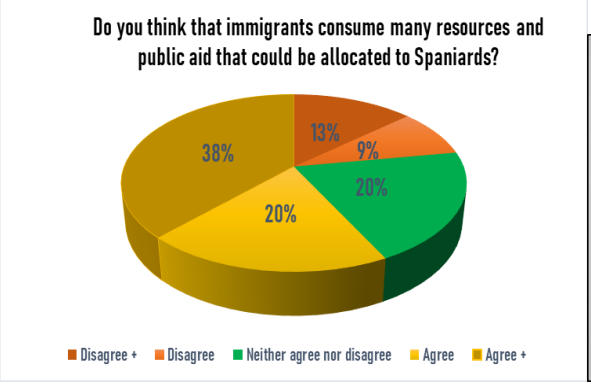


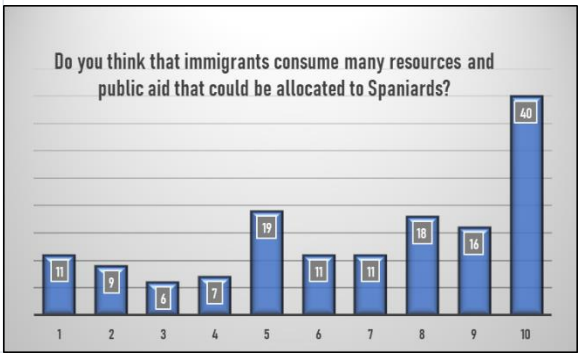
Q18 Do you think that immigrants (either legal or not) bring customs and religions that generate problems in Spain?



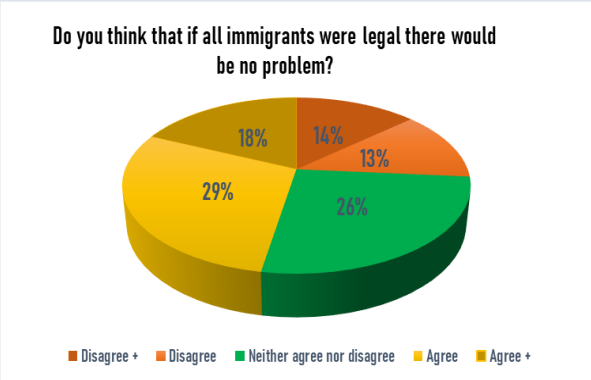


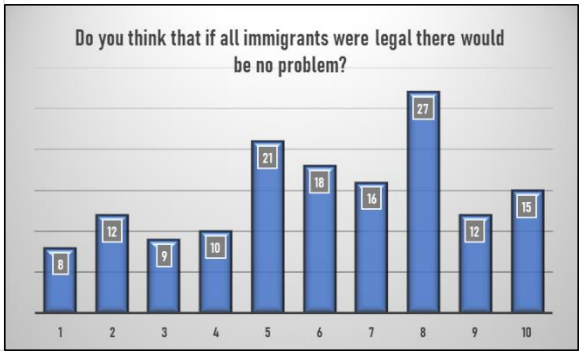
Q19 Do you think that immigrants consume many resources and public aid that could be allocated to Spaniards?



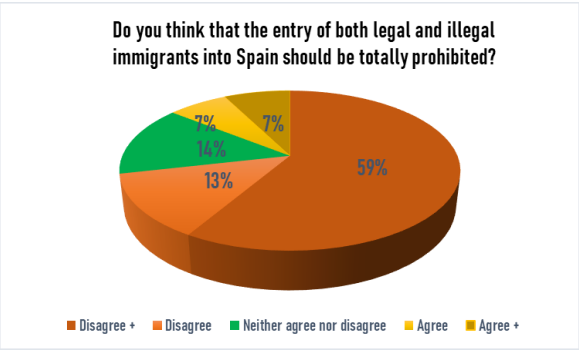


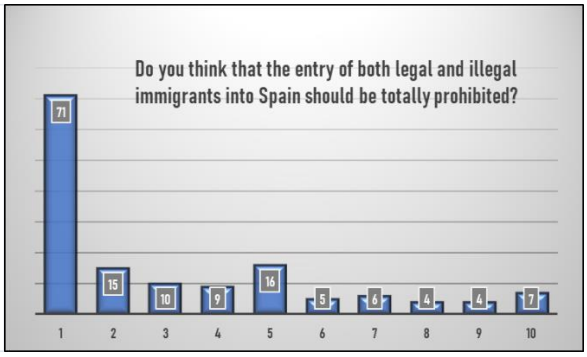
Q20 Do you think that if all immigrants were legal there would be no problem?



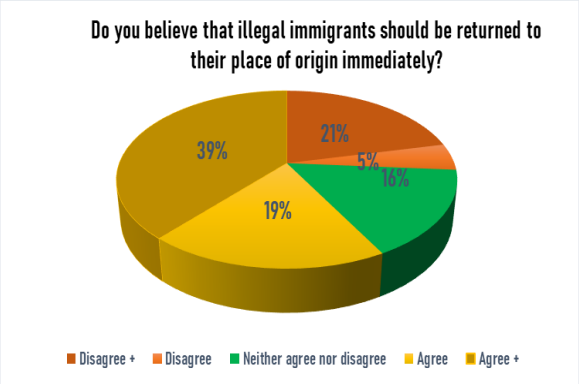


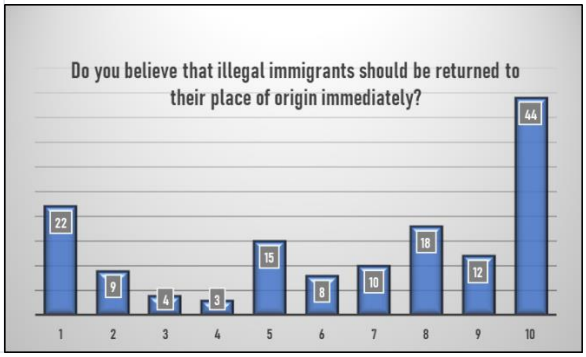
Q21 Do you think that the entry of both legal and illegal immigrants into Spain should be totally prohibited?



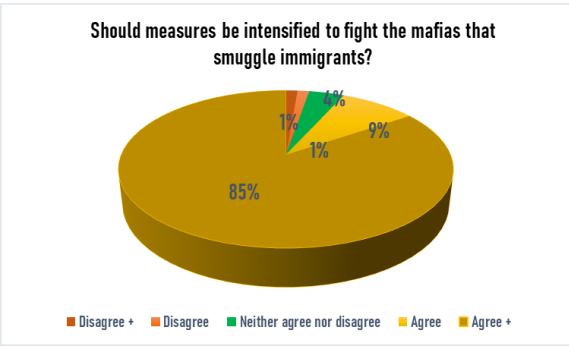


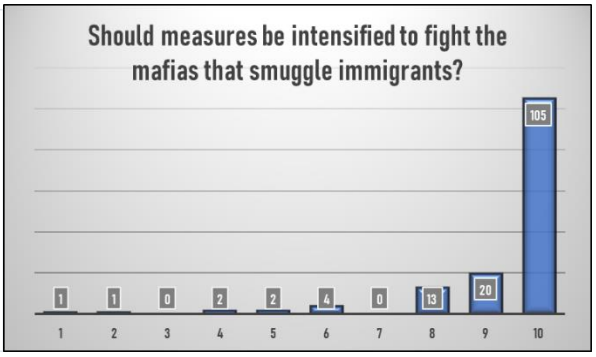
Q22 Do you believe that illegal immigrants should be returned to their place of origin immediately?



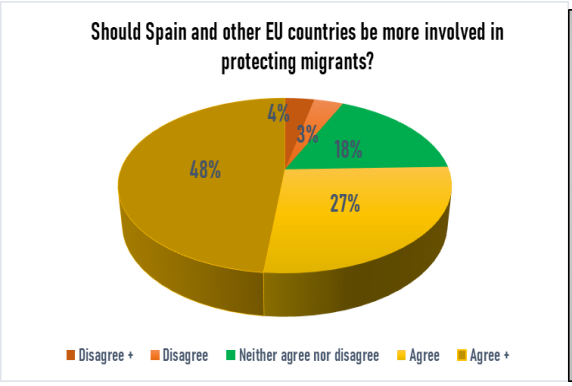


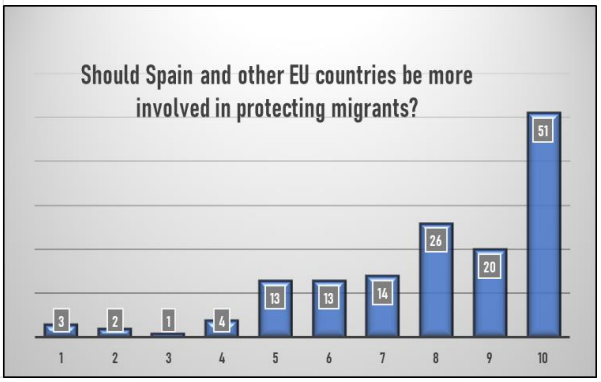
Q23 Should measures be intensified to fight the mafias that smuggle immigrants?



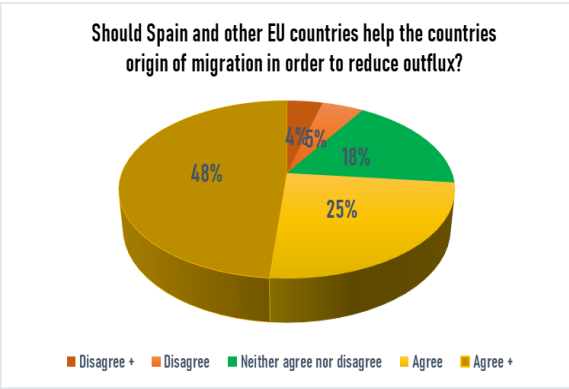


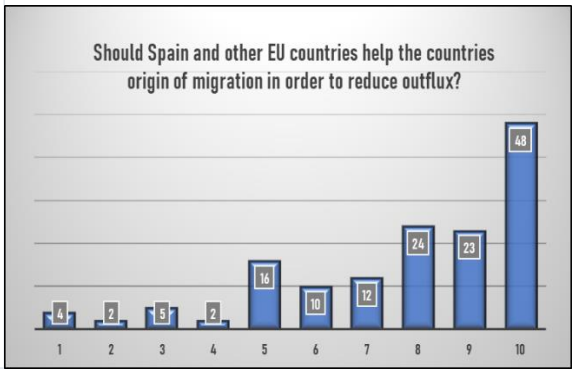
Q24 Should Spain and other EU countries be more involved in protecting migrants?





Q25 Should Spain and other EU countries help the countries origin of migration in order to reduce outflux?





AIII.4. Questionnaire

Esta encuesta forma parte de una investigación universitaria destinada a proponer cambios en las leyes. Los investigadores no somos políticos y no sabemos si nuestras propuestas se van a llevar a cabo o no. Este trabajo tiene como fin conocer pareceres y plantear posibles mejoras legales relativas a la inmigración basándonos en las opiniones de los españoles. Para cualquier duda consulte al investigador Dr. Julio E. Marco Franco al e-mail: julio.marcof@usal.es. Le agradecemos su colaboración. Por favor marque de esta forma ☒

La encuesta está destinada a la población general ESPAÑOLA. Si usted no es español o si es una persona que trabaja con inmigrantes o que conoce los datos oficiales de inmigración NO DEBE CONTESTAR LA ENCUESTA. En este caso marque el cuadrado y no siga con la encuesta. 0 ☐

Los datos son anónimos. No tiene por qué contestar a todas las preguntas, pero sus respuestas serán de gran ayuda. Nada permitirá identificarle a usted, por lo que le rogamos que conteste las 25 preguntas.

1-**Soy:** Hombre ☐ Mujer ☐ Otro/No contesta ☐ 2- Año de nacimiento: _____

3-**Nivel de estudios** (marque la casilla correspondiente tanto si los ha completado como no):

Elementales/Ninguno ☐ Estudios no superiores ☐ Estudios superiores ☐

4-Mis **ingresos** provienen de:

Ninguno/pensionista/rentas/ayudas A ☐ Contratado que no precisa título para trabajar B ☐

Actividad por cuenta propia C ☐ Trabajador cualificado (medio/superior) o directivo D ☐

5 ¿Aproximadamente cuántos inmigrantes creen que llegaron a España (tanto legales como ilegales) el pasado año 2019?

1.000	20.000	50.000	100.000	250.000	500.000	750.000	1.000.000	5.000.000	10.000.000

6 ¿Aproximadamente cuántos de ellos cree que llegaron de forma ilegal?

5%	10%	20%	30%	40%	50%	60%	70%	80%	90%

Señale una de las casillas del 1 a 10 como se indica arriba (X), donde 1 es ninguna importancia o nada de acuerdo y 10 es máxima importancia o totalmente de acuerdo. Marque SOLO UNA OPCIÓN.

7 ¿Está de acuerdo con que la inmigración es un problema en España?

1	2	3	4	5	6	7	8	9	10

8 ¿Está de acuerdo con que lleguen inmigrantes siempre que vengan por la vía legal?

1	2	3	4	5	6	7	8	9	10

9 ¿Cree que los inmigrantes legales son un problema para el país?

1	2	3	4	5	6	7	8	9	10

10 ¿Conviene que lleguen inmigrantes legales para trabajar y aportar fondos a la sanidad y pensiones?

1	2	3	4	5	6	7	8	9	10

11 ¿Cree que los inmigrantes ilegales son un grave problema para España?

1	2	3	4	5	6	7	8	9	10

12 ¿Cree que los inmigrantes sin papeles representan la mayoría de los migrantes que entran en España?

1	2	3	4	5	6	7	8	9	10

13 ¿Cree que los inmigrantes ilegales son víctimas porque están en manos de mafias?

1	2	3	4	5	6	7	8	9	10

El principal problema de la inmigración es que

14 ¿llegan demasiadas personas a España?

1	2	3	4	5	6	7	8	9	10

15 ¿Qué llegan muchos ilegales?

1	2	3	4	5	6	7	8	9	10

16 ¿Cree que España debe ser solidaria con los inmigrantes ilegales porque ponen en peligro sus vidas?

1	2	3	4	5	6	7	8	9	10

17 ¿Cree que los inmigrantes ilegales son una vía importante de transmisión de enfermedades?

1	2	3	4	5	6	7	8	9	10

18 ¿Cree que los inmigrantes (legales o no) traen unas costumbres y religión que genera problemas en España?

1	2	3	4	5	6	7	8	9	10

19 ¿Cree que los inmigrantes consumen muchos recursos y ayudas públicas que podrían destinarse a otras personas del propio país?

1	2	3	4	5	6	7	8	9	10

20 ¿Cree que si todos los inmigrantes fueran legales no habría ningún problema?

1	2	3	4	5	6	7	8	9	10

Creo que sería conveniente que la ley cambiase para:

21 ¿Prohibir totalmente que entrasen inmigrantes tanto legales como ilegales a España?

1	2	3	4	5	6	7	8	9	10

22 ¿que los inmigrantes ilegales fuesen devueltos a su país inmediatamente?

1	2	3	4	5	6	7	8	9	10

23 ¿que se intensificasen las medidas para luchar contra las mafias que trafican con inmigrantes?

1	2	3	4	5	6	7	8	9	10

24 ¿que España y los otros países europeos se implicasen más en proteger a las personas que migran?

1	2	3	4	5	6	7	8	9	10

25 ¿que España y otros países ayuden más a los países de donde proceden los migrantes para que no vengan?

1	2	3	4	5	6	7	8	9	10

Este espacio está reservado para el procesamiento de datos. No tiene que escribir nada aquí

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25

¡Gracias por su colaboración!

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APPENDIX IV: TEXT STYLE

AIV.1. Grammatical Abbreviations and Acronyms

APA
The well-known writing style and format for scholarly documents, particularly used in the fields of behaviour and social sciences. Corresponds to the American Psychological Association Manual used in this text (7th (2019) edition)
e.g.
Exempli gratia (for example) followed by comma.
i.e.
That is, followed by comma.
(Ed.)
Editor, Editorial
K
Thousand
M
Million
[n.d.] [N.D.]
No date
[n.p.]
No page.
ORCID
Open researcher and contributor ID.
p. / pp.
Page / pages
para.
Paragraph
[recte]
Author's correction of wrong spelling
Rev.
Reviewer
[sic]
Incorrect writing intentionally being left as it was in the original.
Transl.
Translator

—♦—

AIV.2. Style & Format Additional Information

No specific format or style requirement has been requested by the University of Salamanca, other than general instructions for a cover model. The standard A4 paper format, including 1.15 line

spacing, 12 font size, 2.6 and 3 cm margins, and number of words has been accorded with the supervisor.

The *Manual of the American Psychological Association* (APA), Seventh Edition (2019) has been used as a complementary formatting-style source particularly for references, using the reference management software Mendeley®. When a format out of APA recommendations has been adopted, it has been consistently maintained.

The headings follow the five-level APA format, but they have been labelled with numbers to enhance readability. Subheadings do not end with full stop. Also, tables and figures are not included after the references on separate pages, but again, intentionally, they have been embedded in the text, to facilitate reading, in consonance with recommendations of well-known universities.

Translation of foreign texts has not considered a paraphrase, and they are directly quoted in the original language followed with translation into English included in square brackets as a footnote.

Capitalisation following a colon, and in general placing the punctuation marks follows the recommendations of the manual. Punctuation marks after DOIs or URLs (full stops) are omitted in the reference list entries, to keep the live links. Note that URL references may be broken in case of paragraph justification. Please remove any empty space in web addresses (if found), before linking. Regarding the controversial capitalisation of «State», the rule of capitalising whenever it refers to a country has been followed.

The references have been generated with Mendeley with the option for APA 7 edition.

Disclaimer notice: If any copyright material has been inadvertently overlooked, the author will gladly make the necessary arrangements at the first opportunity.

AIV.3. Legal Citation Styles

In order to avoid confusions the European Court of Human Rights appears as ECtHR *except* in sentence citations where ECHR is used according to the instructions “Note explaining the mode of citation of the case-law of the Court and the Commission” as of October 2022.
https://www.echr.coe.int/documents/note_citation_eng.pdf
Note that following this instruction, there are three different styles of citation depending on the years.

Regarding the Court of Justice of the European Union (CJUE) the case law citation has followed last (2021) recommendations as in the “Method of citing the case-law,”
https://curia.europa.eu/jcms/jcms/P_126035/en/ and also:
https://e-justice.europa.eu/content_european_case_law_identifier_ecli-175-en.do?init=true

For the International Court of Justice it is followed the European Journal of International Law (EJIL) Style.
https://libguides.graduateinstitute.ch/icj/citation#:~:text=Give%20the%20name%20of%20the,if%20available%3B%20and%20the%20date.

Australian jurisprudence has been cited following
https://bond.libguides.com/aglc/cases

For US Supreme Court the citations take as reference:
https://guides.tricolib.brynmawr.edu/c.php?g=285494&p=1904514

For the International Tribunal of the Law of the Sea (ITLOS) the citations were used as recommended in each case by the Tribunal.

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INDEX OF CASE LAW

10/09/2018]	
Aksoy v. Turkey [GC], no 21987/93, ECHR 1996-XII.	205
Aydin v. Turkey [GC], no 57/1996/676/866, ECHR 1997-VII.	205
Raquel Martin de Mejía v. Perú, Caso 10.970 Informe No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 168 (1996).	205
Denmark v. Greece, no. 3321/67, ECHR 1967-IX.	205
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Judgement of 6 September 2017 [GC]. *Slovak Republic and Hungary v Council of the European Union*, C 643/15 and C 647/15, EU:C:2017:631.	230

For a selection of the 33 most illustrative cases showing the evolution of jurisprudence of the law of the sea (and including expanded information of some of the cases in the list) see: (UN Division for Ocean Affairs and the Law of the Sea. Office of Legal Affairs, 2006).

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REFERENCES

(Automatically generated with Mendeley ® reference manager)

Abderrahim, T. (2019). *Pushing the boundaries: How to create more effective migration cooperation across the Mediterranean* [Blog post 15 January]. European Council of Foreign Relations. https://ecfr.eu/publication/pushing_the_boundaries_effective_migration_cooperation_across_mediterranean/

Abrisketa-Uriarte, J. (2020). *Rescate en el mar y asilo en la Unión Europea: Límites del Regalmento de Dublín III [Rescue at Sea and Asylum in the European Union: Limits of the Dublin III Regulation]*. Aranzadi (Thomson Reuters LTD).

Adamson, F. B., & Tsourapas, G. (2020). The migration state in the Global South: nationalizing, developmental, and neoliberal models of migration management. *International Migration Review*, *54*(3), 853–882. https://doi.org/10.1177/0197918319879057

Agranoff, C. (2014). *Firearms on the boat: The legal issues surrounding carrying weapons for defense in international waters*. Huffpost April 15. https://www.huffpost.com/entry/firearms-on-the-boat-the-_b_5148704#:~:text=So merely flying the flag,ammunition to go with it.

Ahmed, A. (2017). International law of the sea: An overlook and case study. *Beijing Law Review*, *08*(01), 21–40. https://doi.org/10.4236/blr.2017.81003

Alcántara, J. M. (2008). Shipbuilding and classification of ships. Liability to third parties. *Zbornik Pravnog Fakulteta u Zagrebu [Collected Papers of Zagreb Law Faculty]*, *58*(1–2), 135–146.

Anand, R. P. (1981). Maritime practice in South-East Asia until 1600 A.D. and the modern law of the sea. *The International and Comparative Law Quarterly*, *30*(2), 440–454. https://doi.org/10.1093/iclqaj/30.2.440

Anderson, F. (2020). *Likert scale data linear modeling*. Indep. Cookbook using R.

Andrade, M. L., Covelo, E. F., Vega, F. A., & Marcet, P. (2004). Effect of the Prestige oil spill on salt marsh doils on the coast of Galicia (Northwestern Spain). *Journal of Environmental Quality*, *33*(6), 2103–2110. https://doi.org/10.2134/jeq2004.2103

Aranowitz, A. A. (2009). *Human trafficking, human misery: the global trade in human beings* (Praeger (ed.)).

Asher, E. (1960). *The resistance to the maritime classes: The survival of feudalism in the France of Colbert* [Publication 66 on history]. Berkeley. Univesity of California Press.

Attard, F. G. (2020). *The duty to render assistance at sea under international law*. Brill

Njhoff. https://doi.org/10.1163/9789004438255_005

Baldwin-Edwards, M., & Lutterbeck, D. (2019). Coping with the Libyan migration crisis. *Journal of Ethnic and Migration Studies*, *45*(12), 2241–2257. https://doi.org/10.1080/1369183X.2018.1468391

Barbieri-Low, A. J., & Yates, D. S. R. (2015). *Law, state, and society in early Imperial China*. Brill Academic Pub.

Barnes, R. A. (2015). Flag States. In D. Rothwell, A. Oude Elferink, K. N. Scott, & T. Stephens (Eds.), *The Oxford Handbook of the Law of the Sea* (pp. 304–324). Oxford University Press. https://doi.org/10.1093/law/9780198715481.003.0014

Barrett, J., & Barnes, R. (2016). *Law of the sea: UNCLOS as a living treaty* (J. Barrett & R. B. Barnes (eds.)). The British Institute of International and Comparative Law.

Basilien-Gainche, M.-L. (2012). The EU immigration and asylum policy in the post-Lisbon institutional context. In T. Martín & L. Rubini (Eds.), *The Treaty of Lisbon and the Future of European Law* (pp. 355–380). Edward Elgar Publishing.

Basilien-Gainche, M.-L. (2015). The EU external edges: Borders as walls or ways? *The Journal of Territorial and Maritime Studies*, *2*(1), 97–117. https://hal.archives-ouvertes.fr/hal-01112337/document

Basilien-Gainche, M.-L. (2017). Leave and let die: The EU banopticon approach to migrants at sea [International Refugee Law Series Vol. 7]. In V. Moreno-Lax & E. Papastavridis (Eds.), *"Boat refugees" and migrants at sea: a comprehensive approach* (pp. 327–352). Koninklijke Brill NV. https://doi.org/10.1163/9789004300750_015

Batsyukova, S. (2012). Studies of changing societies: comparative and interdisciplinary focus. *SCS Journal. Studies of Changing Societies: Comparative and Interdisciplinary Focus*, *1*(1), 39–49. https://dialnet.unirioja.es/servlet/articulo?codigo=4045928

Becker, M. A. (2018). International Law of the Sea. In *The International lawyer* (Vol. 41, Issue 2, pp. 671–682). American Bar Association's Section of International Law.

Bederman, D. J. (2010). *Custom as a source of law*. Cambridge University Press.

Bendel, P. (2016). Refugee policy in the European Union. Protect human rights! In *WISO Diskurs: The Friedrich-Ebert-Stiftung*. https://library.fes.de/pdf-files/wiso/12405.pdf

Benedict, R. . (1904). The historical position of the Rhodian law. *Yale Law Journal*, *XVIII*(4), 221–242. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/10720/31_18YaleLJ223_1908_1909_.pdf?sequence=2

Bennett, A. (2012). That sinking feeling: stateless ships, universal jurisdiction, and the drug trafficking vessel interdiction act. *Yale J. Int'l L.*, *37*(2), 433. https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=37+Yale+J.+Int'l+L.+433&srctype=smi&srcid=3B15&key=ab77a8a8922dcbfe15b861e61d1b3765

Berti, C. (2021). Right-wing populism and the criminalization of sea-rescue NGOs: the 'Sea-Watch 3' case in Italy, and Matteo Salvini's communication on Facebook.

Media, Culture and Society, *43*(3), 532–550. https://doi.org/10.1177/0163443720957564

Bevilacqua, G. (2019). The right to life at sea seventy years after the proclamation of the Universal Declaration of Human Rights. *Europa Ethnica*, *76*(3–4), 149–154. https://doi.org/10.24989/0014-2492-2019-34-149

Bhagwati, J. (2003). Borders beyond control. *Foreing Affairs*, *Jan/Feb*, 98–104.

Boehm, F. (2012). *Information sharing and data protection in the area of freedom, security and justice: Towards harmonised data protection principles for information exchange at EU- level.* Springer Berlin Heidelberg. https://doi.org/10.10007/978-3-642-22392-1

Boisson de Chazournes, L. (2012). Rules, practice and jurisprudence of the sea. In C. Giorgetti (Ed.), *The international tribunal for the law of the sea* (pp. 111–133). Martinus Nijhoff Pub.

Boisson, P. (1999a). *Safety at sea: Policies, regulations and international law.* (Bureau Veritas 536 (ed.)).

Boisson, P. (1999b). *The History of safety at sea* [Article reproduction of 1999 book by the author]. International Maritime Organization. http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofSafetyatSea/Documents/P. Boisson History of safet at sea extract.htm#_Toc516043734

Børresen, J. (1994). The seapower of the coastal state. *Journal of Strategic Studies*, *17*(1), 148–175. https://doi.org/10.1080/01402399408437544

Brian, T., & Laczko, F. (2014). *Fatal journeys: Tracking lives lost during migration* [IOM report]. https://publications.iom.int/es/books/fatal-journeys-tracking-lives-lost-during-migration

Brown, P. M. (1953). Protective jurisdiction over marginal waters. *The American Journal of International Law*, *47*(3), 452–454. https://doi.org/10.2307/2194684

Brown, P. M. (2017). The law of territorial waters. *American Journal of International Law*, *21*(1), 101–105. https://doi.org/10.2307/2188599

Button, R. (2018). International law and search and rescue. In *Naval War College Review* (Vol. 70, Issue 1) [U.S. Naval War College Digital Commons]. https://doi.org/10.1007/978-3-319-72718-9_7

Cacciaguidi-Fahy, S. (2018). The law of the sea and human rights. In *International Law: Contemporary Issues and Future Developments* (pp. 376–390). https://doi.org/10.4324/9780429499715

Camarena, K. R., Claudy, S., Wang, J., & Wright, A. L. (2020). Political and environmental risks influence migration and human smuggling across the Mediterranean Sea. *PLoS ONE*, *15*(7 July), 1–16. https://doi.org/10.1371/journal.pone.0236646

Carrera, S., & Allsopp, J. (2017). The irregular immigration policy conundrum: Problematizing 'effectiveness' as a frame for EU criminalization and expulsion policies. In A. Ripoll Servent & F. Trauner (Eds.), *The Routledge Handbook of Justice and Home Affairs Research* (First Ed., pp. 93–106). Routledge. https://doi.org/10.4324/9781315645629

Carrera, S., Colombi, D., & Cortinovis, R. (2023). *Policing search and rescue NGOs in the Mediterranean: Does justice end at sea?* (C. for E. P. Studies (ed.)).

Carrera, S., & Cortinovis, R. (2019). The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism? *Policy Insights*, *2019*(14), 1–7. www.ceps.eu

Carrera, S., Curti, D., & Geddes, A. (2020). *20 year anniversary of the Tampere programme. Europeanisation dynamics of the EU Area of Freedom, Security and Justice* [European University Institute]. https://doi.org/10.2870/66646

Carrera, S., & Guild, E. (2016). *Irregular migration, trafficking and smuggling of human beings policy dilemmas in the EU* (S. Carrera & E. Guild (eds.)). Centre For European Policy Studies (Ceps).

Casariego, J. E. (1947). *Historia del derecho y de las instituciones marítimas del mundo hispano [History of law and of the maritime institutions of the Hispanic world]*. José Ruíz Alonso Pub.

Cassese, A., Gaeta, P., Baig, L., Fan, M., Gosnell, C., & Whiting, A. (2013). Cassese's International Criminal Law. In *Cassese's International Criminal Law*. Oxford University Press.

Castles, S. (2004). Why immigration policies fall. *Ethnic and Racial Studies*, *57*, 205–227.

Cave de la Maza, R. (1998). Los usos militares de la zona economica exclusiva [military uses of the Economic Exclusive Zone]. *Revista de Marina*, *2*, 136–150.

Chandrasekhara Rao, P., & Gautier, P. (2018). *The International Tribunal for the Law of the Sea: Law, practice and procedure* (P. Chandrasekhara Rao & P. Gautier (eds.)). Edward Elgar Publishing. https://doi.org/10.4337/9781786433015

Chevreau, E. (2005). La lex Rhodia de iactu: un exemple de la réception d'une institution étrangère dans le droit romain [The lex Rhodia de iactu: an example of the reception of a foreign institution in Roman law]. *Tijdschrift Voor Rechtsgeschiedenis / Revue d'Histoire Du Droit / The Legal History Review*, *1*, 67–80. https://doi.org/10.1163/1571819054088562

Chijioke, C. O. (2016). *Maritime law and practice in Nigeria* [[Ebook]]. AuthorHouse.

Chitwood, Z. (2017). Byzantine legal culture and the Roman legal tradition, 867-1056. In *Byzantine Legal Culture and the Roman Legal Tradition, 867-1056*. Cambridge University Press. https://doi.org/10.1017/9781316861547

Churchill, R. R., & Lowe, A. V. (1999). *The law of the sea*. Manchester University Press.

Coppens, J., & Somers, E. (2010). Towards New Rules on Disembarkation of Persons Rescued at Sea? *The International Journal of Marine and Coastal Law*, *25*(3), 377–403. https://doi.org/https://doi.org/10.1163/157180810X571006

Cordes, A. (2003). *The search for a medieval Lex Mercatoria (Forum 5)*. Oxford University Comparative Law Forum. https://ouclf.law.ox.ac.uk/

Croasmun, J. T., & Ostrom, L. (2011). Using Likert-type scales in the social sciences. *Journal of Adult Education*, *40*(1), 19–22.

Cue, E. (2002). Captain, crew and owner of "Tampa" win Nansen Award for rescue at

sea. In *UNHCR. The UN Refugee Agency* [Press release. March 19.]. https://www.unhcr.org/news/latest/2002/3/3c975a254/captain-crew-owner-tampa-win-nansen-award-rescue-sea.html

Cuerda Arnau, M. L. (1997). *El miedo insuperable. Su delimitación frente al estado de necesidad [Insurmountable fear. Its demarcation from the state of necessity]*. Tiran lo Blanch.

Cusumano, E. (2017). Emptying the sea with a spoon? Non-governmental providers of migrants search and rescue in the Mediterranean. *Marine Policy*, *75*(November 2016), 91–98. https://doi.org/10.1016/j.marpol.2016.10.008

Cusumano, E. (2019). Migrant rescue as organized hypocrisy: EU maritime missions offshore Libya between humanitarianism and border control. *Cooperation and Conflict*, *54*(1), 3–24. https://doi.org/10.1177/0010836718780175

Cusumano, E., & Villa, M. (2021). From “Angels” to “Vice Smugglers”: the Criminalization of Sea Rescue NGOs in Italy. *European Journal on Criminal Policy and Research*, *27*(1), 23–40. https://doi.org/10.1007/s10610-020-09464-1

Czaika, M., & De Haas, H. (2013). The effectiveness of immigration policies. *Population and Development Review*, *39*(3), 487–508. https://doi.org/10.1111/j.1728-4457.2013.00613.x

D’Angelo, E. F. (2009). Non-refoulement : The Search for a consistent interpretation of article 33. *Vanderbilt Journal of Transnational Law*, *42*(1), 279–316.

David, F., Bryant, K., & Larsen, J. J. (2019). *Migrants and their vulnerability To human trafficking, modern slavery and forced labour*. https://publications.iom.int/system/files/pdf/migrants_and_their_vulnerability.pdf

De Boer, T. (2015). Closing legal black holes: The role of extraterritorial jurisdiction in refugee rights protection. *Journal of Refugee Studies*, *28*(1), 118–134. https://doi.org/10.1093/jrs/feu024

De Bruyne, J. (2019). *Third-Party certifiers* (S. M. Bartman (ed.)). Wolters Kluwer.

Del Valle Gálvez (Ed.), A., El Houdaïgui (Ed.), R., Campins Eritja, M., Tremolada Álvarez, E., Kourouma, O., Del Valle Gálvez, A., Nagore Casa, M., González García, I., Rida Nour, M., Déviska Perez, D. B., Iraqi, A., Jimenez García-Carriazo, Á., Bordón, J., Jimenez Cortes, C., Pi LLorens, M., Romero Bartumeus, L., & Calvo Mariscal, L. (2019). Paix et sécurité internationales [International peace and security]. *Journal of International Law and International Relations*, *Yearbook*(7), 117–160. https://doi.org/10.25267/paix_secur_int.2019.i7.04

den Heijer, M., & Lawson†, R. (2012). Extraterritorial human rights and the concept of ‘jurisdiction.’ In M. Langford, M. Scheinin, W. van Genugten, & W. Vandenhole (Eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (pp. 153–191). Cambridge University Press. https://doi.org/DOI: 10.1017/CBO9781139002974.009

Devine, D. J. (1996). Ships in distress - A judicial contribution from the South Atlantic. *Marine Policy*, *20*(3), 229–234. https://doi.org/10.1016/0308-597X(94)00000-I

Dimitriadi, A., & Malamidis, H. (2019). Talking of Values: Understanding the Normative Discourse of EU Migration Policy. In *Norms and values in the European migration*

and refugee crisis (NOVAMIGRA) (Issue 770330). https://doi.org/10.17185/duepublico/49360

Diplock, K. (1946). Passports and Protection in International Law. *Transactions of the Grotius Society*, *32*, 42–49. https://www.jstor.org/stable/743187

Dockray, M. (2004). *Cases and materials on the carriage of goods by sea* (3rd editio). Cavendish Publishing Ltd.

Dubner, B. H., & Arias, M. C. (2017). Under international law, must a ship on the high seas fly the flag of a state in order to avoid being a stateless vessel ? Is a flag painted on either side of the ship sufficient to identify it? *U. S. F. Maritime Law Journal*, *29*(2), 100–142. https://lawpublications.barry.edu/cgi/viewcontent.cgi?article=1120&context=facultyscholarship

Dünnwal, S. (2011). On migration and security: Europe managing migration from Sub-Saharan Africa. *Cadernos de Estudos Africanos [Cahiers of African Studies]*, *22*, 103–128. http://www.scielo.mec.pt/scielo.php?script=sci_arttext&pid=S1645-37942011000200006&lng=pt&nrm=iso&tlng=en

Dupuy, R. ., & Vignes, D. (1986). Traité du nouveau droit de la mer [Treaty of the new law of the sea]. *Revue Québécoise de Droit International*, 359–364.

Duvauchelle Rodríguez, M. (1993). Los usos militares de la zona economica exclusiva [military uses of the Economic Exclusive Zone]. *Revista de Marina*, *4*, 358–371.

Düvell, F. (2006). *Illegal immigration in Europe: beyond control*. Palgrave Macmillan. https://doi.org/10.1057/9780230555020

Egede, E., & Sutch, P. (2013). The law of the sea justice and common heritage of mankind. In E. Egede & P. Sutch (Eds.), *The politics of international law and international justice* (pp. 306–346). Edinburgh University Press.

Einarsen, T. (2012). *The Concept of Universal Crimes in International Law*. Torkel Opsahl Academic EPublisher.

Elliott, C. B. (1904). The Doctrine of Continuous Voyages. *The American Journal of International Law*, *1*(1), 61–104. https://doi.org/10.2307/781220

Esteve-García, F. (2015). El rescate como nueva función europea en la vigilancia del Mediterráneo [Rescue as a new European role in the surveillance of the Mediterranean]. *Revista CIDOB d'afers Internacionals*, *111*, 153–172.

European Court of Human Rights. (2018). *Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights* [[Press release, July]]. https://www.echr.coe.int/documents/fs_extra-territorial_jurisdiction_eng.pdf

Fabris, D. (2017). Crimes committed at sea and criminal jurisdiction: Current issues of International Law of the Sea waiting the 'Enrica Lexie' fecision. *Amsterdam Law Forum*, *9*(2), 5–25. https://doi.org/10.37974/alf.292

Fantinato, M. (2019). EU regional disembarkation arrangements in the Mediterranean: between the outsourcing of search and rescue services and the externalisation of sea border management. In *The Italian Yearbook of International Law Online* (28(1), pp. 63–76). Brill Nijhoff. https://doi.org/10.1163/22116133_02801006

Fantinato, M. (2020). Maritime surveillance of the EU external sea borders: extensive aproaches and operational challenges to the principles of coastaland flag state jurisdiction in Italy. In M. Chantal-Ribero, F. Loureiro-Bastos, & T. Henriksen (Eds.), *GLobal challenges and the law of the sea* (pp. 221–235). Springer Nature Switzerland. https://doi.org/10/1007/978-3-030-42671-2

Feibleman, J. K. (1985). *Justice, law and culture* (1st Ed.). Martinus Nijhoff Pub.

Feldman, E. (2015). *Commercial ships called on to rescue at-sea migrants in distress* [Press release June 1]. Al Jazeera America. http://america.aljazeera.com/articles/2015/6/1/commercial-vessels-called-on-to-rescue-at-sea-migrants-in-distress.html

Fernández Herrera, T. (2012). *Las causas de la emigración en África [Reasons for emigration in Africa]* [Blog post February 16]. https://www.cear-euskadi.org/las-causas-de-la-emigracion-en-africa/

Fiddian-Qasmiyeh, E., Loescher, G., Long, K., Sigona, N., & Goodwin-Gill, G. S. (2014). The International Law of Refugee Protection. In *The Oxford Handbook of Refugee and Forced Migration Studies*. https://doi.org/10.1093/oxfordhb/9780199652433.013.0021

Fife, R. E. (2003). The duty to render assistance at sea: Some reflections after Tampa. In J. Petman & J. Klabbers (Eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (pp. 469–484). Brill Academic Pub. https://doi.org/10.1163/9789004482043_025

Forteau, M., & Thouvenin, J.-M. (2017). *Traité de droit international de la mer [Treaty of international law of the sea]* [Centre de Droit International de Nanterre (CEDIN)]. Editions A. Pedone.

Frankot, E. B. I. (2007). Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea. In F. P. J Pan-Montojo (Ed.), *Communities in European History: Representations, Jurisdictions, Conflicts* (pp. 151–172). Pisa University Press.

Frasca, E., & Gatta, F. L. (2020). *The Malta Declaration on search & rescue, disembarkation and relocation: Much Ado about Nothing* [Blog, 3 March]. EU Immigration and Asylum Law and Policy. https://eumigrationlawblog.eu/the-malta-declaration-on-search-rescue-disembarkation-and-relocation-much-ado-about-nothing/

Frasca, E., & Gatta, F. L. (2023). *The EU Action Plan for the Central Mediterranean: Everybody knows that the boat is leaking* [Blog, 15 February]. EU Immigration and Asylum Law and Policy. https://eumigrationlawblog.eu/

Frenzen, N. (2010). US migrant interdiction practices in international and territorial waters [Legal Challenges. Series: Immigration and Asylum Law and Policy in Europe, Volume: 21]. In B. Ryan & V. Mitsilegas (Eds.), *Extraterritorial immigration Control* (pp. 363–390). Brill. https://doi.org/10.1163/ej.9789004172333.i-441.86

Gafarlı, T. (2019). Against all odds: Turkey's position in the Eastern Mediterranean. In *TRT Wold Research Centre* [Discussion paper]. https://www.academia.edu/41191399/Against_All_Odds_Turkey_s_Position_in_the_Eastern_Mediterranean

Gallagher, A. T., & David, F. (2014). *The international law of migrant smuggling*.

Cambridge University Press. https://doi.org/10.1017/CBO9781139059619

García-Andrade, P. (2022). Respect for institutional balance in the adoption of non-legally binding agreements: France v Commission II. In G. Buttler & R. A. Wessels (Eds.), *EU External Relations Law. The Cases in Context* (pp. 443–454). Hart Publishing Ltd.

Garcia, R. (2003). The Prestige: one year on a continuing disaster. In *WWF - Spain*. https://web.archive.org/web/20110101195734/http://www.wwf.fi/wwf/www/uploads/pdf/Prestige_raportti_marras03.pdf

Garelli, G., & Tazzioli, M. (2018). The humanitarian war against migrant smugglers at sea. *Antipode*, *50*(3), 685–703. https://doi.org/10.1111/anti.12375

Gathmann, C. (2008). Effects of enforcement on illegal markets: Evidence from migrant smuggling along the southwestern border. *Journal of Public Economics*, *92*(10–11), 1926–1941. https://doi.org/10.1016/j.jpubeco.2008.04.006

Gatto, L. (2019). *Le Politiche d'asilo fra Unione Europea e Italia [Asylum policies of the European Union and Italy]* [Thesis, Bologna]. https://www.tesionline.it/tesi/scienze-politiche/le-politiche-d-asilo-fra-unione-europea-e-italia/54821

Gavouneli, M. (2007). *Functional Jurisdiction in the Law of the Sea* [Publications on Ocean Development, Vol.62]. Koninklijke Brill NV.

Georgi, F. (2019). *Managing migration?* Bertz und Fischer (Verlag).

Ghosh, S. (1988). *Law of the territorial sea : evolution and development* (Naya Prokash (ed.)). South Asian Books.

Giuffré, M. (2023). 'Le vent nous portera': Rescue and Confinement at Sea under Human Rights LawM. *Erasmus Law Review*, *16*(1), 1–10. https://doi.org/10.5553/elr.000232

González Jiménez, J. (2007). La evolución del derecho del mar desde el punto de vista de un mar semicerrado como el Mediterráneo [The evolution of the law of the sea from the point of view of a semi-enclosed sea such as the Mediterranean Sea]. In *Revista Electrónica De Estudios Internacionales [Electronic Journal of International Studies]* (Vol. 14, pp. 1–60). https://dialnet.unirioja.es/servlet/articulo?codigo=2559782

Goodwin-Gill, G. S. (2011). The right to seek asylum: Interception at sea and the principle of non-Refoulement. *International Journal of Refugee Law*, *23*(3), 443–457. https://doi.org/10.1093/ijrl/eer018

Gottfredson, M., & Hirschi, T. (2020). *Modern control theory and the limits of criminal justice*. Oxford University Press.

Graf Vitzthum, W. (2003). From the Rhodian Sea Law to UNCLOS III. In *Ocean Yearbook Online, Vol.17 (1)* (pp. 56–59). Brill. https://doi.org/10.1163/221160003X00050

Grant, J. P. (2010). Law of the sea. In J. P. Grant (Ed.), *International Law Essentials* (pp. 109–122). Edinburgh University Press.

Grotius, H. (1618). *Mare liberum sive de iure quod Batavis competit ad Indicana commercia, dissertatio*. Elsevier. https://www.elsevier.com/books/mare-liberum/de-groot/978-1-4832-8303-6

Grotius, H. (2005). *The rights of war and peace. Book II* (K. Haakonssen & R. Tuck (eds.)) [Original text in Latin 1625. From the edition by Jean Barbeyrac]. Liberty Fund, Inc. http://files.libertyfund.org/files/1947/1032-02_LFeBk.pdf

Guilfoyle, D., & Papastavridis, E. (2014). *Mapping disembarkation options: towards strengthening cooperation in managing irregular movements by sea*. https://www.refworld.org/pdfid/5346438f4.pdf

Harris, D., & Sivakumaran, S. (2015). *Cases and materials on international law* (Eighth). Thomson Reuters Ltd.

Heebøll-Holm, T. K. (2013). The law of the sea and the principles of reprisal. In *Ports, piracy and maritime war: Piracy in the English Channel and the Atlantic, c. 1280-c. 1330* (pp. 127–160). Brill. https://doi.org/doi.org/10.1163/9789004248168_006

Heffernan, T.-J. (1982). The rediscovery of the Bute Manuscript of the Northern Homily Cycle. *Scriptorium*, *36*(1), 118–129. https://doi.org/10.3406/scrip.1982.1256

Higgins, R. (1973). The right in international law of an individual to enter, stay in and leave a country. *International Affairs*, *49*(3), 341–357. https://doi.org/10.2307/2616836

Hollifield, J., Martin, P. L., & Orrenius, P. (2014). *Controlling immigration: A global perspective* (J. Hollifield, P. L. Martin, & P. Orrenius (eds.); 3rd ed.). Stanford University Press.

Holsti, K. J. (2004). *Taming the Sovereigns: Institutional Change in International Politics .* Cambridge University Press.

Honniball, A. N. (2016). The exclusive jurisdiction of flag States: A limitation on pro-active port States? *International Journal of Marine and Coastal Law*, *31*(3), 499–530. https://doi.org/10.1163/15718085-12341410

Howie, J. (1983). *Ethical principles for social policy* (S. I. U. Press (ed.)).

Hruschka, C. (2016). *Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission* [Blog, 17 May]. EU Immigration and Asylum Law and Policy. https://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/

Husa, J., & Van Hoecke, M. (2013). *Objectivity in law and legal resoning*. Hart Publishing.

Iberley. (2016). *El estado de necesidad como supuesto de exoneración de la responsabilidad civil [The state of necessity as a case of exoneration from civil liability]* [Case Law reviews]. https://www.iberley.es/temas/estado-necesidad-supuesto-exoneracion-responsabilidad-civil-60150

Igiriogu, F. A. (2012). *Extra-territorial jurisdiction or the European Court of Human Rights: Functional Jurisdiction* [Thesis SOA-3902, Roehampton, Gothenburg, Tromso]. https://munin.uit.no/bitstream/handle/10037/5108/thesis.pdf?sequence=2&isAllowed=y

Infante Caffi, M. T. (2016). International Law Perspectives on Frontiers. *Estudios Internacionales (Santiago) [International Studies (Santiago)]*, *48*(185), online version. https://doi.org/10.5354/0719-3769.2016.44520

International Organization for Migration (IOM). (2010). *World Migration Report 2010 - The*

Future of Migration: Building Capacities for Change. https://doi.org/ISBN 978-92-9068-619-4

International Organization for Migration (IOM). (2019). Glossary on migration No. 34. In *Internatioal Migration Law*. https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf

Kadish, S. H. (1976). Respect for life and regard for rights in the criminal law. *Calif. L. Rev.*, *64*(4), 871–901. https://doi.org/10.2307/3479919

Karaman, I. V. (2011). *Dispute resolution in the law of the sea*. Koninklijke Brill NV.

Kaunert, C. (2009). Liberty versus Security? EU Asylum Policy and the European Commission. *Journal of Contemporary European Research*, *5*(2), 148–170.

Kaye, S. B. (2004). Territorial sea baselines along ice-covered coasts: International practice and limits of the Law of the Sea. *Ocean Development and International Law*, *35*(1), 75–102. https://doi.org/10.1080/00908320490264391

Kent, H. S. K. (1954). The Historical Origins of the Three-Mile Limit. *The American Journal of International Law*, *48*(4), 537–553. https://doi.org/10.2307/2195021

Khalilieh, H. S. (2019). *Islamic law of the sea: freedom of navigation and passage rights in Islamic thought* [Cambridge Studies in Islamic Civilization]. Cambridge University Press. https://doi.org/10.1017/9781108630702

Kieger, K.-F. (1970). *Ursprung und Wurzeln der Rôles d'Oléron [Origin and roots of the Rôles d'Oléron].* Boharau.

Kilpatrick, J. (2019). *The revised Returns Directive: a dangerous attempt to step up deportations by restricting rights* (Issue September). http://www.statewatch.org/news/2007/dec/eu-returns-ngo-compilation.pdf;

Kiseleva, E., & Markin, E. (2017). *The concept of mixed migration flows and international legal regulation of migration*. *107*, 376–379. https://doi.org/10.2991/icedem-17.2017.97

Klein, N. (2021). Maritime autonomous vehicles and international laws on boat migration: Lessons from the use of drones in the Mediterranean. *Marine Policy*, *127*(September 2020), 104447. https://doi.org/10.1016/j.marpol.2021.104447

Klepp, S. (2010). A Contested asylum system: The European Union between refugee protection and border control in the Mediterranean Sea. *European Journal of Migration and Law*, *12*(1), 1–21. https://doi.org/https://doi.org/10.1163/138836410X13476363652523

Knauss, J. A. (1985). Creeping jurisdiction and customary international law. *Ocean Development & International Law*, *15*(2), 209–216. https://doi.org/10.1080/00908328509545775

Koh, T. (2020). The origins of the 1982 Convention on the law of the sea. In *Building a New Legal Order for the Oceans* (pp. 173–203). NUS Press.

Korman, S. (1993). *The right of conquest. The acquisition of territory by force in international law and practice*. Oxford University Press.

Komp, L. (2017). The duty to assist persons in distress: An alternative source of protection against the return of migrants and asylum seekers to the high seas? [International Refugee Law Series Vol. 7]. In V. Moreno-Lax & E. Papastavridis (Eds.), *"Boat refugees" and migrants at sea: a comprehensive approach* (pp. 222–247). Koninklijke Brill NV. https://doi.org/10.1163/9789004300750_011

Kornfeld, I. E. (2009). Mesopotamia: a history of water and law. In J. W. Dellapenna & J. Gupta (Eds.), *The Evolution of the Law and Politics of Water* (pp. 21–36). Springer. https://doi.org/10.1007/978-1-4020-9867-3

Krivenko, E. Y. (2022). Reassessing the relationship between equality and vulnerability in relation to refugees and asylum seekers in the ECtHR: The MSS case 10 Years On. *International Journal of Refugee Law*, *34*(2), 192–214. https://doi.org/10.1093/ijrl/eeac027

Künnecke, A. (2019). *Legal challenges and the practicability of the disembarkation centres for illegal migrants outside the EU* [Report ARI 53/2019 16 May]. Real Instituto Elcano [Royal Institute Elcano]. http://www.realinstitutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/ari53-2019-kunnecke-legal-challenges-disembarkation-centres-illegal-migrants-outside-eu

Lajeunesse, A. (2016). *Lock, stock, and Icebergs: A history of Canada's Artic maritime Sovereignty* [Original work published in 1982]. UBC Press.

Lielbarde, S. (2018). The concept of "shipowner" under new maritime labor law (MLC, 2006): does the shipowner own the ship? (comparative analysis of national law of Denmark, Finland, Germany, Norway, and the United Kingdom). *WMU J Marit Affairs*, *17*, 229–247. https://doi.org/10.1007/s13437-018-0141-8

Lieutcheu Tientcheu, V. T. (2021). Cooperation and collaboration between EMSA and FRONTEX. *Academia Letters*, *August*(3021), 1–4. https://doi.org/10.20935/AL3021.

Likert, R. (1932). A technique for the measurement of attitudes. *Archives of Psychology*, *22*(140), 5–55.

Llain Arenilla, S. (2015). Violations to the principle of non-refoulement under the asylum policy of the United States. *Anuario Mexicano de Derecho Internacional*, *15*(1), 283–322. https://doi.org/10.1016/j.amdi.2014.09.005

Lucas, P. J. (2001). Printing Anglo-Saxon in Holland and John Selden's Mare Clausum seu de Dominio Maris. *Quaerendo*, *31*(2), 120–136. https://doi.org/10.1163/157006901X00100

Maccanico, Y., Hayes, B., Kenny, S., & Barat, F. (2018). *The shrinking space for solidarity with migrants and refugees: How the European Union and member States target and criminalize defenders of the rights of people on the move* (F. Martone, H. Twomey, & D. Burke (eds.)). https://reliefweb.int/report/world/shrinking-space-solidarity-migrants-and-refugees

Mallia, P. (2011). Case of M.S.S. v. Belgium and Greece: A Catalyst in the re-thinking of the Dublin I Regulation. *Refuge Survey Quarterly*, *30*(3), 107–128. https://doi.org/10.1093/rsq/hdr008

Mancilla, A. (2016). *The Right of Necessity: Moral Cosmopolitanism and Global Poverty*. Rowman & Littlefield International Ltd.

Manning, J. G. (2018). Conclussions. In *The open sea: The economic life of the Ancient Mediterranean world from the Iron Age to the rise of Rome* (pp. 262–270). Princeton University Press. http://www.jstor.com/stable/j.ctvc7752s.16

Marco-Franco, J. E. (2023). *¿Existen diferencias en los rasgos racistas ocultos entre la prensa local y la nacional? [Are there differences in hidden racist traits between the local and national press?]*. Universidad Miguel Hernández, Elche, Spain.

Markard, N. (2016). The right to leave by sea: Legal limits on eu migration control by third countries. *European Journal of International Law*, *27*(3), 591–616. https://doi.org/10.1093/ejil/chw034

Markesinis, B. (2007). *Good and evil in art and law: an extended essay*. Springer.

Martin, S. (2005). The legal and normative framework of international migration. In *Global Commission on International Migration*. https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/tp/TP9.pdf

Martínez-Jiménez, M. I. (1991). *Los contratos de explotación del buque: especial referencia al fletamento por tiempo [The contracts for the operation of the ship: special reference to time charter]* (J.M. Bosch (ed.)). https://libros-revistas-derecho.vlex.es/vid/formas-utilizacion-nave-derecho-historico-284069

Martínez-Torres, J. A. (2017). «Gobernar el Mundo». La polémica Mare Liberum versus Mare Clausum en las Indias Orientales (1603-1625) [«Governing the World». The Mare Liberum vs. Mare Clausum Polemic in the East Indies (1603-1625)]. *Anuario de Estudios Americanos [Yearbook of American Studies]*, *74*(1), 71–96. https://doi.org/10.3989/aeamer.2017.1.03

Martínez Alcañiz, A. (2009). Cuestiones jurídicas sobre piratería en la mar [Legal issues on piracy at sea]. *Revista General de Marina (General Jounal of the Navy) (Spanish)*, *256*(3), 229–250.

Martins Pereira da Silva, D. (2018). Análise da jurisdição no âmbito da convenção das nações unidas sobre o direito do mar: uma vocação expansionista? /Analysis of jurisdiction under the United Nations convention on the law of the sea: an expansionist vocation? *Revista Jurídica Portucalense (Portucalense Law Journal)*, *5705*(23), 48–100. https://doi.org/10.21788/issn.2183-5705(23)2018.ic-03

Marzano, A. (2013). *Harvesting the sea: the exploitation of marine resources in the Roman Mediterranean*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199675623.001.0001

Masters, D. (1955). *The Plimsoll mark* (Cassell (ed.)). Cassell.

Mata de Antonio, J. M. (2013). La responsabilidad en las asociaciones [responsability of the associations]. *Acciones e Investigaciones Sociales*, *18*(18), 165. https://doi.org/10.26754/ojs_ais/ais.200318269

Mayordomo-Rodrigo, V. (2011). Nueva regulación de la trata, el tráfico ilegal y la inmigración clandestina de personas [New regulation of trafficking, smuggling and illegal immigration]. *Estudios Penales y Criminológicos [Criminological Studies]*, *XXXI*, 325–390. https://minerva.usc.es/xmlui/bitstream/handle/10347/7321/327-392.pdf?sequence=1&isAllowed=y

McConville, M., & Chui, W. H. (2017). *Research Methods for Law* (M. McConville & W. H. Chui (eds.); 2nd Ed.). Edinburgh University Press.

Medina Morales, D. (1993). *Temática filosófico-jurídica sobre el conocimiento filosófico del derecho [Philosophical-legal issues on the philosophical knowledge of law]*. Córdoba Univ. Pub.

Mitsilegas, V. (2019). Extraterritorial immigration control, preventive justice and the rule of law in turbulent times: lessons from the anti-smuggling crusade. In S. CARRERA, J. SANTOS VARA, & T. STRIK (Eds.), *Constitutionalising the external dimensions of EU migration policies in times of crisis* (pp. 290–307). Cheltenham (Northampton) [UK]. https://doi.org/10.4337/9781788972482.00024

Molenaar, E. J. (2021). Multilateral Creeping Coastal State Jurisdiction and the BBNJ Negotiations. *The International Journal of Marine and Coastal Law*, *36*(1), 5–58. https://doi.org/https://doi.org/10.1163/15718085-BJA10042

Monterreal, A. A. (2013). La problemática del litus maris en derecho romano y su pervivencia [The problem of the litus maris in Roman law and its survival]. *Anuario Da Facultade de Dereito Da Universidade Da Coruña [Yearbook of the Faculty of Law of Coruña University]*, *17*, 553–576. https://ruc.udc.es/dspace/bitstream/handle/2183/12530/AD_17_2013_art_27.pdf

Moreno-Lax, V. (2011). Seeking asylum in the Mediterranean: Against a fragmentary reading of EU Member States' obligations accruing at sea. *International Journal of Refugee Law*, *23*(2), 174–220. https://doi.org/10.1093/ijrl/eer005

Moreno-Lax, V. (2022). Towards a thousand little Morias: The EU (Non-) rescue scheme - Criminalising solidarity, structuralising defection. In T. Daniels & Odysseus Academic Network (Eds.), *Reforming the Common European Asylum System. Opportunities, pitfalls, and downsided of the Commission proposal for a new pact on migration and asylum.* (pp. 161–186). Nomos. Konstatnz University. https://doi.org/10.1093/law-epil/9780199231690/e2204

Moreno-Lax, V., & Lemberg-Pedersen, M. (2019). Border-induced displacement: The ethical and legal implications of distance-creation through externalization. *QIL, Zoom-In*, *56*, 5–33.

Morocco, A. N. (2005). *Seaworthiness in the Context of the ISP Code and the Relevant Amendments To SOLAS Convention, 1974* [World Maritime University. Master thesis]. https://commons.wmu.se/cgi/viewcontent.cgi?article=1040&context=all_dissertations

Muchmore, A. I. (2004). Passports and Nationality in International Law. *U.C. Davis Journal of International Law & Policy*, *10*, 301–356. https://core.ac.uk/download/pdf/229637848.pdf

Ndiaye, T. M. (2019). Human rights at sea and the Law of the Sea. *Beijing Law Review*, *10*(2), 261–277. https://doi.org/10.4236/blr.2019.102016

Neal, A. W. (2009). Securitization and risk at the EU border: The origins of FRONTEX. *Journal of Common Market Studies*, *47*(2), 333–356. https://doi.org/10.1111/j.1468-5965.2009.00807.x

Neelis, J. (2011). Trade networks in Ancient South Asia. In *Early Buddhist Transmission and Trade Networks. Mobility and Exchange within and beyond the Northwestern*

Borderlands of South Asia (pp. 183–228). Brill. http://www.jstor.com/stable/10.1163/j.ctt1w8h16r.9

Niño, C. (2014). *Derecho, moral y política: Una revisión de la teoría general del derecho [Law, morals and politics: A review of the general theory of law]*. Siglo Veintiuno Editores.

Nordquist, M. H. (8591). *United nations convention on the law of the sea 1982* (M. H. Nordquist (ed.)) [Several volumes published 1985-1991]. Martinus Nijhoff Pub.

Novotný, V. (2019a). Reducing irregular migration flows through EU external action. In *Wilfried Martens Centre for European Studies*. https://doi.org/10.1177/1781685819843064

Novotný, V. (2019b). *Rescue Operations in the Mediterranean: Towards a Reliable EU Policy* [Wilfried Martens Center for Eurpean Studies Report]. https://www.academia.edu/41339057/Rescue_Operations_in_the_Mediterranean_Towards_a_Reliable_EU_Policy

Noyes, J. (2020). The common heritage of mankind: Past, present, and future. *Denver Journal of International Law & Policy*, *40*(1–3), 1–26.

Noyes, J. E. (2007). Ships in Distress. In R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law (Vol IX)* (pp. 173–179). Oxford University Press. https://doi.org/10.1093/law:epil/9780199231690/e1219

Núñez, J. E. (2021). *Territorial disputes and State sovereignty. International law and politics*. Routledge.

O'Sullivan, A. (2017). *Universal jurisdiction in international criminal law: the debate and the battle for hegemony*. Routledge.

Obokata, T. (2005). Trafficking of human beings as a crime against humanity: some implications for the international legal system. *The International and Comparative Law Quarterly*, *54*(2), 445–457. http://www.jstor.org/stable/3663256

Office of the United Nations High Commissioner for Human Rights. (2018). *The principle of non-refoulement under international human rights law*. https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf

Öner, S., & Cirino, M. (2023). The perceptions of political and civil society actors on securitisation of sea rescue NGOs in the Mediterranean: the case of Italy. *Journal of North African Studies*, *28*(2), 392–418. https://doi.org/10.1080/13629387.2021.1989586

Panebianco, S. (2016). The Mare Nostrum Operation and the SAR approach: the Italian response to address the Mediterranean migration crisis. *EUMedEA Online Working Paper Series*, *May*, 1–27. https://doi.org/10.13140/RG.2.1.1342.8081

Papanicolopulu, I. (2014). Human rights and the law of the sea. In D. J. Attard, M. Fitzmaurice, & N. A. Martínez Gutiérrez (Eds.), *IMLI Manual on International Maritime Law. Vol I. The Law of the Sea* (pp. 509–532). Oxford University Press. https://doi.org/10.1093/law/9780199683925.001.0001

Papanicolopulu, I. (2016). The duty to rescue at sea, in peacetime and in war: A general

overview. *International Review of the Red Cross*, *98*(902), 491–514. https://doi.org/10.1017/S1816383117000406

Papastavridis, E. (2020). The European Convention of Human Rights and migration at sea: Reading the “jurisdictional threshold” of the convention under the law of the sea paradigm. *German Law Journal*, *21*(3), 417–435. https://doi.org/10.1017/glj.2020.23

Papastavridis, E. D. (2014). Crimes at sea: A law of the sea perspective [The Centre for Studies and Research in International Law and International Relations]. In A. de droit international de La Haye (Ed.), *La criminalité en mer / Académie de Droit International de la Haye = Crimes at sea / Hague Academy of International Law* (pp. 1–52). Brill | Nijhoff. https://doi.org/10.1163/1875-8096_pplcdu_ej.9789004268050.ch01

Pardessus, J. M. (1828). *Collection de lois maritimes antérieures au XVIIIe siècle. [Collection of maritime laws prior to the 18th century] (Tome I)*. Imprimerie Royale.

Patterson, I. (2017). *Tourism and leisure behaviour in an ageing world* (C. International (ed.)).

Pemmaraju, S. R. (2016). The South China Sea arbitration (The Philippines v. China): Assessment of the award on jurisdiction and admissibility. *Chinese Journal of International Law*, *15*(2), 265–307. https://doi.org/10.1093/chinesejil/jmw019

Periñán-Gómez, B. (2018). El mar ¿res communis omnium? dogma y realidad desde la óptica jurisprudencial. [The sea, res communis omnium? Dogma and reality from the jurists’ standpoint]. *Revista Internacional de Derecho Romano [International Journal of Roman Law]*, *21*, 682–749. http://www.ridrom.uclm.es/documentos21/perinan21_pub.pdf

Perkowska, M. (2016). Illegal, legal, irregular or regular - Who is the incoming foreigner? *Studies in Logic, Grammar and Rhetoric.*, *45*(58), 187–197. https://doi.org/10.1515/slgr-2016-0024

Perruchoud, R., & Redpath-Cross, J. (Eds). (2019). International migration law: glossary of migration terms. In *International Organization For Migration, Pub. 25. 2nd Ed.* https://doi.org/10.1017/CBO9781107415324.004

Pilgrim, D. (1975). The Colbert-Seignelay Naval Reforms and the Beginnings of the War of the League of Augsburg. *French Historical Studies*, *9*(2), 235–262. https://doi.org/10.2307/286127

Price, S. (2021). *Maritime safety history & general framework*. Slidepptx.Com. https://slidepptx.com/history-general-framework_59fafe091723dde26727b9be.html

Proelss, A. (2017). *United Nations Convention on the Law of the Sea. A Commentary* (A. Proelss (ed.)). C.H.Beck/Hart Nomos.

Pugh, M. (2004). Drowning not waving: Boat people and humanitarianism at sea. *Journal of Refugee Studies*, *17*(1), 50–69. https://doi.org/10.1093/jrs/17.1.50

Rahim, R. A., Ahmad Tajuddin, M. A. bin, Abu Bakar, K. bin H., & Abdul Rahim, M. N. Bin. (2015). Combating smuggling in persons: A Malaysia experience [Online 10 June 2015]. *ICoLASS 2014 – USM-POTO International Conference on Liberal Arts & Social Sciences. SHS Web of Conferences*, *18*, 1–13. https://doi.org/10.1051/shsconf/20151801004

Raible, L. (2018). Title to territory and jurisdiction in international human rights law: Three models for a fraught relationship. *Leiden Journal of International Law*, *31*(2), 315–334. https://doi.org/10.1017/S0922156518000018

Ratcovich, M. (2015). The concept of 'place of safety': Yet another self-contained maritime rule or a sustainable solution to the ever-controversial question of where to disembark migrants rescued at sea. In *Australian Year Book of International Law* (Vol. 33, Issue 34, pp. 81–130). https://doi.org/10.2139/ssrn.3057342

Regional Support Office (RSO) to the Bali Process. (2015). *Policy guide on protecting victims of trafficking- the Bali Process*. https://www.baliprocess.net/UserFiles/baliprocess/File/Policy Guide on Protecting VIctims of Trafficking.pdf

Reiff, H. (1959). The United States and the Treaty Law of the Sea. In *Use and Abuse of the Sea* (pp. 18–72). Univesity of Minnesota Press. https://www.jstor.org/stable/10.5749/j.ctttt9m3.4

Reydams, L. (2004). *Universal jurisdiction: International and municipal legal perspectives*. Oxford University Press.

Reynolds, J. (2011). Universal jurisdiction to prosecute human trafficking: Analyzing the practical impact of a jurisdictional change in Federal law. *Hastings International and Comparative Law Review*, *34*(2).

Ribeiro-Porfírio, L. C. (2019). *Tratamiento jurídico dos refugiados [Legal treatment of refugees]*. Editorial Juruá.

Ringbom, H. (2015). *Jurisdiction over ships. Post-UNCLOS developments in the Law of the Sea.* (H. Ringbom (ed.)) [Publications on Ocean Development]. Koninklijke Brill NV.

Riofrío Martínez-Villalba, J. C. (2015). La selección del método en la investigación jurídica. 100 métodos posibles. Selection of Methods for Legal Research. 100 Possible Methods. *Revista de Educación y Derecho (Education and Law Review)*, *12*, 1–27.

Roach, J. A. (2005). Enhancing maritime security in the straits of Malacca and Singapore. *Journal of International Affairs*, *59*(1), 97–116.

Rodolakis, G. E. (2007). Από το νόμο Ροδίων στο 53ο βιβλίο των Βασιλικών: συμβολή στη μελέτη του βυζαντινού ναυτικού δικαίου [From the law of the Rhodians to the 53rd book of Basilica: contribution to the study of byzantine maritime law]. In Academy of Athens (Ed.), *Yearbook of the Research Centre for the History of Greek Law 20, supp. 8* (pp. 213–260).

Rojas-Donat, L. (2000). El origen de la potestad apostólica de los Papas y su proyección en los descubrimientos y conquistas portuguesas y castellanas en el s.XV- [The origin of the apostolic power of the Popes and its projection in the Portuguese and Spanish discoveries and con. *Revista de Derecho, Criminologia y Ciencias Penales [Journal of Law, Criminology and Criminal Sciences]*, *2*, 107–122.

Rose, S. (1990). Naval activity in the exclusive economic zone—Troubled waters ahead? *Ocean Development & International Law*, *21*(2), 123–145. https://doi.org/10.1080/00908328909545927

Rothwell, D. R., & Stephens, T. (2010). *The international law of the sea*. Hart Publishing Ltd.

Ruiz, M. (2019). *Datos: qué ayudas reciben los inmigrantes en España [Facts: What benefits do migrants receive in Spain?]* [[Report, January 17]]. Newtral. https://www.newtral.es/datos-que-ayudas-reciben-los-inmigrantes-en-espana/20190117/

Runyan, T. (2015). Ships and seafaring. In A. Classen (Ed.), *Handbook of medieval culture. Vol. 3. Fundamental aspects and conditions of the European Middle Ages.* (pp. 1610–1633). Walter de Gruiter, Inc.

Russell, J., & Cohn, R. (2012). *Likert scale* (J. Russell & R. Cohn (eds.)). Bood on Demand.

Ryngaert, C. (2015). The concept of jurisdiction in international law. In A. Orakhelashvili (Ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Issue Section 6, pp. 50–75). Edward Elgar Publishing. https://doi.org/10.4337/9781783472185.00007

Salazar-Revuelta, M. (2007). *La responsabilidad objetiva en el transporte marítimo y terrestre en Roma [Objective liability in maritime and land transport in Rome]* (Dykinson SL (ed.)).

Sánchez-Moreno Ellart, C. (2012). Law of the sea, Rhodian. In R. S. Bagnall, K. Brodersen, C. B. Champion, A. Erskine, & H. S. R. (Eds.), *The Encyclopedia of Ancient History* (First ed., pp. 2970–3972). Blackwell Publishing Ltd. https://doi.org/10.1002/9781444338386.wbeah13141

Sánchez-Ramos, B. (2017). Places of refuge for ships in need of assistance: looking for the best response. *Revue Maroco-Espagnole de Droit International et Relations Internationales (v. Electronique). [Moroccan-Spanish Journal of International Law and International Relations (Electronic Version).]*, *7*(Jan-Dec), 117–144.

Sánchez Legido, Á. (2018). ¿Héroes o villanos? las ONG de rescate y las políticas europeas de lucha contra la inmigración irregular: (a propósito del caso Open Arms) [Heroes or villains? Rescue NGOs and European policies to combat irregular immigration: (on the Open Arms case)] [RI §420713]. *Revista General de Derecho Europeo [General Journal of European Law)*, *46*, 1–35.

Santos-Vara, J. (2014). Crónica sobre la aplicación judicial del derecho internacional público en España [Chronicle on the judicial application of public international law in Spain]. *Revista Electronica de Estudios Internacionales*, *14 (Enero-Junio)*, 1–24. www.reei.org

Santos-Vara, J., & Sánchez-Tabernero, S. R. (2016). In deep water: Towards a greater commitment for human rights in sea operations coordinated by frontex? *European Journal of Migration and Law*, *18 ()*, 65–87. https://doi.org/10.1163/15718166-12342090

Santos Vara, J. (2018a). La transformación de Frontex en la agencia europea de la guardia de fronteras y costas: ¿hacia una centralización en la gestión de las fronteras? [The transformation of Frontex into the European border and coast guard agency: towards a centralisation of b. *Revista de Derecho Comunitario Europeo [European Community Law Journal]*, *59*(Ene-Abr), 143–186.

Santos Vara, J. (2018b). The EU's agencies: Ever more important for the governance of the Area of Freedom, Security and Justice. In A. Ripoll Servent & F. Trauner (Eds.), *The Routledge handbook of justice and home affairs research* (pp. 445–457). Routledge.

Santos Vara, J. (2019). Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU. In S. Carrera, J. Santos Vara, & T. Strik (Eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis Legality, Rule of Law and Fundamental Rights Reconsidered* (pp. 21–38). Edward Elgar Publishing Limited. https://doi.org/10.4337/9781788972482

Santos Vara, J., & Pascual Matellán, L. (2020). The Global Compact on Migration: convergence or divergence with EU policies? In E. Fahey (Ed.), *Framing convergence with the global legal order: The EU and the world (modern studies in European law)* (pp. 163–176). Hart Publishing. https://doi.org/10.5040/9781509934409.ch-009

Schittenhelm, K. (2019). Implementing and rethinking the European Union's Asylum legislation: The Asylum Procedures Directive. *International Migration*, *57*(1), 229–244. https://doi.org/https://doi.org/10.1111/imig.12533

Scovazzi, T. (2015). ITLOS and jurisdiction over ships. In H. Ringbom (Ed.), *Jurisdiction over ships. Post UNCLOS development in the law of the sea* (pp. 382–404). Koninklijke Brill NV.

Serna Vallejo, M. (2020). La historiografía sobre los Rôles d'Oléron (siglos XV a XX) [The historiography on the Rôles d'Oléron (15th to 20th centuries)]. *Anuario de Historia Del Derecho Español [Annuary of the History of the Spanish Law)*, *70*, 471–498.

Shalowitz, A. L. (1954). Boundary problems raised by the Submerged Lands Act. *Columbia Law Review*, *54*(7), 1021–1048. https://doi.org/10.2307/1119696

Sharpe, M. (2018). Mixed up: International law and the meaning(s) of "Mixed Migration." *Refugee Survey Quarterly*, *37*(1), 116–138. https://doi.org/10.1093/rsq/hdx021

Shaw, M. N. (2017). *International law* (Eigth). Cambridge University Press (CUP). https://doi.org/10.1017/9781316979815

Shawt, M. N. (1996). The Heritage of States: The Principle of Uti Possidetis Juris Today. *British Yearbook of International Law*, *67*(1), 75–154. https://doi.org/10.1093/bybil/67.1.75

Sherman, C. P. (1913). The indebtedness of modern jurisprudence to medieval Italian law. *The Canadian Law Times*, *XXXIII*(10), 869–877. https://core.ac.uk/download/pdf/72834358.pdf

Skrivankova, K. (2006). Combating trafficking in human beings. *International Review of Law, Computers & Technology*, *20*(1–2), 229–232. https://doi.org/10.1080/13600860600705135

Slingenberg, L. (2019). The right not to be dominated: The case law of the European court of human rights on migrants' destitution. *Human Rights Law Review*, *19*(2), 291–314. https://doi.org/10.1093/hrlr/ngz012

Smis, S., & van der Borght, K. (1999). The EU-US compromise on the Helms-Burton and

D'Amato Acts. *The American Journal of International Law*, *93*(1), 227–236. https://doi.org/10.2307/2997968

Smith, A. (2017). Uncertainty, alert and distress: The precarious position of NGO search and rescue operations in the Central Mediterranean. *Paix et Securite Internationales*, *5*, 29–70. https://doi.org/10.25267/paix_secur_int.2017.i5.02

Smith, W. H. I. (1971). The duty to render assistance at sea: Is it effective or adrift? *California Western International Law Journal*, *2*(1–8), 146–163. https://scholarlycommons.law.cwsl.edu/cwilj/vol2/iss1/8

Söğüt, İ. S. (2017). A Synoptic Overview of the Lex Rhodia De Iactu. *Prof. Dr. Bülent Tahiroğlu'na Armağan, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi Özel Sayısı [Special Issue of Marmara University Faculty of Law Journal of Legal Studies Dedicated to Prof. Dr. Bülent Tahiroğluna Armağan]*, *23*(3), 209–235. https://dergipark.org.tr/en/download/article-file/469372

Sohn, L. B., Noyes, J. E., Franckx, E., & Juras, K. G. (2014). *Cases and materials on the law of the sea* (2nd ed.). Koninklijke Brill NV.

Solomon, S. (2019). Migrant boats on the high seas and their interception through psychologically coercive measures: Is there a case to extraterritorially apply human rights law? *Netherlands Quarterly of Human Rights*, *37*(1), 36–49. https://doi.org/10.1177/0924051918824170

Stelmach, J., & Brożek, B. (2006). *Methods of legal reasoning* (F. Laporta, A. Peczenik, & F. Schauer (eds.)). Springer. https://doi.org/10.1007/1-4020-4939-0

Stewart, D., & Gerber, H. (1999). *Islamic Law and Culture, 1600-1840*. Brill.

Tanaka, Y. (2019). The International law of the sea. In *The International Law of the Sea* (3rd ed.). Cambridge University Press. https://doi.org/10.1017/9781108545907

Terrazas-Ponce, J. D. (2012). The concept of "res" in the Roman jurists, II: The "res communes omnium." *Revista de Estudios Histórico-Jurídicos [Journal of Historical-Legal Studies]*, *XXXIV*, 127–163. https://doi.org/10.4067/S0716-54552012000100005

Thym, D. (2022). *Reforming the Common European Asylum System. Opportunities, pitfalls, and downsided of the Commission proposal for a new pact on migration and asylum.* (T. Daniels & Odysseus Academic Network (eds.)). Nomos. Konstatnz University.

Tipton, M. J. (1989). The initial responses to cold-water immersion in man. *Clinical Science*, *77*(6), 581–588. https://doi.org/10.1042/cs0770581

Tomasi, B. (2015). Variation on the theme: CPCF V Minister for immigration and border protection. *University of Western Australia Law Review*, *39*(2), 426–436. http://classic.austlii.edu.au/au/journals/UWALawRw/2015/34.html

Topak, Ö. E. (2019). Humanitarian and human rights surveillance: The challenge to border surveillance and invisibility? *Surveillance and Society*, *17*(3–4), 382–404. https://doi.org/10.24908/ss.v17i3/4.10779

Tousley, M. (1990). United States seizure of stateless drug smuggling vessels on the high seas: is it legal? *Case W. Res. J. Int'l L.*, *22*(2), 375. http://heinonlinebackup.com/hol-

cgi-bin/get_pdf.cgi?handle=hein.journals/cwrint22&section=25

Tranchina, G. (2022). *Italy's criminalisation of migrant rescue: the luventa case.* [December 13]. Human Rights Watch. Euobserver. https://www.hrw.org/news/2022/12/13/italys-criminalisation-migrant-rescue-luventa-case

Treves, T. (2010). Human rights and the Law of the Sea. *Berkeley Journal of International Law*, *28*(1), 0–14.

Tzevelekos, V. P., & Proukaki, E. K. (2017). Migrants at sea: A duty of plural states to protect (extraterritorially)? *Nordic Journal of International Law*, *86*(4), 427–469. https://doi.org/10.1163/15718107-08604003

United Nations Conference on Trade and Development (UNCTAD). (2018). Review of Maritime Transport 2018. In *United Nations Conference on Trade and Development*. https://doi.org/10.18356/a9b345e7-en

United Nations High Commissioner for Refugees (UNHCR). (1996). *Handbook Voluntary repatriation: international protection*.

United Nations Office on Drugs and Crime. (2003). *Acts against the safety of marine navigation*. https://www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_9.pdf

United Nations Office on Drugs and Crime. (2020). *Maritime crime: a manual for criminal justice practitioners* [3rd Edition]. https://www.unodc.org/documents/Maritime_crime/GMCP_Maritime_3rd_edition_Ebook.pdf

Van Berckel Smit, J. (2020). Taking 0nboard the issue of disembarkation. *European Journal of Migration and Law*, *22*(4), 492–517. https://doi.org/10.1163/15718166-12340086

Van Hoecke, M. (2002). *Law as communication*. Hart Publishing. https://doi.org/10.5040/9781472562647

Van Hoecke, M. (2011). *Methodologies of Legal Research : What Kind of Method for What Kind of Discipline?* Hart Publishing Ltd.

van Liempt, I., & Doomernik, J. (2006). Migrant's agency in the smuggling process: The perspectives of smuggled migrants in the Netherlands. *International Migration*, *44*(4), 165–190. https://doi.org/10.1111/j.1468-2435.2006.00383.x

Van Liempt, I., & Sersli, S. (2013). State responses and migrant experiences with human smuggling: A Reality check. *Antipode*, *45*(4), 1029–1046. https://doi.org/10.1111/j.1467-8330.2012.01027.x

Velluti, S. (2014). *Reforming the Common European Asylum System — Legislative developments and judicial activism of the European Courts*. Springer Berlin Heidelberg. https://doi.org/https://doi.org/10.1007/978-3-642-40267-8

Ventrella, M. (2010). *The control of people smuggling and trafficking in the EU: Experiences from the UK and Italy*. Routledge.

Ventrella, M. (2015). Recognising effective legal protection to people smuggled at sea, by

reviewing the EU legal framework on human trafficking and solidarity between member states. *Social Inclusion*, *3*(1), 76–87. https://doi.org/10.17645/si.v3i1.170

Ventura, V. A. M. F. (2020). *Environmental jurisdiction in the law of the sea. The Brazilian blue Amazon*. Springer Nature. https://doi.org/10.1007/978-3-030-50543-1

Vignon, J. (2019). *For a European Policy on Asylum , Migration and Mobility*. http://institutdelors.eu/wp-content/uploads/2018/11/ForaEuropeanPolicyonAsylumMigrationandMobility-Vignon-Nov18.pdf

Vives, L. (2017). Unwanted sea migrants across the EU border: The Canary Islands. *Political Geography*, *61*(Nov), 181–192. https://doi.org/10.1016/j.polgeo.2017.09.002

Volckart, O., & Mangels, A. (1999). Are the roots of the modern Lex Mercatoria really medieval? *Southern Economic Journal*, *65*(3), 427–450. https://doi.org/10.2307/1060808

Vrancken, P., & Tsamenyi. (2017). *The law of the sea. The African Union and its Member States*. Juta and Company Ltd.

wa Muiu, M., & Martin, G. (2009). A new paradigm of the African state: Fundi wa Afrika. In *A New Paradigm of the African State: Fundi wa Afrika*. https://doi.org/10.1057/9780230618312

Walker, G. K. (Ed). (2012). *Definitions for the law of the sea: Terms not defined by the 1982 Convention*. Martinus Nijhoff Pub.

Watkins, D., & Burton, M. (2017). *Research methods in law* (D. Watkins & M. Burton (eds.); 2nd Ed.). Routledge. https://doi.org/10.4324/9781315386669

Watson, A. (1984). *Sources of law, Legal change, and ambiguity*. University of Pennsylvania Press.

Wensink, W., Warmenhoven, B., Haasnoot, R., Wesselink, R., Dr. Van Ginkel, B., Wittendorp, S., Dr. Paulussen, C., Dr. Douma, W., Dr. Boutin, B., Güven, O., & Rijken, T. (2017). The European Union's policies on counter-terrorism. Relevance, coherence and effectiveness. In *Directorate-General For Internal Policies. Policy Department Citizens' Rights and Constitutional Affairs.* https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf

Wessels, J. (2023). *Planned destitution as a policy tool to control migration in the EU: Socio-economic deprivation and international human rights law* [Blog, 17 March]. EU Immigration and Asylum Law and Policy. https://eumigrationlawblog.eu/

Wessels, R. A. (2018). 'Soft' international agreements in EU external relations: pragmatism over principles? *ECPR SGEU Conference, Panel Hard and Soft Law in the European Union, Paris 13-15 June*, 1–24. https://www.utwente.nl/en/bms/pa/research/wessel/wesselconf17.pdf

Weyemberg, A., Armada, I., & Brière, C. (2014). *European added value assessment the EU arrest warrant. Annex I. Critial assessment of the existing European arrest warrant framework decision* (A. Weyemberg (ed.)). General Secretariat of the European Parliament. https://doi.org/10.2861/44748

Widener, M. (2009). Freedom of the seas. Part 2. In *Yale Law School. Lillian Goldman Law Library.* [Online report October 22, accessed August 23, 2020]. https://library.law.yale.edu/news/freedom-seas-part-2

Wilde, R. (2005). Legal “black hole”? Extraterritorial State action and international treaty law on civil and political rights. In *Michigan Journal of International Law* (Vol. 26, Issue 3).

Wilder, R. J. (1998). *Listening to the sea: the politics of improving environmental protection*. University of Piitsburgh Press.

Wilpon, A. (2016). Floating armories: a legal grey area in arms trade and the law of the sea. *Georgetown Journal of International Law*, *48*(May), 873–894. https://www.theguardian.com/world/2013/jan/10/pirate-weapons

Wise, M. B. (2013). Intercepting migrants at sea: Differeing views of the U.S. Supreme Court and the European Court of Human Rights. *Willamette Journal of International Law and Dispute Resolution*, *21*(1), 19–33. http://www.jstor.org/stable/26207578

Wolfrum, R. (1999). The legislative history of articles 20 and 21 of the statute of the International Tribunal for the law of the sea. *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht [The Rabel Journal of Comparative and International Private Law]*, *63–2*(April), 342–349. https://www.jstor.org/stable/27878118

Xernou, M. (2016). When States fail to rescue persons in distress in the Mediterranean: International Judicial remedies for the unassisted migrants. In *Athens PIL Research Paper Series* (Issue 2). https://www.athenspil.law.uoa.gr/fileadmin/depts/law.uoa.gr/athenspil/uploads/2-2016.pdf

Yates, P. (2015). *Seeking solutions for irregular migration by sea in the Mediterranean Sea: Balancing national security concerns and human rights concerns* [Master thesis, supervisor Dr Felicity Attard, Malta]. https://www.researchgate.net/publication/293873437

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