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«When States fail to Rescue Persons in Distress in the Mediterranean: International Judicial Remedies for the Unassisted Migrants»

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TABLE OF CONTENTS

INTRODUCTION……
I. The Search and Rescue Regime under the Law of the Sea 1

A. The International Legal Framework concerning Rescue at Sea…….....1

i. The obligation to assist..... 1

ii. The obligation to cooperate..... 9

iii.One step beyond; disembarkation in a place of safety..... 12
2. International refugee law: The principle of non-refoulement 17

i. The provision: article 33 of the Geneva Convention 1951 17

ii. The Principle of Non-Refoulement in the course of Search and Rescue Operations..... 20
3. Human Rights Law..... 22

i. Search and Rescue Operations under the light of the right to life 22

ii. Moving towards a right to be rescued at sea?..... 25
4. International Criminal Law..... 27

B.International Judicial Avenues available to States: Surrealism or Pragmatic Answers?.....30

1. Evolution of the treatment of foreigners in the international context..... 30
2. Establishing a contentious case under the dispute settlement system of UNCLOS 32

3. Jurisdiction ratione personae in disputes relevant to article 98 UNCLOS 35

i. Identification of the applicant party..... 35

ii. Identification of the respondent party..... 46

4. Merits of the case: the ‘due diligence’ obligations in particular 48

II. The Judicial Review of Search and Rescue Obligaitons on European Level……53

A. The European Court of Human Rights: a Judicial Safe Haven for the Unassisted?.....53

1. The role of the European Court of Human Rights in the context of Search and Rescue obligations 53
2. The non-refoulement principle in the context of SAR operations..... 55

i. The Non-refoulement principle applied to extraterritorial state action 58

ii. Effective control in Search and Rescue operations on the high seas: the positive answer..... 66
3. Procedural guarantees under article 13 ECHR..... 68
4. The aftermath of the Hirsi Jamaa case..... 70

i. The Hirsi Jamaa Judgment in a political context 70

ii. Article 46 ECHR: Diplomatic assurances or direct assumption of responsibility?..... 72

B. Establishing a case before the European Court of Justice…….……73

1. The European Union and migration by sea 74
2. The obligations of the European Union in Search and Rescue matters 76

i. The competence of the European Union in Search and Rescue matters 76

ii. The European Union and the non-refoulement principle 82
3. The role of Frontex in Search and Rescue Operations 85

i. The structure and responsibilities of Frontex 85

ii. The activities of Frontex 87

ii. Assessment of the role of Frontex in matters of Search and Rescue 89

iv. Responsibility of Frontex in the framework of Search and Rescue operations 92
4. Judicial Proceedings before the European Court of Justice 96
Bibliography…….103

When States fail to Rescue Persons in Distress in the Mediterranean:
International Judicial Remedies for the Unassisted Migrants

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INTRODUCTION

On 20 January 2014, a boat capsized in the Aegean Sea, leading to the death of eleven persons and bringing to the fore the discussion about immigration, asylum and rescue of persons at sea. One year later, on 20 January 2015, the survivors and family members of the deceased filed a complaint against the Greek state to the European Court of Human Rights. The events of the fatal night were reported by active actors in the protection of human rights in Greece, as follows.

'*During the early hours[…], off the coast of Farmakonisi island, within Greek waters and close to the border line, a small boat capsized, which carried 27 refugees from Afghanistan and Syria, including 4 women and 9 children. The boat capsized and sank, while it was towed by a vessel of the Greek Coast Guard. The sinking resulted in the death of 11 persons (3 womens and 8 children). The corpses of one woman and two children were found at sea and the rest of them in the cabin of the vessel, when it was lifted one month after its sinking.*

During their immediate contact with the representatives of the UNHCR, which took place the following day on the island of Leros, the 16 refugees who survived reported that their boat had approached the Greek coastline when it came across the Coast Guard and that the towing of the boat by the coast guard was conducted towards Turkey, in two stages at high speeds and resulting in water entering the boat. They also reported that the rope which kept the boat connected with the Coast Guard vessel was cut by the Coast Guard officers, which resulted in the boat being capsized and in the death of 11 women

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and children and that the necessary rescue actions were not taken. They also complained about further acts of mistreatment against them after they reached the island of Farmakonisi.

The Coast Guard officers, on the contrary, denied the complaints.'[1]

The incident provoked political unrest and reactions on national and regional level. Non-Governmental Organizations [hereinafter NGOs], including Amnesty International and Human Rights Watch published reports on the serious situation in the South Mediterranean and discussion over collective expulsions, pushbacks and ill-treatment of migrants arose.[2] The Head of the Coast Guard, Vice Admiral Bandias, who expressed publicly his apology for the loss of life, disbanded one moth latter.[3] Miltiadis Varvitsiotis, the Greek Minister of Shipping, Maritime Affairs and the Aegean at the time, denied any responsibility of the Greek Coast Guard for the incident, as well as the accusations of towing the vessel towards Turkey. He attributed the sinking of the boat to the moves of the migrants and the children on board.[4]

The public opinion, however, demanded an answer to the events.[5] The European Home Affairs Commissioner Cecilia Malmström asked for an independent inquiry into the circumstances of the incident and stated that the EU is doing everything possible to help Greece manage the migratory flows arriving at its borders.[6] Nils Muižnieks, the

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[1] Greek council for Refugees, Hellenic League of Human Rights, Network of Social Support to Refugees and Migrants, Group of Lawyers for the Rights of Migrants and Refugess, *Background Briefing on the Investigation into the Farmakonisi Boat Wreck of 20.1.2014* (31 July 2014) available online at http://www.statewatch.org/news/2014/aug/greece-farmakonisi-boat-wreck-briefing.pdf (accessed 6 January 2015)

[2] Human Rights Watch, *Greece: Human Rights Watch Submission to the United Nations Committee against Torture* (24 March 2014) available online at https://www.hrw.org/news/2014/03/24/greece-human-rights-watch-submission-united-nations-committee-against-torture (accessed 6 January 2015)

[3] Διονύσης Βυθούλκας, *Δημήτρης Μπαντιάς: Πάλι συγγνώμη θα ζητούσα για το Φαρμακονήσι*, ToVima (22 February 2014) available online at http://www.tovima.gr/society/article/?aid=570140 (accessed 6 January 2015)

[4] Supra no 2

[5] For further details on the reactions of the press see Απόστολος Φωτιάδης, *Έμποροι των συνόρων: Η νέα ευρωπαϊκή αρχιτεκτονική επιτήρησης* (1st edition, Potamos, 2015) at p. 48 and Very Mix, *Farmakonisi tragedy: Greece dismiss claims, coast guard was towing migrants back to Turkey*, available online at http://www.keeptalkinggreece.com/2014/01/23/farmakonisi-tragedy-greece-dismiss-claims-coast-guard-was-towing-migrants-boat-back-to-turkey/ (accessed 6 January 2015)

[6] *EC home affairs commissioner also wants inquiry into Farmakonisi drownings*, Kathimerini (24 January 2014) available online at http://www.ekathimerini.com/157260/article/ekathimerini/news/ec-home-affairs-commissioner-also-wants-inquiry-into-farmakonisi-drownings (accessed 6 January 2015)

Commissioner for Human Rights of the Council of Europe at the time, expressed his doubt over the official assessment of the incident by the Greek authorities.[7]

The Farmakonisi incident prompted Nils Muižnieks, Cecilia Malmström, the United Nations High Commissioner on Human Rights and NGOs to urge Greek authorities to conduct an independent inquiry.[8] The Prosecutor of the Piraeus' Marine Court ordered a preliminary investigation on the case, after which the case was considered 'manifestly ill-founded in substance' and the file was archived.[9] The decision was approved by the Prosecutor of the Military Court of Review and thus, the investigation into the responsibility of the Greek Coast Guard was closed. In addition to not taking into consideration the testimonies of the survivors due to lack of credibility, the Prosecutor did not take into account the rules of the law of the sea related to the duty to assist those in distress, as well as relevant rules of search and rescue.[10]

The Farmakonisi incident is one of the many cases of boats capsizing in the Mediterranean, leading to death those travelling to reach Europe. In October 2015, the photo of Aylan, a dead 5-year-old Syrian refugee on the Turkish shore, stimulated a massive response and political initiatives on European level. Not all tragic events, though, gain publicity and raise public awareness. In 2004, the 'Tampa incident' incited IMO to amend the search and rescue regime. At nearly the same time the M/S Joola ferry capsized and led almost 1.800 passengers to death,[11] an Indonesian ferry carrying more than 180

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[7] Commissioner for Human Rights, *Reply of the Commissioner to the letter of Mr Miltiadis Varvitsiotis, on the lives lost at sea during the Farmakonisi tragic incident*, CommDH (2014)6, Council of Europe (14 February 2014) available online at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2861629&SecMode=1&DocId=2108796&Usage=2 (accessed 6 January 2015) The Greek Minister, who exercised political oversight over the Greek Coast Guard, also made the following infamous statement: '*Muiznieks and some others want to create a political problem in Greece. [..] I don't believe that anyone wants us to open the gates and let all migrants enjoy asylum in the country*'. See *Βαρβιτσιώτης για Φαρμακονήσι: Δεν πιστεύω ότι κανείς θέλει να ανοίξουμε τις πύλες της χώρας*, SKAI.gr (23 January 2014) available online at http://www.skai.gr/news/greece/article/250431/varvitsiotis-gia-farmakonisi-den-pisteuo-oti-kaneis-thelei-na-anoixoume-tis-pules-tis-horas/ (accessed 6 January 2015)

[8] UNHCR, *Statement on boat incident off Greek coast* (21 January 2014) available online at http://www.unhcr.org/52df83d49.html (accessed 6 January 2015)

[9] Supra note 1, p.1

[10] The decision to file the case was strongly criticized. Nils Muiznieks in a Facebook post stated that '*Impunity risks covering these serious human rights violations. This would be a grave mistake*.' Cecilia Malmstrom did not comment the decision of the Prosecutor. See *Government defends shelving of Farmakonisi probe,* Kathimerini (11 August 2014) available online at http://www.ekathimerini.com/162239/article/ekathimerini/news/govt-defends-shelving-of-farmakonisi-probe (accessed 6 January 2015)

[11] The vessel was only supposed to be carrying a maximum of 580 people. The day it capsized off the coast of Gambia, MV Joola was crammed more than three times beyond its capacity. See M. Jullien, *Africa's Titanic: Seeking justice a decade after Joola*, BBC News (26 September 2012) available online at http://www.bbc.com/news/world-africa-19717929 (accessed 25 November 2015)

passengers sank not far from the scene of the Tampa incident[12] and the media did not look into respective losses and states' responsibilities. Why, thereafter, insist on an incident of loss of life at sea among so many others?

The Farmakonisi case is not as common as it may seem at first glance. Although many vessels transferring migrants capsize globally, it is not common that the judicial mechanism is triggered under allegation of failure to assist in distress. The reasons are practical, since those resorting to justice must survive the failure to assist them, identify the ship or ships that could but did not assist them and, last but not least, have access to legal support. As Patrick Long has commented, '*Dead men tell no tales. Nor do they sue*'.[13] The small likelihood of the aforementioned conditions being met indicates the importance of the Farmakonisi case.

This research paper describes the legal framework of rescue at sea under international law and its implementation, using the Farmakonisi incident as a hint of its deficiencies. During 2016, new developments in the activities in the Aegean Sea have introduced additional problematics, concerning mainly NATO's deployment,[14] as well as search and rescue operations in light of the EU-Turkey Statement of the 18th March 2016.[15] The special characteristics and issues of international law arising from the operations of the ships participating in NATO's Standing Maritime Group 2 and the coordination with Frontex's and Greek Coast Guard's activities, are not examined in the present research paper. Taking into consideration the short period of implementation of these agreements, as well as the limited official information available currently, a future legal analysis is recommended.

The provisions of the law of the sea relevant to search and rescue obligations are not always respected by states, often resulting in tragic events. On European level, the

[12] In november 2002 the boat sank near the port city of Ambon. The sinking was attributed to the decision of the captain to overload it with cargo, although violence in the area between religious gangs initially raised concerns of an operation against the muslim passengers of the ship. See *Dozens Missing After Indonesian Ferry Sinks*, CNN,com/World (4 November 2002) available online at http://www.cnn.com/2002/WORLD/asiapcf/southeast/l 1/03/indonesia.ferry/index.html (accessed 25 November 2015)

[13] PJ Long, *The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea*, Buffalo Law Review, pp 591-628 (2000) at p. 613

[14] NATO, ''Assistance for the refugee and migrant crisis in the Aegean Sea'', available online at http://www.nato.int/cps/fr/natohq/topics_128746.htm?selectedLocale=en# (accessed 25 September 2016)

[15] Council of the European Union, ''EU-Turkey Statement, 18 March 2016'', available online at http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/ (accessed 25 September 2016)

European Court of Human Rights [hereinafter ECtHR] has played an important role in defining the content of relevant obligations. However, the same cannot be said of the International Court of Justice [hereinafter ICJ] and the European Court of Justice [hereinafter ECJ]. For this reason, taking into consideration the reluctance of national judges to implement the relevant provisions of international law, the research paper will evolve around the following main research questions:

'*Does the judicial review on international level, of cases concerning search and rescue obligations at sea, contribute to their implementation? Which judicial avenues are available to the unassisted migrants, apart from national courts?*'

As far as the scope of the research is concerned, this research paper touches upon situations of distress on the high seas. It is on the high seas that the most complex issues of jurisdiction and states' responsibility arise. The sovereignty of the coastal state on its territorial waters combined with the right of innocent passage through the territorial sea provide a clear, in the majority of cases, legal framework. In the case of Farmakonisi notably, it was the Greek state's duty to rescue the passengers of the boat. What would be the case though, should the boat have capsized some nautical miles to the south? Who would be responsible for assisting the boat on the high seas and what would be the legal consequences of inaction? Furthermore, the research paper concerns the practice of vessels owned or operated by a state and used only on government non-commercial service. State vessels include coast guard vessels, naval vessels, national lifeboats and all types of vessels specifically engaged in search and rescue operations. The reason behind this delimitation of the issue under scrutiny consists in the different aspects of flag state responsibility depending on the owner of the ship. Although both private and state vessels may engage in a rescue-at-sea operation, attribution of a private ship's conduct to a state is a separate issue.

The first chapter presents the states' duties concerning the rescue of migrants and refugees at sea and the relevant international legal instruments. The second chapter looks into the possibility of a case before an international court under the pertinent provisions of the law of the sea. The third chapter gives an outline of the jurisprudence of ECtHR on the issue and the fourth chapter seeks to examine the possibility of establishing a case before the ECJ.

ABBREVIATIONS

Doc.: Document

EC: European Community

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

ECJ: European Court of Justice

Ed: edited

EU: European Union

ICC: International Coordination Center

ICCPR: International Covenant on Civil and Political Rights

ICJ: International Court of Justice

Ibid: ibidem

ILA: International Law Association

ILC: International Law Commission

ILR: International Law Reports

IMO: International Maritime Organization

ITLOS: International Tribunal for the Law of the Sea

NGO: Non-Governmental Organization

PCIJ: Permanent Court of International Justice

Rep.: Peports

SAR: Search and Rescue

SOLAS Convention: Safety of Life at Sea Convention

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

UN: United Nations

UNCLOS: United Nations Convention on the Law of the Sea

UN GA: United Nations General Assembly

UNHCR: United Nations High Commissioner for Refugees

UNHCR Excom: United Nations High Commissioner for Refugees Executive Committee

UNTS: United Nations Treaty Series

UN/USA: United States of America

UK: United Kingdom of Great Britain and Northern Ireland

v: versus

VCLT: Vienna Convention on the Law of Treaties

Vol: Volume

YbILC: Yearbook of International Law Commission

I. The Search and Rescue Regime on International Level: Substantial and Judicial Issues

Under this section, the legal framework of search and rescue under international law will be presented, as well as its implementation by states. After noting the deficiencies and ambiguous points it presents, I will seek to answer the first question of the research by examining whether a dispute concerning rescue-at-sea obligations before an international court would fill the protection gaps in state practice.

A. The International Legal Framework concerning Rescue at Sea

Firstly, the provisions of international law related to rescue at sea, under the different fields of international law, will be presented.

1. The Search and Rescue Regime under the Law of the Sea

i. The obligation to assist

a. The content of the obligation

The duty to assist persons found in distress at sea is a long-stablished rule of customary international law, deriving from the ancient maritime practice of assisting fellow seafarers.[16] The moral obligation of providing assistance to those in distress at sea took a legal character in the late 19th century.[17] The first international instrument dealing with rescue at sea was the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea in 1910,[18] which focused on the responsibility of the master

[16]The International Law Commission [hereinafter ILC] in its Commentary on article 36, concerning distress at sea, clarified that *'In the opinion of the Commission [International Law Commission], the article as worded above states the existing international law*'. See ILC, Report of the International Law Commission covering the work of its eighth session (23 April-4 July 1956) UN Doc A/5139. See also E Papastavridis, *The Interception of Vessels on the High Seas; Contemporary Challenges to the Legal Order of the Oceans* (1st edition, Oxford: Hart, 2013) at p. 294

[17] See further the Scaramanga v. Stamp Case in 1880, where it was decided that '*To all who have trust themselves to the sea it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations which may result to a ship or cargo from the rendering of needed aid*.', *Scaramanga v Stamp* (1880). The case concerned the steamer Olympia which spotted another merchant ship in distress. After communication with the shipowner, it was agreed to tow the ship. The steamer, however, did not assist. The judges ruled that its deviation was unjustifiable and the shipowner was liable for the loss. See also about the Scaramanga vStamp Case, M Dockray, *Cases and Materials on the Carriage of Goods by Sea* (3rd edition, Cavendish Publishing, 2004) at p.64

[18] Article 11, International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at Sea and Protocol of Signature (1910) available online at

of a ship. The 1910 Salvage Convention was replaced by the International Convention on Salvage, concluded by IMO in 1989.[19] The states-centered approach was multilaterally depicted in the 1958 Geneva Conference, where clear reference was made to the flag states' obligations.[20]

The most integrated conventional codification of this long lasting tradition so far is found in Article 98 of the United Nations Convention on the Law of the Sea [hereinafter UNCLOS], which provides for obligations of both flag and coastal states. It is commonly viewed as a manifestation of fundamental humanitarian considerations.[21] The article is also seen as an answer to the historic needs of the years of drafting UNCLOS, when the phenomenon of large-scale influx of asylum seekers traveling by sea in overcrowded and unseaworthy vessels was rising. However, since this was already a longstanding problem and the calls to the international community for the necessary rescue action were left unanswered,[22] it was mainly the inaction of both flag and coastal states towards the 'boat people' that imposed the need for a new wording of the applicable rule.[23] With regard to flag states, article 98 (1) LOSC provides that:

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
(a) to render assistance to any person found at sea in danger of being lost;
(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

http://www.admiraltylawguide.com/conven/salvage1910.html (accessed 25 November 2015)

[19] International Convention on Salvage (1989) IMO 1953 UNTS 165, S. Treaty Doc. No. 102-12 [hereinafter Salvage Convention]

[20] During the 1958 Geneva Conference, the final report of the ILC constituted the basis for the negotiations. The report was the fruit of the ILC's work on different aspects of the law of the sea, closely followed by the United Nations General Assembly. See for further details the ILC commentary on the body of draft articles deposited to the Conference, ILC, Report of the International Law Commission covering the work of its eighth session, UN Doc A/5139 (23 April-4 July 1956)

[21] The duty to render assistance in distress at sea is also established during armed conflict, according to article 18 of the First Geneva Convention. See Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949) International Committee of the Red Cross (ICRC) 75 UNTS 31. See also M.H Nordquist, *United Nations Convention on the Law of the Sea 1982: A commentary* (3rd edition, Martinus Nijhoff Publishers 1995) at p. 171

[22] UNHCR Reports to GA, Supplement No 12, A/34/12/Add.1 (1979) Official Records of the UNGA, 34th Session, para. 72(1) (d) available online at http://www.unhcr.org/3ae68c370.html (accessed 25 November 2015)

[23] UNHCR Executive Committee, Problems related to the Rescue of Asylum Seekers in Distress at Sea (1981) (EC/SCP/18) at para 3, available online at http://www.unhcr.org/3ae68ccc8.html (accessed 25 November 2015)

Although the provision is located in the Part of UNCLOS concerning the high seas, it is commonly accepted that the duty it stipulates applies in all maritime zones.[24] According to article 33 para 1 of the Vienna Convention on the Law of the Treaties [hereinafter VCLT], importance should be given to the ordinary meaning of the terms used in the provision.[25] Since the article mentions 'any person found at sea' and not on the high seas, no territorial restriction to the rescue-at-sea obligation is identified. Furthermore, the phrase '*any person'* implies that the obligation applies regardless of the legal status of the persons in distress. Irregular migrants, asylum-seekers and of course recognized refugees consequently fall into the category of the protected persons.[26]

On the face of the wording of article 98(1) UNCLOS, as well as the relevant Regulation of the International Convention for the Safety of Life at Sea [hereinafter SOLAS Convention] and provision of the 1989 Salvage Convention,[27] the obligation to render assistance to those in distress at sea rests initially on the master of the ship. The aforementioned provision has a unique wording in the context of the Law of the Sea. It is the only provision in UNCLOS which refers to a duty of a person, namely the shipmaster, rather than a state. This peculiarity can be explained in accordance with its origin in maritime law and practice of the masters of ships. More specifically, the SOLAS Convention provides that:[28]

The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so.

[24] During the negotiation of UNCLOS there was debate concerning the wording of the article. Taking into consideration the object and the context of the provision though, it was decided that the duty to assist in distress could not disappear only because of the crossing of a maritime frontier. See M.H Nordquist, *supra* note 19. See also E Papastavridis, *The Interception of Vessels on the High Seas; Contemporary Challenges to the Legal Order of the Oceans* (1st edition, Oxford: Hart, 2013) at p. 295

[25] As the International Law Commission has stated,'[…] *logic indicates the 'ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' should be the first element to be mentioned'* ILC, Articles on the Law of the Treaties with Commentaries, Vol. II (Yearbook of International Law Commission 1966)

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

[27] Article 11, 1910 Brussels Salvage Convention, '*Every master is bound, so far as he can do so without serious danger to his vessel, and persons thereon, to render assistance to any person in danger of being lost at sea.... [T]he owner of the vessel shall incur no liability for a breach of the master'*.

[28] SOLAS Convention, Regulation 10 (a), Chapter V

As part of Chapter V of SOLAS, the aforementioned provision applies in general to all ships on all voyages. This is in contrast to the Convention as a whole, which only applies to certain classes of ship engaged on international voyages and is justified by the purpose of the provision to contribute to the safety of navigation.[29] This provision is of pivotal importance, given the number of countries that are parties to SOLAS,[30] and complements the relevant provision of UNCLOS by providing a more detailed analysis of the shipmaster's obligations.

The 1974 Convention has been updated and amended on numerous occasions.[31] In the May 2004 amendments procedure a definition of search and rescue services was added. The aim was to set an obligation to provide assistance, regardless of nationality or status of persons in distress, and mandate co-ordination and co-operation between States to assist the shipmaster in delivering persons rescued at sea to a place of safety. During this amendment procedure, a new provision was added on the discretion of the shipmaster.[32]

Although both provisions refer to the master's responsibility to speed to the rescue of persons in distress regardless of their legal status, SOLAS insists on the legal binding character of the provision and provides also for an obligation to report and justify its eventual incapacity of assisting.[33] SOLAS provides for the additional right of the master who assists those in distress to requisition one or more of the ships which answer the emitted distress call.[34] The acts through which assistance is offered vary, ranging from

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[29] Article 31, UN Vienna Convention on the Law of the Treaties (1969) [hereinafter Vienna Convention] UN Treaty Series, vol.1155, at p.331

[30] As of November 2, 2015, 162 states have adopted SOLAS, including major flag of convenience countries and representing 98,53% of the world tonnage, Summary of Status of Conventions, available online at http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx (accessed 25 November 2015)

[31] The first version was adopted in 1914, in response to the Titanic disaster. The second version was adopted in 1929, the third in 1948, and the fourth in 1960. A completely new Convention was adopted in 1974 which included not only the amendments agreed up until that date but a new amendment procedure in order to accelerate the amendments procedure. This innovation was due to the retardation in past amendments procedures, which cost in cases of need for assistance at sea. See http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-%28SOLAS%29,-1974.aspx (accessed 25 November 2015)

[32] The amended SOLAS Convention provides that '*The owner, the charterer, the company operating the ship as defined in regulation IX/1, or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgement, is necessary for safety of life at sea and protection of the marine environment*' 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

[33] '*If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly*'. See supra no 24, SOLAS Convention

[34] *Ibid*, Regulation 33(2)

towing a vessel to safety to providing food and supplies or even standing-by to provide navigational advice.[35] The capability of a vessel to assist is examined *ad hoc* according to objective factors, such as the type and size of the ship, its crew and supplies,[36] as well as the number of survivors.[37] Whether the measures taken by the shipmaster are adequate and contribute in an effective way to the alleviation of the persons in distress is the decisive criterion to assess the assistance provided.[38] In any case however, the shipmaster's actions do not necessarily have to reach the point of rescue, since this obligation rests upon states.[39] Rescue, contrary to assistance, is defined as '*an operation to retrieve persons in distress, provide for the initial medical or other needs, and deliver them to a place of safety'.*[40] The obligations of States concerning the rescue of persons in distress at sea are defined, besides article 98 UNCLOS, by several law of the sea instruments. The SAR Convention among others, obliges State parties to '*ensure that assistance be provided to any person in distress at sea…regardless of the nationality or status of such a person or the circumstances in which that person is found'*.[41]

b. The notion of distress

The situation of distress, although mentioned in article 98(1) UNCLOS, is not defined in the conventional text. The importance of its content lies in the determination of the *ratione materiae* scope of the provision. It constitutes a decisive criterion in order to trigger the obligation of the state to proceed with the necessary measures for rescue-at-sea. The notion of 'distress' is further elaborated in the International Convention on Maritime Search and Rescue, described as '*a situation wherein there is a reasonable*

[35] See *supra* no 19, Nordquist, at p. 15-31

[36] SOLAS Convention, Annex I, Chapter V, Regulation 14; The factors taken into consideration when assistance is provided at sea are also taken into consideration according to the IMO relevant directives for seafarers. Trained radio operators aboard the vessel are advised to provide such information when using the global maritime distress and safety system (GMDSS); International Convention on Standards of Training, Certification and Watch keeping for Seafarers (STCW) (1978), IMO, Regulation VI4, STCW Code, Section A-VI/4 (2001) at 141

[37] MJ Norris, *The Law of Salvage* (1st edition, Mount Kisco NY: Baker, 1958) at p. 23

[38] FJ Kenney and V Tasikas, *The Tampa incident: IMO perspectives and responses on the treatment of persons rescued at sea,* Pacific Rim Law & Policy Journal Association, Vol.12 No 1 (2003) at p. 143-177

[39] The obligations deriving from article 98 UNCLOS and the relevant conventions related to SAR operations, such as the SOLAS and SAR Conventions, are incumbent on states. Although article 98 addresses the shipmaster, only states as subjects of international law are capable of possessing international rights and duties. See ICJ, *Reparation for Injuries case* (Advisory Opinion) ICJ Reports 1949 (11 April 1949) at p.174

[40] International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97, Annex, para. 1.3.2

[41] *Ibid*, Chapter 1.3.2

certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.[42] Clarifications are also provided by jurisprudence, such as the Eleanor case, where the situation of distress is defined both negatively[43] and affirmatively.[44] The relevant jurisprudence and authoritative commentaries align on the need for a threshold of severity of the situation in order to characterize it as a situation of 'distress'.

Although it is commonly accepted that distress is more serious than a mere danger, the degree of seriousness of the danger varies in legal texts. The ILC has confirmed that a situation of distress doesn't necessarily mean one '*that jeopardizes the very existence of the person concerned*'.[45] The proposition of Lord Stowell in the Eleanor case relies on the requirements of urgency and necessity and has been restated in several cases concerning ships in distress before the US Supreme Court[46]. Although a ship doesn't need to reach the brink of sinking in order to attain the urgency and necessity threshold, the facts should '*produce, in the mind of a skillful mariner, a well-grounded apprehension of the loss of the vessel and cargo, or of the lives of the crew*'.[47] The exceptional nature of distress can be better understood if the legal consequences it entails, such as the right of the ship to enter foreign ports[48] and immunity of the ship entails, are taken into consideration.[49]

Although in theory common ground is more or less found, practice doesn't always abide by the aforementioned criteria. The identification of a situation as requiring immediate assistance lies practically on the assessment of the relevant facts and conditions of the vessel's route by the States called to render assistance. An example can be found in the EU context. The infamous 2010/252 European Council Decision[50] indicated that

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[42] *Ibid*, Para 1.3.13

[43] Eleanor Case, (1809) The Eleanor decision established that the vessel doesn't need to be '*dashed against the rocks*', however it '*is not sufficient to say it was done to avoid a little bad weather'. In the case Lord Stowell stated that 'real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human laws*'. Cited after CJ Colombos, *The International Law of the Sea* (6th edition, Longmans 1967) at p. 177.

[44] '*It must be an urgent distress; it must be something of grave necessity', Eleanor Case* (1809)

[45] Yearbook of the International Law Commission, Vol II (1973) at para.4

[46] US Supreme Court, *The New Yorker case* (1818) Canadian Supreme Court, *May v The King* (1931)

[47] *Ibid, New Yorker case*

[48] *Eleanor case*

[49] '*If a ship is driven in by storm, carried in by mutineers, or seeks refuge for vital repair or provisioning, international customary law declares that the local state shall not take advantage of the necessity*'; PC Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1st edition, Jennings, 1927) at p. 548

[50] Council Decision No. 2010/252/EU 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 111/20, 26 April 2010. The decision supplemented the Schengen Borders Code on the issue of surveillance of the sea external borders in the context of the operational cooperation coordinated by Frontex.

although unseaworthiness is certainly an element to take into consideration when assessing the situation, it does not automatically imply a distress situation.[51] The Decision departed from the idea of establishing a general threshold of urgency and necessity and considered an assessment possible only on a case-by-case basis.[52]

This ad hoc decisive approach is of course not left entirely to the discretion of the states or EU organs. Although states' margin of appreciation is considered to be essential, certain objective criteria are set. Firstly, states should not rely exclusively on the existence of an actual request for assistance.[53] Secondly, the objective factors taken into consideration include '*(a) the existence of a request for assistance; (b) the seaworthiness of the ship and the likelihood that the ship will not reach its final destination; (c) the number of passengers in relation to the type of ship (overloading); (d) the availability of necessary supplies (fuel, water, food, etc.) to reach a shore; (e) the presence of qualified crew and command of the ship; (f) the availability of safety, navigation and communication equipment; (g) the presence of passengers in urgent need of medical assistance; (h) the presence of deceased passengers; (i) the presence of pregnant women or children; and (j) the weather and sea conditions*.'

Despite the annulment of the aforementioned Council Decision, its practical importance is underlined by the incorporation of the objective factors it contains in Regulation 656/2014 on Frontex operations at sea.[54] The Council Decision was annulled after relevant action lodged by the European Parliament before the European Court of Justice for procedural reasons.[55] The ECJ ruled that the Decision contained binding rules and interpretation of rules concerning international obligations of Member States and

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[51] *Ibid*, Annex, Part II, para. 1.3

[52] J. Coppens, *Search and Rescue at Sea*, pp. 381-427, in E. Papastavridis and K. Trapp (Eds.) *Criminal Acts at Sea* (1st edition, Martinus Nijhoff Publishers 2014) at p.381

[53] D Guilfoyle and E Papastavridis, *Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea* (Background Paper) (4 March 2014) at p.15, available online at http://www.refworld.org/docid/5346438f4.html (accessed 25 November 2015)

[54] See Article 9 (f) of the European Parliament and Council Regulation No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 189/93, 2014

[55] More specifically, Council Decision 2010/252 was adopted following the 'regulatory procedure with scrutiny' of the 'comitology procedure', whereby the European Commission proposes a measure and the established committee either approves, rejects or does not take a decision. The comitology procedure is provided only for amending non-essential elements of the SBC. However, the Decision under scrutiny concerned measures that granted significant powers to combat irregular immigration at sea, namely 'surveillance of the sea external borders'. See also L Ankersmit, *Boat refugees, the Democratic Deficit and EU Constitutional Law*, European Law Blog (6 September 2012) available online at http://europeanlawblog.eu/?p=798 (accessed 25 November 2015)

Frontex[56] '*intended to produce legal effects as against Member States which participate in an operation coordinated by the Agency*'.[57] The objective factors it set are however integrated in the recent Regulation, thus illustrating its impact on normative reality.[58]

It has also been suggested that when the great majority of the irregular traffic in a marine area is carried out by small, underequipped and unseaworthy vessels, people on board ships are *per definitionem* in distress and need of assistance.[59] This is the case notably in the Mediterranean, where according to the European Commission, 80 per cent of the unauthorized traffic towards the EU is undertaken by such vessels.[60]

[56] Measures listed in point 2.4 of Annex I of the Council Decision do, according to the General Advocate, bind MSs to a particular interpretation of those obligations and powers' when they derive from international obligations which all MSs and Frontex should abide by. General Advocate also made reference to the ECtHR's jurisprudence of Hirsi and Jamaa v Italy. See Opinion of Advocate General Mengozzi (17 April 2012) on ECJ, *European Parliament v Council of the European Union*, C-355/10, CMLR I-53 (2012)

[57] *Ibid*, at para. 50

[58] See Article 9 (f) of the European Parliament and Council Regulation 656/2014 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, I.189/94, 27.6.2014

[59] E Papastavridis, *The Interception of Vessels on the High Seas; Contemporary Challenges to the Legal Order of the Oceans* (1st edition, Oxford: Hart, 2013) at p. 295

[60] See *Commission of the European Communities, Study on the international law instruments in relation to illegal immigration by sea, Commission staff working document SEC (2007) 691*. The study examined the international legal instruments and their protection gaps. Among the amendments suggested on the international legal framework, the Commission proposed to extend the flag state's extensive jurisdiction on the high seas in UNCLOS, in order to include transport of irregular migrants. See H Tervo, K Hossain, A Stepien, Illegal Immigration by Sea as a Challenge to the Maritime Border Security of the European Union with a Special Focus on Maritime Surveillance Systems, pp 387-406, in T Koivurova, A Chircop, E Franckx, E Molenaar, D Zwaag (eds), *Understanding and Strengthening European Union-Canada Relations in Law of the Sea and Ocean Governance* (1st edition, University of Lapland Printing Centre, Rovaniemi 2009) at p.396

ii. The obligation to cooperate

The aforementioned rule is complemented by the duty of governments to maintain maritime search and rescue systems, addressed mainly to the coastal states. As article 98 (2) UNCLOS stipulates,

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

This provision sets out a general obligation on the part of coastal states to maintain search and rescue services on the one hand, and a general obligation of cooperation with other states to this end on the other. Given its general wording and calculated vagueness, this provision sounds more like a proclamation rather than a legal obligation, if not examined on the face of the relevant SOLAS and SAR provisions. Only in the latter case the obligation is crystallized. Where UNCLOS requires states only to '*promote*' maritime SAR services, SOLAS requires each contracting state to '*undertake*' such services '*to ensure necessary arrangements are made*'. As illustrated in the SAR Convention:

'Parties shall co-ordinate their search and rescue organizations and should, whenever necessary, co-ordinate search and rescue operations with those of neighboring States'[61]

According to the SOLAS and SAR Conventions, coastal states must establish adequate and effective search-and-rescue [hereinafter SAR] services and, when required by the circumstances, cooperate with other states to this end.[62] The purpose of the cooperation is to ensure prompt reply in urgent cases, by coordinating the SAR operations of different coastal states and mandating the one that can provide the most appropriate assistance available.[63] The SAR Convention initially called for the oceans to be divided into thirteen SAR areas, where coastal states would be responsible for specific SAR zones. The slow pace of ratification of the Convention hindered the application of this ambitious plan.

According to the SAR Convention, the first preparatory measure of fulfilling the obligation to organize a search and rescue system is the provision of adequate search and

[61] SAR Convention, Chapter 3, 3.1.1
[62] Art. 98 para 2 UNCLOS. SAR Convention, Annex, Chapter 2 para. 2.1.1.
[63] *Ibid* SAR Convention, chapter 2, 2.1.9

rescue services and relevant information to the other states. The exchange of information among states is attainable thanks to action undertaken by the competent authority, the Secretary General of the IMO.[64] Questions of competence in the maritime area, competence of national authorities, technical communication details and budget are left to the discretion of the state.[65] Therefore, the first step usually taken in order to fulfil this obligation of result is the enactment of legislation on the different parameters of the issue. Then, states are required to ensure that arrangements are made for the provision of adequate SAR services in their coastal waters according to the technical requirements of the SAR Convention contained in the five Chapters of the Annex.

The second preparatory measure consists in providing for the coordination of the facilities available for assistance in case of distress.[66] Cooperation and co-ordination of search and rescue organizations is the third and final stage of the duty of the State to cooperate. States remain reticent towards the obligation of cooperation, since it calls for close interaction with other coastal states and, in certain cases, concession of the right to enter the territorial sea or territory for the purpose of rescue.[67] It also raises issues of public order, since customs, immigration and port authorities are implicated.[68] These concerns of legal and political nature combined with the considerable additional obligations the 1979 Convention imposes on states parties, such as setting up the shore installations required, justify the fact that the SAR Convention has fewer ratifications than the SOLAS Convention.[69]

Due to the aforementioned issues, with an emphasis on technical details and strengthening of the cooperative approach, the SOLAS and SAR Conventions were amended in a coordinated effort to '*ensure that persons in distress are assisted, while minimizing the inconvenience to assisting ships and ensuring the continued integrity of SAR services'.* The amendments procedure was first triggered in 1998 and amendments

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[64] *Ibid*, chapter 2, 2.1.1, 2.1.2. IMO, *Search and Rescue*, available online at http://www.imo.org/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/Default.aspx (accessed 25 November 2015)

[65] *Ibid*, Chapter 2, 2.3

[66] *Ibid*, Chapter 2, 2.2

[67] *Ibid*, Chapter 3, 3.1.3 According to the provisions of Chapter 3 of the SAR Convention, unless otherwise agreed between the States concerned, a Party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory for rescue units of other Parties solely for the purpose of search and rescue.

[68] *Ibid*, Chapter 3, 3.3

[69] SAR has been ratified by 106 States, representing 81,11% of the world tonnage, whereas for SOLAS the corresponding numbers are 168 states and 98,53%, available online at http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx (accessed 25 November 2015)

concerning persons in distress at sea were introduced in May 2004, after the notorious Tampa and Castor incidents.[70] The Maritime Safety Committee [hereinafter MSC] also adopted amendments to chapter V of the SOLAS Convention which, together with the SAR Convention amendments, entered into force on 1 July 2006. At the same session, the MSC adopted the 'Guidelines on the Treatment of Persons Rescued at Sea' and the topics of 'Treatment of Persons Rescued at Sea' and 'Places of Refuge' dominated the IMO agenda.

[70] In August 2001, the Norwegian cargo vessel Tampa was denied admission to Australian waters in order to disembark the 433 persons it rescued from a sinking Indonesian flagged vessel 75 nautical miles off the Australian coast. The Tampa was intercepted by the Australian authorities before entering Australian territorial waters and ports. In a similar case, in December 2000, the Cypriot oil tanker Castor developed multiple cracks in its deck, while carrying nearly 30,000 tons of unleaded gasoline in the western Mediterranean Sea. Authorities in Morocco, Gibraltar and Spain prohibited the ship from entering their waters. A gunboat escorted the vessel from Algerian waters. Malta, Tunisia and Greece announced they would also bar the ship entry to their coasts. The connection of the case with consequent IMO action on rescu-at-sea can be understood by the IMO Secretary-General William O'Neil statement; '*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*.' See also IMO, Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, 21st Extraordinary Sess., Agenda Item 24(a), IMO Paper C/ES.21/24(a) (2001)

iii. One step beyond; disembarkation in a place of safety

One further purpose of the SOLAS and SAR Conventions amendments in 2004 was to complement the obligation of the shipmaster to render assistance through states co-ordination and cooperation, thus relieving the shipmaster of the responsibility to provide follow-up care to the survivors.[71] This perspective was adopted after the courageous decision of Captain Rinnan of the Tampa ship to take refugee seekers on board and attempt to provide them assistance to the limit of his vessel's capacity.[72] The intent of the amendments on this point was to ensure that in every case a place of safety was provided to the rescued persons, with minimum deviation of the ship and within reasonable time.[73]

It is clear also that an additional aim emerged after Australia's response to the accident, in an effort to make sure that '*ships, which have retrieved persons in distress at sea, are able to deliver the survivors to a place of safety*'.[74] The obligations of coastal states not only to cooperate for the release of the shipmaster providing assistance to persons at sea, but also to ensure the provision of a place of safety to these people, are necessary when referring to an obligation to rescue.[75] According to some commentators, the duty to render assistance is fulfilled only when the rescued persons disembark in a place of safety.[76] This look into the content of the obligation meets, however, a strong opposition.[77] According to the opposite point of view, there is no such duty. The SOLAS Convention refers to '*rescue of persons in distress at sea*' without imposing an obligation

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[71] M Davies, *Obligations and Implications for ships encountering persons in need of assistance at sea*, Pacific Rim Law & Policy Journal Association, pp 109-141 (2003) at p. 110

[72] M Richardson, *In Migrant's Plight, a Sea of Trouble for Skippers; Australian Case Shows Rescues Can Be Costly*, International Herald Tribune (2001). See also *supra* no 36 at p.177

[73] Resolution MSC 167(78) Guidelines on the Treatment of Persons Rescued at Sea, IMO MSC 78/26/Add.2 (2004) Annex 34

[74] Assembly Resolution A.920 (22) Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea (2001) Item 8

[75] In many cases where people were rescued at sea, delay in their rescue was caused by the lack of an agreement on the issue of disembarkation. In 2007 such a case reached the UN Committee against Torture. In the *J.H.A. v Spain* case negotiations among Spain, Senegal and Mauritania lasted eight days after the vessel in distress was towed by a Spanish maritime rescue tug; as a result the two ships remained anchored off the Mauritanian Coast and the following immigrant identification process contributed to the delay of the due procedure. See Committee against Torture, *J.H.A. v. Spain* (Decision) Comm. no. 323/2007 (21 November 2008) 2.2-2.5

[76] S Trevisanut, *Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?* , The International Journal of Marine and Coastal Law, pp 523-542, Vol.25 (2010) at p. 524. See supra no V Tasikas at p. 154

[77] K O' Brian, *Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem*, Goettingen Journal of International Law, pp723-725 (2011). See G Goodwin-Gill and J McAdam, *The Refugee in International Law* (2nd edition, Oxford: Clarendon Press, 1996) at p. 157. See J. Coppens, Search and Rescue at Sea, pp 381-427, in E. Papastavridis and K. Trapp (Eds.) *Criminal Acts at Sea* (1st edition, Martinus Nijhoff Publishers, 2014) at p.390

on states to disembark the survivors.[78] UNCLOS blurs further the distinction between 'rescue' and 'assistance' by not specifying in article 98 (1)(b) the content of the master's obligation.[79]

A definition of the 'place of safety' is found in the SOLAS and SAR Convention amendments, where it is described as '*a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination*'.[80] An assisting ship cannot be considered as a place of safety. Even if its capacities allow for the sustenance of survivors, the vessel should be swiftly released of its responsibility to assist.[81] The place of safety should be decided *ad hoc*, according to objective factors such as the distress situation, medical needs of the survivors and availability of transportation of the vessel to the coastal states' territory.[82]

On European level, the issue of disembarkation of the assisted TCNs to a place of safety has been addressed explicitly and repeatedly. In the Operational Plans (OPLANs) of Frontex joint opearations at sea, there is no reference to an obligation of disembarkation or international rules concretizing the state responsible of receiving the survivors. On the contrary, disembarkation is envisaged as a stage posterior to the rescue operation.[83]

In my point of view, according to the maritime SAR regime, there exists a primary responsibility of states to provide a place of safety. Although the conventional texts do not address the scenario of a vessel that has rendered assistance seeking disembarkation of survivors, they make consistent reference to the provision of a place of safety. The SAR Convention for instance defines rescue as an '*operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety*'. Consequently, the notion of rescue according to the Convention englobes the provision of

[78] More specifically, Regulation V/7.1 states that '*Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around their coasts'*

[79] It rather refers to '*such action*' which '*may be reasonably expected from him'*. See article 98 para 2 UNCLOS

[80] SOLAS and SAR Convention amendments. See *supra* no 30

[81] *Ibid*, 6.13

[82] *Ibid*, 6.15

[83] As stressed in the Frontex official website, '' *Once the rescue operation is completed, the migrants are disembarked and handed over to the national authorities for identification and registration*.'' Available online at http://frontex.europa.eu/pressroom/faq/frontex-operations/ (accessed 19 September 2016)

a place of safety.[84]

A second debate arises as to whether the state responsible for the SAR region is the one obliged to disembark survivors in its own area. On European level, the place of disembarkation is decided separately for every Joint Operation at Sea, whereas the latest reports include rules related to in cases of interception and search and rescue. Concerning search and rescue operations, the first option for disembarkation is a place of safety identified ad hoc by the coastal member state and the other participating actors, whereas the second option is the Host member state.[85] This regulation is in accordance with the third point of view, which will be presented subsequently. However, Frontex does not consider the Member States as bound by an international norm on disembarkation, rather than the Operational Plan of every operation.[86]

According to the first point of view, the coastal state only has the duty to ensure that a place of safety is provided, without being explicitly obliged to allow survivors to disembark in its own territory.

A second point of view consists sustains the radical opinion that the government responsible for the SAR region is the one responsible for disembarkation in its own territory is also supported based on the main conventional texts[87]. The Guidelines state that '*the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Contracting Government/Party responsible for the SAR region in which the survivors were recovered*'.[88] Furthermore, the SOLAS and SAR amendments specify that the 'responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered.[89]

According to a third opinion, which I consider in accordance with the *ratio* and the

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[84] IMO, Guidelines on the Treatment of Persons Rescued at Sea, Resolution MSC. 167(78) (2004) Appendix 2

[85] The participating actors include the participating Member States and the responsible Rescue Coordination Centre; Frontex Annual Report on the Implementation on the EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders, Reg. No 11077a/09.07.15, p.4

[86] '*'The fact that the host Member States assumed the responsibility for disembarkation of all persons apprehended and/or rescued in the territory is deemed as a constructive approach to the difficulty of dealing with mixed flows*'', *ibid*, p.15

[87] Furthermore, according to the UNHCR Executive Committee, the granting of permission to asylum-seekers to disembark without the need for resettlement guarantees; UNHCR, *Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, EC/SCP/18 (1981) available online at http://www.unhcr.org/3ae68ccc8.htm (accessed 25 November 2015)

[88] See *supra* no 81, Preamble

[89] SOLAS and SAR Convention amendments, 2,5

purpose of the rescue-at sea provisions, the state in whose SAR region the people in distress were rescued is under the obligation to disembark them in its territory, only if a different solution cannot be swiftly arranged. As provided by the SOLAS Convention:

'The Contracting Government responsible for the search and rescue region in which assistance is rendered shall exercise primary responsibility for ensuring […] that survivors assisted are disembarked from the assisting ship and delivered to a place of safety. […] In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effective as soon as reasonably practicable'[90]

According to the IMO International Aeronautical and Maritime Search and Rescue Manual, survivors '*must be delivered in a place of safety as quickly as possible*'.[91] Therefore, the main criterion of ascribing the obligation to host survivors in one state's territory is the celerity of the procedure. If disembarkation can be swiftly arranged to another coastal state, after coordination of the states involved, this option should prevail. If, however, this is not the case, the Government responsible for the SAR region should accept the disembarkation.[92] When determining the place of disembarkation though, the allegation of a well-founded fear of persecution by the persons rescued should be taken into due consideration.[93] On European level, Council Decision 2010/252/EU[**94**] stated that the *non-refoulement* principle should be respected when designating the port or island of disembarkation.[95] The aforementioned conclusion does not imply though an obligation of states under international law to grant durable asylum to rescued refugees.[96]

At this point, an imbalance in the rescue-at-sea obligations is detected. Although the responsibility of the shipmaster to assist persons in distress is clearly-defined, the extent of the obligations of states on this matter is characterized by a calculated ambiguity. Practical reasons, such as accumulation problems of coastal states, account for that. Although , there is no obligation under international law for the flag State of a rescuing vessel to grant durable asylum to rescued refugees, the burden for the coastal states'

[90] SOLAS Convention, article 4.1-1
[91] IMO, International Aeronautical and Maritime Search and Rescue Manual, (2013) Vol. II, Mission Coordination, at p.542
[92] IMO, Guidelines on Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, FAL.3/Circ.194 (2009)
[93] SOLAS and SAR Convention amendments, 6.17
[94] *Supra* no 48
[95] *Ibid*, preamble para. 10
[96] *Supra* no 71

administrative mechanism, welfare state and infrastructure calls for arrangements in order to relieve the burden from first asylum countries.[97] This leads us into the domain of international refugee law.

[97] Receiving states encounter issues of accommodation of asylum seekers and migrants. As a result, some coastal states resort to restrictive policies by refusing disembarkation of the survivors or permitting it after long negotiations and guarantees of other states' assistance in future SAR operations. This procedure often costs valuable time and doesn't always lead to tangible results for the rescued asylum-seekers; UNHCR, *Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, EC/SCP/18 (1981) available online at http://www.unhcr.org/3ae68ccc8.htm (accessed 25 November 2015) See also with respect to accommodation issues of asylum seekers in Greece; Danae Leivada, *Hundreds of Refugees Find Shelter in New Athens Camp*, The Huffington Post (26 August 2015) available online at http://www.huffingtonpost.com/entry/athens-camp-refugees_55d7732ae4b04ae4970330d6 (accessed 25 November 2015)

2. International refugee law: The principle of non-refoulement

i. The provision: article 33 of the Geneva Convention 1951

The principle of *non-refoulement*, as a rule of customary international law,[98] constitutes a cornerstone of the international legal framework on refugee protection. It can be found in various legal texts, such as regional treaties,[99] international human rights treaties,[100] extradition treaties[101] and antiterrorism conventions.[102] The fundamental and non-derogable character of the principle of *non-refoulement* has also been affirmed by the UNHCR Executive Committee in various cases.[103] The principle is enshrined in article 33 (1) of the 1951 Convention Relating to the Status of Refugees [hereinafter Refugee Convention] which states:[104]

'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.'

The protection against refoulement applies to anyone who is a refugee under the

[98] The principle has been incorporated in various international human rights treaties and reaffirmed in the 1967 UN Declaration on Territorial Asylum. Moreover, the UNHCR ExCom has systematically reaffirmed it in various resolutions adopted by the UNGA. See UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/83, 2 BvR 1953/93, 2 BvR 1954/93 (1994) available online at http://www.refworld.org/docid/437b6db64.html (accessed 25 November 2015). See UNHCR, *Note on the Principle of Non-Refoulement*, EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures (1997) available online at http://www.refworld.org/docid/438c6d972.html (accessed 25 November 2015) See also comprehensive study of state practice and opinio juris in relation to non-refoulement can be found in Lauterpacht & Bethlehem, The scope and content of the principle of non-refoulement: Opinion, in Feler et al (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003)

[99] Article 22 para 8, OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, Treaty Series No 14691 (1969) Organization of American States (OAS) American Convention on Human Rights, "Pact of San Jose", Costa Rica (22 November 1969)

[100] Protection of the right to life (Article 6 ICCPR, article 2 ECHR, article 4 ACHR, article 4 of the African Charter on Human and People's Rights) and the right to be free from torture (article 1 1984 Convention Against Torture, article 7 ICCPR, article 3 ECHR, article 5 (2) ACHR)

[101] Article 3(2) European Convention on Extradition, ETS 024 359 UNTS 273 (1957) and article 4(5) of the Inter-American Convention on Extradition, 20 ILM 723 (1981)

[102] Article 9(1) of the International Convention against the Taking of Hostages, 1316 UNTS 205 (1979) and article 12 of the International Convention for the Suppression of Terrorist Bombings, 37 ILM 249 (1997)

[103] UNGA Res 52/75, UN Doc A/RES/51/75 (12 February 1997) para. 3; UNGA Res 52/132 (12 December 1997), UN Doc A/RES/52/132, preamble, para. 12.

[104] Convention relating to the Status of Refugees [hereinafter: Refugee Convention] UNTS 137 (28 July 1959)

Refugee Convention. This doesn't mean that a person should be a recognized refugee in order to fall within the scope of application of the provision. A person does not become a refugee because of recognition, but is recognized because he or she is a refugee.[105] The non-refoulement principle therefore applies to persons formally recognized as refugees, but to asylum seekers as well.[106] The principle doesn't entail a right of the person to be granted asylum in a particular state, but states must not proceed to any measures resulting in his or her removal to a place where his or her life is in danger.[107] The danger should arise from specified subjective characteristics of the person, including his or her race, religion, nationality, membership of a particular social group or political opinion.[108] As far as the scope of application of the states' obligation enshrined in article 33(1) of the Refugee Convention is concerned, two main issues emerge. On the one hand, controversy exists over the question of extraterritorial application of the principle. The issue of extraterritorial application of the principle of *non-refoulement* by the international courts will be further elaborated below.

On the other hand, the phenomenon of indirect refoulement has raised issues of including in the prohibition of refoulement certain policies that do not directly expose the person to his or her well-founded fear. Indirect refoulement occurs when a person is returned not to the state where he faces a fear of persecution, but to a state which '*will not afford the person claiming asylum effective protection against return to the place where he or she has a well-founded fear of persecution*'.[109] The principle applies also in respect

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[105] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, under UN Doc. HCRI1 I41ENGIREV.3 (2nd edition, 2011)

[106] UNHCR ExCom (1977) Conclusion No 6 (XXVII) para (c) and UNHCR ExCom (1979) Conclusion No. 15(XXX) paras (b) and (c); UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007) See also UNHCR, Note on International Protection, UN Doc. A/AC.961694 (3 August 1987)

[107] E. Lauterpacht and D. Bethlehem, The scope and content of the principle of non-refoulement: Opinion, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (1st edition, Cambridge University Press, 2003) at para 76. See also Recommendation No. R (84) 1 of the Committee of Ministers to member States on the protection of persons satisfying the criteria in the Geneva Convention who are not formally recognized as refugees; *supra* no 100, UNHCR Handbook, at para 28

[108] See UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (26 January 2007) at p. 17

[109] Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. A/59/40 (2004); UNHCR ExCom, Conclusion No 97 (LIV), Protection Safeguards in Interception Measures (2003), para (a)(iv); See also amicus curiae submissions of the UNHCR Office, High Court of Australia, *CRCF v Minister for Immigration and Border Protection*, The Commonwealth of Australia (15 September 2014) at paras 40-42

of return to a place where the person has a reason to fear threats to his or her life or freedom, based on the grounds of the Refugee Convention.[110]

[110] G Goodwin-Gill and J McAdam, *The Refugee in International Law* (2nd edition, Oxford: Clarendon Press, 1996)

ii. The Principle of Non-Refoulement in the course of Search and Rescue Operations

The question of application of the principle of *non-refoulement* on the high seas has been answered in opposite ways by courts. In the *Sale v. Haitian Centers Council* case,[111] the US Supreme Court ruled in favor of a presidential executive order according to which all aliens intercepted on the high seas could be repatriated. The Supreme Court thus reversed the judgment of the Court of Appeals based on the argument that article 33 of the Refugee Convention is silent regarding extraterritorial application. Moreover, its wording suggests that only individuals who have already arrived on a state's soil are protected, since the use of the words '*expel or return*' support the restrictive interpretation of the provision.[112]

The Inter-American Court of Human rights ruled, however, against this point of the decision of the Supreme Court by deciding that '*Article 33 has no geographical limitations'.*[113] UNHCR also clarified its point of view in relation to the geographical scope of the principle, based on the human right of refugees to seek asylum under the Universal Declaration of Human Rights and the humanitarian purpose of the principle. According to the interpretation of article 33 of the Refugee Convention, '*The obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders*'.[114]

In the course of SAR Operations, the principle of *non-refoulement* applies in two directions: access to territorial waters and ports on the one hand and provision of a place of safety on the other. Concerning the first aspect, asylum-seekers and refugees must not be rejected at the maritime frontier.[115] This doesn't mean however that the state has to host the survivors and grant the vessel permission to access territorial waters and ports.

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[111] The case concerned the practice of the US Coast Guard, the national maritime search and rescue agency, to return fleeing Haitians to Haiti according to a presidential order issued by President Bush in 1992. In 1991, Jean-Bertrand Aristide, the first elected President of Haiti was ousted by military coup. As a result of the political unrest, Haitians began fleeing their country in boats, due to fear of political persecution. The US Coast Guard interdicted the majority of the Haitians on the high seas whereas those found to have 'credible fears of political persecution' were being held in Guantanamo without access to legal support. Those who failed their asylum interviews were sent back to Haiti, facing the danger of persecution. See H Hongju Koh, *Refugees, The Courts, and the New World Order*, Yale Law School Faculty Scholarship Series Paper 2093, pp 999-1025 (1994) at p. 1001

[112] US Supreme Court, Acting Commissioner, *INS v. Haitian Centers Council* (1993)

[113] *Haitian Center for Human Rights v. United States*, Case 10.675, Report No. 51/96, Inter-American Commission of Human Rights Doc. OEA/Ser.L/V/II.95 Doc. 7 rev (13 March 1997) at para 156

[114] UNHCR, Note on International Protection, UN Doc. A/AC.961694 (3 August 1987)

[115] S Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection* , Max Planck Yearbook of United Nations Law, vol 12, pp 205-246 (2008) at p.239

Problematic situations like the one concerning the Haitian refugees can thus occur. The second aspect of the principle of non-refoulement offers the solution to this normative contradiction. Since refugees should not be left at the maritime front or be redirected to the high seas or country of origin, a place of safety should be provided to them, as swiftly as possible. This is the reason why access to territorial waters or ports should be granted in these cases, under the principle of non-refoulement.[116]

As the UNHCR Executive Committee has stated, '*interception measures should not result in asylum seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law*'.[117] If a survivor though is determined not to be in need of international protection, he or she should be swiftly returned to his or her country of origin.[118] This case is of course rare, since the so-called 'boat-people', in the majority of cases, flee from their country of origin for reason of fear of persecution.[119]

In my point of view, after recent debate on the matter, the provision's scope *ratione loci* is unambiguous. The principle applies wherever a State exercises jurisdiction, including the frontiers and the high seas.[120] In order to apply the principle, the state must exercise effective control over the persons concerned through its organs.[121] However, there is no consensus on this issue among theorists. This controversy coupled with the fact that international refugee law does not apply to migrants who do not allege a fear of persecution, such as the economic migrants, lead us to human rights law, as a more widely applicable area of law.

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[116] *Ibid*, p.241
[117] UNHCR ExCom Conclusion No 97, Conclusion on Protection Safeguards in Interception Measures (10 October 2003)
[118] *Ibid*, para 7
[119] RM Wallace, The principle of non-refoulement in international refugee law, in V. Chetail & C. Bauloz (eds.) *The Research Handbook on International Law and Migration* (1st edition, Cheltenham: Edward Elgar, 2014) at p. 417
[120] *Supra* no 101, UNHCR Advisory Opinion, at p. 110
[121] E. Papastavridis, *The 'Left-to-Die Boat' incident of March 2011 :Questions of International Responsibility arising from the Failure to Save Refugees at Sea*, Refugee Law Initiative Working Paper No.1 (October 2013) at p. 9; See also E. Papastavridis, European Convention of Human Rights and the Law of the Sea: the Strasbourg Court in Unchartered Waters?, in M. Fitzmaurice & P. Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (1st edition, Martinus Nijhoff Publishers, 2013) at p. 117

3. Human Rights Law

i. Search and Rescue Operations under the light of the right to life

Obligations upon States concerning persons in distress at sea may arise, beyond the law of the sea and international refugee law, from international human rights law. The right to life is protected under various international human rights treaties and connected to the safety of life at sea.[122] In the European context, the ECtHR is the one addressing the issue of protecting people rescued at sea under the pertinent provision. According to Article 2 para 1 of the European Convention on Human Rights [hereinafter ECHR],

'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

In the view of the ECtHR, article 2 para1 entails negative and positive obligations for the state. The positive one, which is of importance in the context of search and rescue operations, consists in taking '*appropriate steps to safeguard the lives of those within its jurisdiction*'.[123] The issue of state's jurisdiction over the people rescued at sea or about to be rescued at sea will be further elaborated below.[124] At this point it is sufficient to refer to the ECtHR jurisprudence according to which any person on board a European fragged ship[125] or a ship under the effective control of state agents,[126] is a person within the jurisdiction of that state and thus under the protection of the ECHR. Even if we take for granted that the survivors aboard the ship are under the jurisdiction of a state though, why should this obligation apply in the context of search and rescue operations?

According to the case-law of the ECtHR, the obligation of the state to safeguard the lives of people within its jurisdiction has been found in various contexts: police

[122] International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976); American Convention on Human Rights, 1144 UNTS 123 (22 November 1969, entered into forced 18 July 1978) African Charter on Human and Peoples' Rights, 21 ILM 58 (adopted 27 June 1981, entered into force 21 October 1986)
[123] ECtHR, *L.C.B. v the United Kingdom*, App no 23413/94 (9 June 1998) at para 36; ECtHR, *Ilbeyi Kemaloglou and Meriye Kemaloglou v Turkey* [hereinafter Kemaloglou v Turkey] App no 19986/06 (10 April 2012) at para 32
[124] See Chapter II.A.2
[125] ECtHR, *Medvedyev and Others v France* [Grand Chamber] App no 3394/03 (29 March 2010)
[126] ECtHR, *Hirsi Jamaa and Others v Italy* [Grand Chamber] App no 27765/09 (23 February 2012)

investigations,[127] acts or omissions of health professionals[128] and activities ensuring safety on board a ship.[129] The Court has stressed however that the list of sectors provided by existing jurisprudence is not exhaustive, since the positive obligation under examination applies '*in the context of any activity, whether public or not, in which the right to life may be at stake*'.[130] Therefore, although search and rescue operations have not been explicitly included in the list, the positive obligation under article 2 applies in its context as well.

The content of the positive obligation in rescue-at-sea operations is delineated by the jurisprudence relevant to article 2, as applied in the various contexts. The main reason for this is that only one case in the context of SAR operations has been brought to an international judicial body.[131] The ECtHR's jurisprudence indicates that a rudimentary precondition for the positive obligation to arise is that the authorities had knowledge of the risk to the life of individuals or ought to have known at the time of its existence.[132] The answer as to whether the failure to perceive the risk to life constitutes '*gross negligence or willful disregard of the duty to protect life*' is given in the light of each particular case's circumstances.[133]

The choice of means for ensuring the positive obligation under article 2 para 1 falls within the state's margin of appreciation, although this doesn't preclude the examination of the choice by the ECtHR.[134] Moreover, the obligation should be interpreted in a way that doesn't impose an excessive burden on the authorities.[135] The ECtHR has repeatedly stressed the need for a balance between the ability of the state organs to exercise their powers for reasons of implementation of the legislation on the one hand, and protection of the right to life on the other.[136] The need to exercise public authority doesn't however deprive the ECtHR from looking into the effective implementation of the domestic legal

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[127] ECtHR, *Osman v United Kingdom* [Grand Chamber] App no 87/1997 (28 October 1998)
[128] ECtHR, *Dodov v Bulgaria,* App no 59548/00 (17 January 2008) paras 70, 79-83; see also ECtHR, *Byrzykowski v Poland,* App no 11562/05 (26 June 2006) See also *Vo v France* [Grand Chamber] App no 53924/00 (8 July 2006) para 104,106
[129] ECtHR, *Leroy and others v France,* App no 36109/03 (2 October 2008)
[130] *Supra* no 118, *Kemaloglou,* para 35, ECtHR, *Oneryildiz v Turkey* [Grand Chamber] App no 48939/99 (30 November 2004)
[131] See ECtHR, *Hirsi Jamaa and Others v Italy* [Grand Chamber] App no 27765/09 (23 February 2012)
[132] ECtHR, *Keenan v the United Kingdom,* App no 27229/95 (3 April 2001) at paras 89-92. *Supra* no 118, Kemaloglou, para 36
[133] ECtHR, *Osman v United Kingdom* [Grand Chamber] App no 87/1997/871/1083 (28 October 1998) at para 116
[134] ECtHR, *Fadeyeva v Russia,* App no 55723/00 (9 June 2005) at para 96
[135] *Ibid,* at para 36
[136] In the case of Osman v UK, the ECtHR referred to '*the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention*'. See *supra* no 128

framework safeguarding the right to life.[137] In assessing the pertinent legislation, the court includes in its investigation the surrounding circumstances of the case, such as '*the planning and control of the operations in question*'.[138]

Apart from a breach of the right to life, the omission of state organs to rescue people at sea may constitute torture and cruel, inhuman or degrading treatment. According to the Committee against Torture, the aforementioned breach is committed not only if a person is deliberately harassed, but also when he or she is '*placed in a situation that caused his death*'.[139] In the Sonko v Spain case, the Committee found that the subjection of Mr Sonko to physical and mental suffering prior to his death exceeded the threshold of cruel, inhuman or degrading treatment or punishment.[140] Last but not least, the general recommendations of the Council of Europe Commissioner for Human Rights on the treatment of migrants on entry provide that any person entering the territory of a state has the right '*to be treated with respect for his or her human dignity rather than automatically considered to be a criminal or guilty of fraud*'.[141] The aforementioned guarantees, however, are attached to the right to life, mainly as applied on regional level. The current protection deficiencies, arising principally from the vagueness of the interplay between law of the sea and human rights rules, have led theorists to the idea of establishing a new right.

[137] ECtHR, *Nachova and Others v Bulgaria*, App nos 43577/98 and 43579/98 (26 February 2004) at para 110

[138] ECtHR , *Al Skeini v the United Kingdom* [Grand Chamber] App no 55721/07 (7 July 2011) at para 163

[139] The case concerned a Senegalese national died after being apprehended by guards in Spanish waters. He was forced to remain in the water without flotation device despite not knowing how to swim; UN Committee Against Torture, *Sonko v Spain*, Communication no. 368/2010, 47th Session (November 2011) at para 10.4

[140] *Ibid*, 10.6

[141] Council of Europe, Criminalization of Migration in Europe: Human Rights Implications, Issue Paper commissioned and published by the Council of Europe Commissioner for Human Rights (4 February 2010) available online at https://wcd.coe.int/ViewDoc.jsp?id=1579605 (accessed 25 November 2015)

ii. Moving towards a right to be rescued at sea?

The judicial control of SAR operations in the light of the right to life has brought to the fore this contemporary question. Is there an individual right to be rescued at sea? If not, is the recognition of such a right of decisive importance to strengthen control over the states' compliance with the obligation to assist in distress?

The proponents of connecting the law of the sea and international human rights law argue that article 98 para 1 UNCLOS constitutes a manifestation of fundamental humanitarian considerations, associated with affirmative human rights.[142] This perspective is in line with the perception of UNCLOS as a contribution '*to the realization of a just and equitable international economic order which takes into account the interest and needs of mankind as a whole*'.[143] Given the important human rights issues arising in the context of SAR operations, does article 98 para 1 UNCLOS offer an adequate normative frame in order for states to abide by their international human rights obligations? If not, does this deficiency constitute a *lacuna*? Is it possible to apply International Human Rights Rules to fill in the Law of the Sea *lacunae*? As stated by the International Tribunal on the Law of the Sea [hereinafter ITLOS], '*considerations of humanity must apply in the law of the sea, as they do in other areas of international law*'.[144]

According to commentators in favor of a right to be rescued at sea, a universal duty to rescue is a practical response to protecting the right to life. Given that this duty applies to '*any person*' found in distress at sea, a right to be rescued at sea is at least implied, if not established.[145] In the field of human rights, the jurisprudence applies human rights rules in the context of SAR operations, including the right to life. The implementation of the duty to assist in distress could therefore be strengthened by the recognition of a right to be rescued at sea.[146]

Theorists skeptical to the idea of an existing right to be rescued at sea stress that '*It is one thing, however, to acknowledge that the high seas are not legibus solutus and another*

[142] See S Cacciaguidi-Fahy , *The Law of the Sea and Human Rights*, Panoptica, Vitoria, (2007) at p. 20
[143] B Oxman, Human rights and the United Nations Convention on the law of the sea, in Henkin, L. Charney, J. I. Anton D. K. and O"Connell, M. E (eds). *Politics, values and functions, international law in the 21st Century, Essays in honor of Professor Louis Henkin* (1st edition, Kluwer Law International, 1997) at p. 377.
[144] ITLOS, *The M/V 'SAIGA' (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea) (1999) at para 155
[145] See *supra* no 137 , at p. 20
[146] S Trevisanut, *Is there a right to be rescued at sea? A constructive view*, Questions of International Law 4, pp 3-15 (2014)

thing to read into the law of the sea human rights obligations'.[147] The obligations of flag and coastal states under the SAR legal framework do not annul their separate obligations under human rights law.[148] Furthermore, an interpretation of the UNCLOS obligations in a way that a right to be rescued at sea derives from its provisions cannot lead to the establishment of a novel rule, since consent of states parties has not been expressed.[149] In my opinion, the latter is the pragmatic approach based on the existing provisions. The problems arising from the implementation of human rights law in the context of SAR operations cannot be solved by establishing an additional right. The relevant rules of international law are already numerous, extending also in the field of international criminal law.

[147] E Papastavridis, *Is there a right to be rescued at sea? A skeptical view*, Questions of International Law 4, pp 13-32 (2014)
[148] E Papastavridis, European Convention of Human Rights and the Law of the Sea: the Strasbourg Court in Unchartered Waters? , pp 119-121, in M Fitzmaurice, P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (1st edition, Martinus Nijhoff, 2013) at p.117
[149] *Supra* no 142, at p.23

4. International Criminal Law

In 2003, UNHCR made reference to an '*emerging legal framework for combating criminal and organized smuggling and trafficking of persons'.*[150] This statement came after the adoption of the two additional Protocols to the UN Convention on Transnational Organized Crime in 2000, addressing the issues of human trafficking[151] and smuggling of migrants.[152] Apart from typical differences, such as the fact that migrants are explicitly mentioned in the Migrant Smuggling Protocol, there is a substantial difference between smuggling of migrants and human trafficking. These are two distinct crimes, requiring different legal and operational responses.[153]

The Trafficking Protocol defines trafficking in persons in article 3(a).[154] The definition of trafficking was the most controversial aspect of the drafting of the Protocol.[155] According to the final definition, the key element in the trafficking process is the exploitative purpose, whereas all criminal means by which trafficking takes place are included, such as '*abuse of a victim's vulnerability',* even if they are less explicit.

If there is evidence that persons rescued at sea are victims of trafficking, the Protocol applies on them and the state where disembarkation took place is bound by the relevant human rights obligations.[156] An important element of the protection of the trafficked

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[150] The Executive Committee referred in particular to '*the Protocol Against the Smuggling of Migrants by Land, Sea and Air, which, inter alia, contemplates the interception of vessels enjoying freedom of navigation in accordance with international law, on the basis of consultations between the flag State and the intercepting State in accordance with international maritime law, provided that there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea'* , UNHCR ExCom, Conclusion No 97, Protection Safeguards in Interception Measures (10 October 2003)

[151] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children [hereinafter the Trafficking Protocol] *UN* Treaty Series, Vol 2237, p 319, *Doc* A/55/383 (15 November 2000)

[152] The Protocol against the Smuggling of Migrants by Land, Sea and Air [hereinafter the Migrant Smuggling Protocol] UN Treaty Series, vol. 2241, p. 507, *Doc* A/55/383 (2000)

[153] The UN Security Council insisted recently on the fact that 'although the crime of smuggling of migrants may share, in some cases, some common features with the crime of trafficking in persons, Member States need to recognize that they are distinct crimes, as defined by the UNTOC Convention and its Protocols, requiring differing legal, operational, and policy responses UNSV Resolution 2240/2015 UN Doc S/RES/2240 (2015)

[154] *"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'.* See Trafficking Protocol, article 1

[155] Certain NGOs participating in the Ad Hoc Committee's deliberations supported a narrower definition of human trafficking, limited to forced or coerced trafficking, without including prostitution or sexual exploitation. This point was shared by states that had legalized prostitution, but the final definition englobes all victims of trafficking, See Janice G. Raymond, Guide to the New UN Trafficking Protocol, Coalition against Trafficking in Women International, at p.4, available online at http://www.no-trafficking.org/content/pdf/guide_to_the_new_un_trafficking_protocol.pdf (accessed 6 January 2016)

[156] See *supra* no 51, at p.11

persons according to the Trafficking Protocol is that they are not considered as breaking the immigration legislation of the country they enter, since they are victims and move due to the threat or use of force or other criminal means.[157] Therefore, the Protocol suggests that each State Party should proceed to the necessary measures in order to ensure that victims of trafficking '*remain in its territory, temporarily or permanently, in appropriate cases*'.[158]

On regional level, the Council of Europe adopted a Convention on Action against Trafficking in Human Beings which provides for measures taken by states parties to assist victims of trafficking. This is realized by providing access to appropriate assistance and residence permit and inducing a framework for the prosecution of those involved in trafficking.[159] The assistance offered to victims of trafficking is supplemented by the European Union Council Directive 2004/81/EC, which extends protections to those who have been irregularly brought in by agents.[160]

As far as migrant smuggling is concerned, it is defined in article 3(a) of the relevant Protocol as '*the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party*'. Apart from the prevention of the phenomenon and cooperation of states to this end,[161] the Migrants Smuggling Protocol refers explicitly to measures against the smuggling of migrants by sea. Interception measures can be taken by the flag state of a vessel suspected of carrying migrants who are victims of smuggling and assistance of other states may be requested for this purpose.[162] These provisions can also be found in other conventional texts and represent generally accepted international standards.[163]

It becomes clear that in order to present the provisions relevant to rescue-at-sea, a walkthrough in various areas of international law is necessary. Law of the sea constitutes the origin and basis of the relevant states obligations, but international human rights and international refugee law have brought to the light new perspectives of relevant states obligations. The SAR regime remains though in principle, a legal regime under the law of

[157] *Ibid*, p.9
[158] Trafficking Protocol, art.7
[159] Council of Europe, Convention on Action against Trafficking in Human Beings and Explanatory Report, Council of Europe Treaty Series No 197 (2005) articles 12, 18
[160] Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate irregular immigration, who cooperate with the competent authorities, L 261/04 (29 April 2004)
[161] Chapter III, Migrant Smuggling Protocol
[162] *Ibid*, Article 8
[163] *Ibid*

the sea. As such, its implementation is primarily the mission of the competent international court under UNCLOS, apart from national courts. Consequently, I will seek to find illumination on its content and practical extensions by examining the scenario of judicial review on the international level. By choosing this path, I opt primarily for a state-centric approach, following the state-centric system of UNCLOS.

B. International Judicial Avenues available to States: Surrealism or Pragmatic Answers?

1. Evolution of the treatment of foreigners in the international context

An illustrative example of the shift in the perspective on international level concerns the control of the entry of aliens and their expulsion, an inherent right of states. At the end of the 19th century, it was asserted in the Preamble of the International Rules on the Admission and Expulsion of Aliens that '*for each State, the right to admit or not admit aliens to its territory or to admit them only conditionally or to expel them is a logical and necessary consequence of its sovereignty and independence*'.[164] According to the traditional reading of the text, emphasis is given on the states' freedom of action and their sovereign prerogative to regulate the presence of foreigners on their territory. Although the right to expel an alien remains an inherent right of the state, nowadays '*Expulsion shall be […] without prejudice to other applicable rules of international law, in particular those relating to human rights*'.[165] This aspect of the procedure of expulsion, as redacted by the International Law Commission, depicts the evolution in state practice since the 19th century.

Due to increasing human rights considerations in the years following the Second World War, the margin of discretion recognized in favor of states was limited.[166] Although admission to territory remains in principle a matter reserved to the discretion of the State under the International Covenant of Civil and Political Rights [hereinafter ICCPR], considerations of non-discrimination, prohibition of inhuman treatment and respect for family life should be taken into consideration by the governmental authorities.[167] In such cases, aliens may enjoy the protection of the Covenant even in relation to entry or residence.[168] Although the substantive grounds for expulsion are determined by domestic

[164] This prerogative was not without any constraints though, since according to the Preamble '*humanity and justice oblige States to exercise this right while respecting, to the extent compatible with their own security, the rights and freedom of foreigners who wish to enter their territory or who are already in it'*. See for further details Institute of International Law, Preamble of the International Rules on the Admission and Expulsion of Aliens (9 September 1892)

[165] International Law Commission, Draft articles on the expulsion of aliens, 2014

[166] A Pascale, Exceptional Duties to Admit Aliens in R Plender, *Issues in International Migration Law* (1st edition, Brill Nijhoff Publishers, 2015) at p.201

[167] Human Rights Committee, General Comment 15, '*The position of aliens under the Covenant*', 27th session 1986, UN Doc HRI/GEN/1/Rev.1 at 18 (1994) at para 5

[168] B Nascimbene and A Pascale, Adressing Irregular Immigration Through Criminal Penalties: Reflections on the Contribution of the ECJ to Refining and Developing a Complex Balance, in N. Boschiero, T. Scovazzi, C. Pitea, C.Ragni, *International Courts and the Development of International Law, Essays in Honour of Tullio Treves'* (1st edition, Springer, 2013) at p.911

legislation, the procedure of expulsion and the remedy available to the alien are controlled under the respective provisions of international human rights legal instruments, and may lead to the assessment of an expulsion as 'arbitrary'.[169]

This perspective is dominant in the field of human rights law. However, it needs to be taken into consideration at this point of the research, due to the similarities that the SAR regime presents in this regard. More specifically, the duty to assist those in distress at sea diverges from the traditional approach which wants the state to protect the rights of its citizens and of other states' citizens only when they enter the territory lawfully. Securing the rights and freedoms of refugees, even if they do not possess the necessary documents, means filling the protection gaps these persons have envisaged in their home state. According to a common point of view, offering assistance to irregular migrants and providing a place of safety to persons who do not meet the national immigration requirements goes too far. This provision can be read as boosting the motivation of persons to leave their home state in search of better living conditions, even when not necessary.[170]

I believe that this rapprochement in mentality is pragmatically necessary and in line with the obligations of the shipmaster, that is an individual rather than a state, set by article 98 UNCLOS. The wide scope of application of the duty to assist in distress is in line though with the changes in migrants' protection in Europe during the last decades.

[169] *Ibid*, p.10

[170] As the Commissioner for Human Rights emphasized in one of his issue papers, states are called to find the balance between protection of TCNs' rights and control of their borders ('*The challenge in human rights terms is to reconcile these different perspectives by protecting migrants' rights in host states and by reducing the causes of much involuntary migration through greater rights protection in home countries.*') CoE, Commissioner for Human Rights, The Human Rights of Irregular Migrants in Europe, CommDH/IssuePaper(2007)1 (12 December 2007) at introduction

2. Establishing a contentious case under the dispute settlement system of UNCLOS

Although the content of article 98 UNCLOS and relevant rules of international law set certain states obligations as presented in chapter A, the reticence of national courts to apply the SAR provisions creates a vacuum of implementation. Seeking a solution to this problem and an answer to the second question of my research, I will now look into the scenario of establishing a case under the dispute settlement system provided by UNCLOS.

In case of a dispute concerning the interpretation or application of UNCLOS, states parties are under an obligation to use peaceful means[171] and exchange views on the means of settlement to be adopted.[172] States may proceed to the judicial settlement of the dispute only if the procedures for amicable dispute settlement under Part XV[173] are exhausted without successful result.[174]

If peaceful settlement with free choice of means is not achieved, states resort to the compulsory settlement of disputes provided by UNCLOS. The obligatory nature of the judicial procedure under UNCLOS, in combination with the binding character of the judicial decisions, aims at deterring unreasonable states' conduct and preventing unnecessary disputes.[175] Taking into consideration the number of innovative provisions introduced in UNCLOS and its adoption as a package deal,[176] controversy over its interpretation and application was highly probable.[177] Moreover, the binding nature of the

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[171] Article 279 UNCLOS

[172] Article 283, para 1 UNCLOS

[173] ITLOS, *Southern Bluefin Tuna Cases* (Australia V Japan) (Provisional Measures) Order of 27 August 1999, at paras 57-58. In this case a controversy arose between Australia and New Zealand as applicants and Japan over the conservation of a highly migratory species. The ad hoc tribunal decided that the particular disputes settlement mechanism under a treaty among the three countries prevented the dispute from been included in the UNCLOS dispute settlement mechanism. The Tribunal thus corroborated the importance of states' consent on the choice of methods of dispute settlement. See also for further details on the Southern Bluefin Tuna case, N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (1st edition, Cambridge University Press, 2005)

[174] CF Amerasinghe, The International Tribunal for the Law of the Sea; The Dispute Settlement System of the 1982 Law of the Sea Convention, in *Local Remedies in International Law* (3rd edition, Cambridge University Press, 2004) at p.257

[175] *Ibid,* p.258

[176] See '*The Question of Universal Participation in the Convention; The United Nations Convention on the Law of the Sea (a historical perspective)*' available at http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm (accessed 6 January 2016)

[177] Another reason for incorporating the provisions on dispute settlement under UNCLOS was the demand for equal treatment of developed and developing states. The latest felt uncomfortable with the likelihood of developed states making use of their political and economic power to promote their interests. As a guarantee of protection against such practices, the system of compulsory settlement of disputes was included in the Convention. T.A. Mensah, The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law, pp.81-94, in D. Vidas & W. Ostreng (eds), *Order for the Oceans at the Turn of the Century* (1st edition, The Fridtjof Nansen Institute1999) at p. 84. The mechanism provided in Part XV UNCLOS was destined to guarantee the 'integrity' of the text. See F A Boyle, *Dispute Settlement and the Law of the Sea*

decisions would reassure developing states on the application of the convention. Consequently, the Third United Nations Conference on the Law of the Sea, known as UNCLOS III, elaborated a system for the settlement of disputes. Its importance has been historically corroborated.[178]

UNCLOS contains a detailed[179] dispute settlement system which provides for the possibility to opt for the dispute settlement body. Apart from the pre-existing ICJ and two ad hoc arbitral tribunals,[180] a new court created by UNCLOS constitutes the fourth option. ITLOS as a specialized[181] judicial body has been nominated by several states as the judicial body competent for the disputes concerning the interpretation and application of UNCLOS.[182]

Since the adoption of UNCLOS, no dispute concerning article 98 UNCLOS and the obligation to assist in distress has been submitted to compulsory procedures under the Convention.[183] Furthermore, although cases relating to the law of the sea are often brought before the ICJ, the Court has not yet examined a case under the UNCLOS dispute settlement system. The majority of cases concern maritime boundary delimitation and the rest of the cases touch upon a wide variety of other law of the sea matters.

The flexibility on the choice of fora available to states parties entails a difficulty on choosing the most suitable or convenient one for every dispute. Criteria such as the service provided by the two permanent courts and the two arbitral tribunals, the judges' familiarity with the particular issue to be examined, as well as the necessary flexibility of the

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Convention: Problems of Fragmentation and Jurisdiction, International and Comparative Law Quarterly, Vol 46, pp 38-79 (1997) at p.39 and JE Noyes, *The International Tribunal for the Law of the Sea*, Cornell International Law Journal, Volume 32, Issue 1, pp 110-142 (1999) at p.128

[178] The law of the sea has generated the greatest number of international disputes since 1945. Despite strong criticism as contributing to the fragmentation of international law, many cases have been adjudicated under the UNCLOS provisions and provisional measures have prevented escalation of disputes and environmental damage. See A. Yankov, *The International Tribunal for the Law of the Sea: Its Place within the Dispute Settlement System of the UN Law of the Sea Convention*, The Indonesian Journal of International and Comparative Law, Volume 37(3), pp 356-371 (1997) at p. 359. See also Igor Karaman, *Dispute resolution in the law of the sea* (1st edition, Martinus Nijhoff Publishers 2012) at p.1

[179] E.D. Brown, *Dispute Settlement and the Law of the Sea: the UN Convention Regime*, Marine Pol'y, Volume 21(1), pp17-43 *(*1997) at p. 18, *supra* no 174, I Karaman, at p.251

[180] Article 298 UNCLOS

[181] See C.F. Amerasinghe, *Local Remedies in International Law* (3rd edition, Cambridge University Press, 2004) at p.264 ('*The source for the creation of ITLOS was the idea that disputes of a particular type are best handled by tribunals set up for the purpose'*)

[182] States make a declaration of preference under article 287 UNCLOS

[183] The majority of cases were submitted under the mechanisms for the speedy resolution of disputes. These are the procedure of provisional measures under article 286 UNCLOS and prompt release of vessels and/or their crews under article 292 UNCLOS. During these procedures the merits of the case is not necessarily examined. See N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (1st edition, Cambridge University Press, 2005) at p.50

procedure, are to be taken into consideration by states.[184]

Taking into consideration the range of choices offered under UNCLOS, an important question arises: which tribunal would be the most appropriate one to deal with a case concerning article 98 UNCLOS? Would the choice of forum have an impact on the final result? In order to answer these questions, certain issues of jurisdiction and substance need to be examined.

[184] This procedure can be viewed as an introduction of 'market competition' notions in international adjudication. Such a system is the most functional according to theorists, since it provides for an accommodation of disagreements on the appropriate means of resolving a dispute. On the face of this dimension, the dispute settlement system of UNCLOS disposes of a diplomatic function as well; See *supra* note 178, N Klein, at pp 54-55

3. Jurisdiction ratione personae in disputes relevant to article 98 UNCLOS

i. Identification of the applicant party

Which state can resort to the Court in case of failure to assist in distress under article 98 para 1 UNCLOS? The answer to the question is related to the legal force of the obligation to assist in distress. More specifically, since the need for rescue arises at sea, the key question lies in the jurisdiction of states to enforce the obligation to assist in distress at sea under article 98 para 1 UNCLOS. In order to find which states could resort to an international court or tribunal and become parties to a dispute concerning the implementation and application of article 98 UNCLOS, I will look into the rules of international law concerning enforcement jurisdiction, specifically in the context of navigation on the high seas.

Enforcement jurisdiction has not been an issue of great interest for commentators in the context of article 98 UNCLOS, except for the fact that refugees aboard the ship are not treated as if they are in the territory of the ship's flag state.[185] In public international law, jurisdiction is territorial at least as a presumption.[186] The territorial theory, although often criticized by the doctrine as obsolete[187] and inadequate compared to the divergence of the circumstances in each case,[188] is based on the only judgement of an international court on the issue so far.[189]

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[185] C Allen, *Australia's Tampa incident: the convergence of international and domestic refugee and maritime law in the Pacific Rim*, Pacific Rim Law & Policy Journal, Vol.12 No 1, pp 97-108 (2003) at p. 99

[186]I Brownlie, *Principles of Public International Law* (4th edition, Clarendon Press, 1990) at p.298. See also M Akehurst, *Jurisdiction in International Law*, British Yearbook of International Law, Volume 46, pp 145-257 (1975) at p.157

[187] See *ibid* Brownlie at p.3, Dissenting Opinion of Mme Van Den Wyngaert, at para. 51 *('It has often been argued, not without reason, that the "Lotus" test is too liberal and that, given the growing complexity of contemporary international intercourse, a more restrictive approach should be adopted today*.')

[188] A.V. Lowe, *Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980*, American Journal of International Law, Vol 75 (1981) at p.257 (believing that is it '*likely that the Court in the Lotus case only intended the presumption to apply in cases such as that then before it, where there is a clear connection with the forum'*). See also F.A. Mann, *The Doctrine of Jurisdiction in International Law*, Recueil des Cours I (1964) at p. 35 (noting that '*there is no certainty that [the Court] was contemplating the doctrine of jurisdiction in general or any of its ramifications outside the field of criminal law'*) ILC Yearbook 1956, Volume II, at p.281 (the Commission commented on the case that '*A diplomatic conference held at Brussels in 1952 disagreed with the conclusions of the judgement. The Commission concurred with the decisions of the conference […] with the object of protecting ships and their crews from the risk of penal proceedings before foreign courts in the event of collision on the high seas, since such proceedings may constitute an intolerable interference with international navigation'*)

[189] In the Lotus case, the Court held as to enforcement jurisdiction that '[*T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention*' PCIJ, *The case of S.S. Lotus* (France V Turkey) P.C.I.J. Reports 1927, Series A, No. 10 (1927) at pp 18-19

a. Practical deficiencies of the flag state's exclusive jurisdiction

The international community realized the need for a specialized jurisdictional system on the high seas early on. State practice and negotiations in the framework of the Geneva Conference reached the same conclusion; the rule of a state's exclusive jurisdiction over a ship flying its flag at the high seas was enshrined in article 92(1) UNCLOS.[190] Some commentators opine that the provision reflects the legal fiction that the ship constitutes an extension of the territory of the flag state,[191] sailing in waters were no territorial sovereignty may be declared.[192] Others consider the application of the territoriality principle in this case outdated[193] and insist on the wording of article 92 UNCLOS, according to which the flag state has responsibility and jurisdiction over the ship.

Since the law of the flag was established as the one applicable on the high seas,[194] a state has exclusive jurisdiction over vessels entitled to fly its flag. In virtue of the principle of the freedom of the high seas, no state may declare sovereignty on the high seas in order to exercise jurisdiction upon foreign vessels.[195] The law of the flag is applicable to all events which take place on the ship[196] and the flag state exercises diplomatic protection on the behalf of a vessel flying its flag.[197] The flag constitutes only one piece of evidence of the ship's nationality, since the ship must carry its registration papers.

In addition to these rights, granting nationality to a merchant ship entails responsibility of the state for it and authority over it.[198] Every state has the right to legislate on the conditions under which it will grant nationality to merchant ships as a consequence

[190] Art 92 para.1 UNCLOS provides that '*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. 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'*, see *supra* no 184 Lotus case, at p.25

[191] See *supra* note 69 Davies, p.117

[192] See *supra* note 184 *Lotus case*, at p.25 ('*Vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them*')

[193] See *supra* note 181 Brownlie, at p.317 ('*The view that a ship is a floating part of state territory has long fallen into disrepute'*)

[194] Article 92 para 1 UNCLOS. The provision codifies existing customary international law. See supra no 184, *Lotus case*, at page 22 ('*International law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas'*) Churchill & Lowe, The Law of the Sea (3er edition, 1999) at p.263

[195] Supra note 184, *Lotus case*, at p. 25

[196] C J Colombos, *International Law of the Sea* (1st edition, Longman Green & Co, 1954) at para 317

[197] See *supra* note 189, RR Churchill & AV Lowe, at p. 257

[198] Article 94 UNCLOS lays out the basic duties of the flag state. A state must exercise jurisdiction in administrative, technical and social matters, whereas the flag state is considered responsible for the vessel '*where an act or omission is attributable to the state'*. US Supreme Court, *Lauritzen v Larsen* (1953) 345 US 571

of granting registration at its ports.[199] Despite the clause of article 91(1) UNCLOS[200] and growing international pressure to require a 'genuine link' between a state and a vessel,[201] practically many states do not require such a link.[202]

In the context of assisting in distress at sea, the rule of flag state's responsibility has been the object of criticism and strong controversy among implicated actors. The lack of unanimity on the matter has been illustrated during discussions under the auspices of UNHCR. In 1979 notably, during the DISERO meeting of experts in Geneva,[203] the experts pointed out the principle of flag state responsibility and proposed the adoption of a principle of responsibility for nationally owned vessels in open registries. The case of a state being unable to offer resettlement was also taken into consideration by the UNHCR. The first controversy on the matter manifested in the 1980 meeting of the UNHCR Executive Committee [hereinafter ExCom].[204] The representatives of the United Kingdom, Netherlands and Greece manifestly stated their position that the rescue of refugees at sea should not impose flag-state responsibility. According to them, responsibility rests with all signatories of the Convention and the Protocol, therefore the burden should be equitably shared.[205]

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[199] *Supra* note 189, at p.309

[200] The provision states that '*there must be a genuine link between the State and the ship*'. Taking, though, into account states' exclusive jurisdiction over the granting of nationality to ships, this clause sounds strange. See for further analysis M Gavouneli, From Uniformity to Fragmentation? The Ability of the UN Convention on the Law of the Sea to Accommodate New Uses and Challenges, Chapter 8, pp 205-234 in A Strati, M Gavouneli & N Skourtos (editors), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (1st edition, Martinus Nijhoff Publishers, 2006) at p. 207

[201]ICJ, *Nottebohm case* (Liechtenstein V Guatemala) ICJ Reports 1955 (Judgment of 6 April 1955) p.4

[202] H. Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives*, Tulane Maritime Law Journal, Volume 29, pp 150-57 (1996)

[203] The Disembarkation Resettlement Offers Scheme was initiated by UNHCR in 1979 and received the endorsement of the ExCom. The scheme's purpose was to provide a solution to problems of ships flying the flags of states operating an open registry and of countries which for special reasons were unable to guarantee permanent admission to refugees. Its operation contributed to the disembarkation and resettlement of over 60 persons until 1984. During its field operations, assistance was also provided by the Rescue at Sea Resettlement Offers (RASRO) Scheme. The purpose of RASRO was to ensure that survivors would be resettled by the flag state of the ship that assisted them in distress. If the flag state did not abide by its obligation, the survivors were placed on the DISERO list. In a burden-sharing rationale, resettlement states undertook the duty to receive these persons included in the list; See UNHCR, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea , EC/SCP/35 (28 August 1984) available online at http://www.unhcr.org/3ae68cbd0.html (accessed 30 November 2015)

[204] See also *SE Davies, Legitimizing Rejection: International Refugee Law in Southeast Asia* (1st edition, Martinus Nijhoff Publishers, 2008) at p.170

[205] The representatives referred to the purpose of the principle of immunity of ships owned or controlled by a state from local jurisdiction. The rules regarding competition among vessels owned or controlled by states, engaged in commercial undertakings, operate not only in comparison with private vessels but other states' vessels as well. Equitable sharing of the burden to assist in distress is intended, in the view of the representatives, to 'safeguard the prestige and dignity of a sovereign Power but not to put that Power into a considerable economic advantage' in competition with other actors in navigation and trade; See with respect to the principle of immunity of ships owned or controlled by a State. See *supra* note 189, at p. 285

In response to this proposal, a working group was set up, composed of representatives coming from different backgrounds.[206] The report elaborated by the working group underlined the need for practical solutions and insisted on the role of coastal States, flag States, countries of resettlement and the international community as a whole to contribute to the fulfilment of the duty to assist in distress.[207] Although the responsibilities were divided between international actors, their scope and the limits were not specified. The divergence of views on the issue during the Executive Committee's sessions led to a deadlock and reiteration of the need for practical arrangements. Therefore, the principle of flag-state responsibility cannot be considered as a rule of customary international law.[208]

This is a serious obstacle in the effort of identifying the applicant party in a hypothetical dispute concerning article 98 UNCLOS. However, it is not the only problem I encountered during my research, since the reality of navigation on the high seas imposes additional peculiarities. The issue of stateless vessels and ships flying a flag of convenience is one of them.

[206] The working group comprised representatives of the maritime and coastal states, of the potential resettlement countries and international bodies active on the issue of rescue at sea; See GS Goodwin-Gill, *The Refugee in International Law* (1st edition, Oxford University Press, 1983) at p.90
[207] UNHCR ExCom, Report of the Working Group on Problems Related to the Rescue of Asylum-Seekers in Distress at See (1982) Conclusion No.26 (XXXIII)
[208] *Ibid*

b. Flags of convenience and stateless vessels

Theorists agree that legal force can only be given to the duty to assist in distress on the high seas by the flag state.[209] An important percentage of vessels is, however, registered under flags of convenience or not registered at all.

This is a major issue, since no such state would be interested in resorting to an international court. It would be an initiative counter to its national interests. In my point of view, the legal framework of the high seas is undermined by reality as a result of this state practice. In theory, the high seas are not subject to the exercise of sovereignty by any state and ships are liable to the exclusive jurisdiction of the flag state, save exceptional cases provided for by treaty or under general international law. In the maritime world though, the majority of the vessels carrying the 'boatpeople' are usually denied flag-state protection, resulting in a *de facto* gap of protection at sea. Although the major flag of convenience countries have adopted UNCLOS,[210] these countries would be reluctant in enforcing the obligation to assist ships of other flag states.[211] States with open registries lack the will to enforce obligations like the duty to provide assistance and therefore do not put at the disposal of the competent authorities the adequate resources.[212]Some of these countries lack, due to high levels of poverty and debt overhang, the necessary resources to pursue extraterritorial enforcement of their laws.[213]

In addition to ships flying flags of convenience, another alarming phenomenon concerns ships having no nationality at all. Although there is no generally accepted rule of international law on the prerequisites for attribution of nationality to a ship, merchant ships are obliged under international law to possess a nationality and provide the relevant evidence.[214] Ships without nationality are stateless and no state can exercise control over them on the high seas.[215] This undesirable, yet not unlawful status entails the absence of

[209] See M Davies, *Obligations and Implications for ships encountering persons in need of assistance at sea*, Pacific Rim Law & Policy Journal Association, pp 109-141 (2003) at p. 112
[210] Chronological Lists of Ratifications of Accessions and Successions to the Convention and the Related Agreements as of 12 November 2001, available online at http://www.un.org/depts/los/reference-files/chronological_lists_of_ratifications.html (accessed 6 January 2016)
[211] R Barnes, *Refugee Law at Sea*, The International and Comparative Law Quarterly, Volume 53, No 1, pp. 47-77 (2004) at p.51
[212]Numerous accidents at sea are due to the reluctance of these states to exercise their supervisory duties or their defective implementation under the best scenario. See also Alan A The *Duty* to *Render Assistance* in the *Satellite Age*, California Western International Law Journal, Vol. 36, No. 2, pp 377-400 (2006) at p.387
[213] See also *supra* note 69, Davies, at p.126, citing the examples of Vanuatu and the Marshall Islands.
[214] See *supra* note 192, at para 331
[215] Article 92 UNCLOS. See also *supra* note 189, Churchill and Lowe, B Allyson, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, The Yale Journal of International Law, Volume 37, pp. 433-461 (2012) at p. 440

an international person responsible for the conduct of the ship-users. The legal consequences of statelessness are paramount, given that minimum public order at sea cannot be ensured if compliance with the international regulations is not guaranteed. Needless to say, the parties of a dispute concerning activities on this ship cannot be easily identified in this case.

The phenomenon of stateless ships is not rare, especially in the context of migrants smuggling and trafficking. In general, a ship is stateless when it has never registered with any state.[216] A vessel, however, may also become stateless, even if initially it was included in a state's registries. This is the case when the vessel violates its flag state's laws, if it does not comply with the flag state's requirements, and when the flag state is not recognized by the international community.[217] An additional reason of 'assimilated statelessness' occurs when a ship sails under more than one flag, using one or the other according to convenience.[218]

Several theorists opine that, in such cases, a state's freedom of action is delineated according to the circumstances of each case, such as the obligation to assist in distress. Given the humanitarian considerations arising from such situations and the relevant human rights concerns, some theorists argue that all states should be able to take action.[219] This point of view is in accordance with the opinion that stateless vessels under article 110 (1) UNCLOS are subject to the laws of the boarding state.[220]

Although a right of visit is granted to warships under article 110 UNCLOS when reasonable suspicion arises that a vessel is without nationality,[221] the purpose of the power conferred to the warship is the verification of the ship's registries.[222] The list of crimes in

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[216] See *supra* note 189, Churchill and Lowe, at p.214

[217] See A Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act,* The Yale Journal of International Law, Vol.37, 433-361 (2012) at p. 441

[218] Article 92 UNCLOS, *supra* note 189, R. Churchill and A.V. Lowe, at p.213

[219] See *infra* chapter 'Solutions to the lack of jurisdiction over flagless ships on the high seas'

[220] H. Lauterpacht, *International Law: A Treatise by L. Oppenheim* (7th edition, Longmans Green & Co., 1948) at p.546.

[221] Art 110 para 1(d) UNCLOS ('*Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: […] (d) the ship is without nationality'*) The right of visit englobes the right of approach, i.e. the right to gain physical contact with the suspected ship and the right of search. The latter tight applies when, after control of the ship's papers, doubts on the nationality of the ship remain. In that case, the officer of the visiting vessel may proceed to a detailed inspection of the ship and cargo in order to establish the violation on specific grounds. The right to board goes beyond the right to interrogate the ship; See RJ Dupuy and D Vignes, *A Handbook on the New Law of the Sea* (1st edition, Martinus Nijhoff Publishers, 1991) at p.420-421

[222] Art 110 para 2 UNCLOS ('*In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination*

article 110 UNCLOS comprises certain universal crimes,[223] but further action taken by states in these cases derives from other provisions of the convention.[224] Therefore, it cannot be sustained that statelessness constitutes a universal crime, since no such provision exists in UNCLOS.

As far as state practice is concerned, there seems to be no consensus on attribution of a universal crime character to statelessness. Even states arguing that stateless vessels should be subject to the criminal laws of all states, do not rely on this argument. Norwegian measures against stateless vessels implicated in unauthorized fishing offer an illustrative example. Norway, more specifically, does not outlaw the use of stateless ships entirely and thereby subject them to universal jurisdiction. The Norwegian authorities treat stateless vessels as their own, without referring to the rules of universal jurisdiction.[225] Furthermore, although various commentators support the idea of recognizing statelessness as a universal crime, they do not view this idea as a normative reality so far.

on board the ship, which must be carried out with all possible consideration.')

[223] Article 110 para 1(a),(b)(c) UNCLOS refer to piracy, slave trade and unauthorized broadcasting

[224] Articles 105-109 UNCLOS. In the case of piracy for example, the right to board a suspect pirate vessel is provided in article 110 UNCLOS, yet the jurisdictional basis for further measures is conferred to states under article 105 UNCLOS. Such a provision is not included in the convention as far as stateless vessels are concerned. No customary rule has emerged in this regard. See also E Papastavridis, Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law, 36 Syracuse Journal of International Law & Commerce 145, 160-181 (2009) at p. 168

[225] See *supra* note 212 A Bennett, at p. 450

c. Solutions to the lack of jurisdiction over flagless ships on the high seas

Initiatives in the framework of domestic law, such as the one previously described, do not cover the issue of stateless vessels globally, nor can we refer to international practice establishing a rule of customary international law. I will consequently seek to find solutions to this regulatory issue by referring to the legal tools provided by the law of the sea.

Some commentators argue that statelessness should be recognized as a universal crime due to its heinous consequences and the current inability to tackle it. The main problem being enforcement of the duty to rescue, the appropriate solution on international level would be to intervene drastically when the duty is not fulfilled. Not rendering assistance to those in distress at sea has potentially murderous results. If a call for assistance is ignored on purpose, in their view, such omission should be considered an act of *hostis humani generis*.[226] Established as one of the most serious international crimes, such omission would provide any state with the right to intervene and decide the penalties to be imposed on the persons aboard under its judicial system.[227]

Although recognizing the operation of a vessel without nationality as a universal crime could be effective on a practical level, the legal justification of such an initiative lacks credibility. In order for an act to constitute a universal crime, it should produce a threat to the entire international community.[228] If the two main justifications for universal jurisdiction are examined closely, they are not fulfilled in the case of stateless vessels. As far as atrocity is concerned on the one hand,[229] the threshold of heinousness under the recognized universal crimes[230] is not reached in the case of statelessness. Operating a stateless vessel is not even unlawful under international law, nor are the humanitarian concerns deriving from this act certain and of large scale. The lack of a flag state

[226] P Jason, *No Duty to Save Lives, No Reward for Rescue: Is that Truly the Current State of International Salvage Law?,* Annual Survey of International and Comparative Law, Vol. 12, Issue 1, Article 6, 87-139 (2006)

[227] A 'carrot-and –stick approach is proposed by Patent Jason, through coordinated attribution of considerable awards to the shipmasters assisting in distress and establishment of universal jurisdiction in the opposite cases; See for further details *ibid*, p. 138

[228] AW. Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, Journal of Maritime Law and Commerce, Volume 13, p. 323-336 (1982) at p.342 . The underlying basis of universal jurisdiction is 'the reality of the danger that [universal] crimes pose on all nations within the international community'; See also Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, Michigan State International Law Review, Volume 9 (2000)

[229] The justification of atrocity in currently the most significant and is based on serious humanitarian concerns. See *supra* note 212, A Bennett, at p. 451

[230] Universal crimes recognized under customary and treaty law such as crimes against humanity and genocide are universally condemned for their atrocity; See for further details *ibid*, at p. 450-453

implicates the lack of adequate oversight and control. This deficiency leads to a likeliness of unlawful conduct aboard the vessel and danger of injuries. Still, these are possible implications under hypothetic scenarios, not actual facts. Should heinous acts take place aboard a stateless ship or due to its conduct, other states could intervene on the grounds of the acts, not the use of the stateless vessel itself.[231]

As far as the practicality justification is concerned, declaring statelessness a universal crime is not a necessary precondition to combat it effectively. Less drastic measures, such as the control of the ship's registries, powers under the right of visit[232] and inspection of stateless ships for seaworthiness[233] can be fruitful if the international community is decided to combat the phenomenon wholeheartedly. In the case of migrant smuggling and trafficking, the suspects can be localized through coordinated governmental initiatives and prosecuted under the current theories of criminal jurisdiction. Recent practice in the Mediterranean proves that states and the EU move towards such an approach.

For these reasons, I leave the idea of universal jurisdiction behind and seek to find an answer to statelessness in the doctrine sustaining that a ship may take on the 'national character' of its owners.[234] Some commentators opine that a state's freedom of action is delineated according to the circumstances of each case, such as the obligation to assist in distress. Given the humanitarian considerations arising from such situations and the relevant human rights concerns, some theorists argue that all states should be able to take action.

Although there is no consensus on the issue, I do not consider this concept thoroughly inapplicable. There is a case when a national court considered the statelessness of a ship as sufficient grounds for the assertion of enforcement jurisdiction by a state. It was the Pamuk and others case in Italy, concerning the interdiction of a flagless ship which was transporting undocumented migrants on the high seas. In this case, the Italian court decided that statelessness of the ship allows for the arrest and trial of irregular migrants.[235]

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[231] *Ibid*, at p. 452

[232] Article 110 UNCLOS

[233] See Papastavridis Efthymios, *Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law*, Syracuse Journal of International Law & Commerce 145, pp 160-181 (2009) at p. 161

[234] See *supra* no202,Gooodwin Gill, p.93

[235] In this case, Cemil Pamuk was intercepted by Italian forces during the seizure of a stateless vessel on the high seas; See *Pamuk and others*, Italy, Crotone Court (27 September 2001), 84 Rivista di Diritto Internationale (2001) p.1155-9. The international community later on drafted a new list of the grounds for interferences on the high seas in cases of suspected migrant smuggling. This list was included in the Migrant Smuggling Protocol; See P Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (1st edition, Springer, 2007) at p.38

Moreover, according to the marine practice of USA and UK, stateless vessels may be intercepted by any state, since they are not protected by any state.[236] This perspective approximates the equation of stateless vessels to *res nullius* and consequent adoption of coercive measures by any state.[237] According to some theorists, the assertion of enforcement jurisdiction in this case would be justified only if a jurisdictional nexus existed between the ship and the intervening state.[238] According to other authors, '*extraordinary deprivational measures are permitted with respect to stateless ships*'.[239]

In my opinion, the main reason why this proposal lacks certainty is that it extends the jurisdiction of the boarding state to matters not contributing to the purpose of clarifying the status of the vessel. This interpretation of article 110 UNCLOS would erroneously simulate the scope of the jurisdiction of the visiting state with the jurisdiction of the flag state. On the face of article 110 para 1 UNCLOS, the boarding state substitutes the flag state only as far as compliance with international regulations is concerned, without exercising further control on the vessel. This power concerns the duties enshrined in article 94 UNCLOS.[240] An extension of these duties would require a positive basis of jurisdiction, since the right of visit is clearly delineated in article 110 UNCLOS. Otherwise, statelessness would constitute the backdoor for interference with a vessel's activities and the people on board. In my point of view, only if a jurisdictional nexus exists between the ship and the intervening state, it is possible to recognize enforcement jurisdiction. This is in line with the rationale of UNCLOS behind the notion of a link between the ship and its flag state.

Last but not least, a solution to the problem of stateless vessels can be found through the application of the UN migrant Smuggling Protocol. The said Protocol provides states with the right to intervene when a ship is suspected of engaging in smuggling of migrants by sea.[241] In these cases, the state concerned may directly '*board and search the vessel'* after control of the ship registries and situation aboard, when '*evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with*

[236]See *supra* no 229, at p.166; See also US Commander's Handbook on the Law of naval Operations (October 1995) para. 3.11.2.4
[237] *Ibid*, E. Papastavridis, p.168
[238] See *supra* note 189, Churchill and A. V. Lowe, The Law of the Sea at p. 214. See also V Moreno Lax, *Seeking asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, International Journal of Refugee Law, (2009) at p.13
[239] M.S. McDougal and WT. Burke, *The Public Order of the Oceans* (1st edition, New Haven, 1962) at p 1084
[240] *Ibid*
[241] Article 8, UN Migrant Smuggling Protocol

relevant domestic and international law'.[242] The aforementioned provisions establish the enforcement jurisdiction of the boarding state. If this provision is taken into consideration, the list of possible applicant states extends to a realistic level. Furthermore, in EU law, Frontex Guidelines provide explicitly that '*in accordance with the Protocol against the Smuggling of Migrants*', when ships without nationality are presumably engaged in the smuggling of migrants the persons on board may be apprehended.[243]

[242] *Ibid*, Article 8(7)
[243] Frontex Guidelines Decision, Annex, Part I, paras. 2.5.2.5. and 2.4.(d)

ii. Identification of the respondent party

After looking into the issue of the applicant state, I will now proceed with the respondent state according to relevant rules of the law of the sea. The reason is related to the wording of article 98 UNCLOS. More specifically, under the pertinent international conventions the one thing crystallized is that there exists an obligation to rescue persons in distress at sea. But it is not clear who is responsible to enforce these duties and consequently, who bears responsibility for the breach of the relevant provisions. If an answer to these questions is not given, the rescue-at-sea regime becomes a cloud in tailored trousers. Likewise, attributing responsibility to every state that can be reasonably expected to assist is not practically attainable.

As a general rule, the flag state is the one responsible for enforcing the duty to assist in distress. Provided with exclusive jurisdiction over the ship on the high seas under article 92 UNCLOS, the flag state is obliged to take the appropriate preventive and coercive measures.[244] All states must ensure that the vessels flying their flag fulfill the SAR equipment criteria. If the shipmaster fails to fulfill his or her obligation, the state should impose the corresponding penalties according to its legislation. Should the state not abide by the relevant obligations, it bears international responsibility.

In practice, the main problem concerns the identity of the vessels which, in every case, were under an obligation to assist. In some cases the answer is easier than in others. In the case of Farmakonisi for instance, it becomes crystal-clear that Greece was the flag state under the obligation to assist. The boat was in Greece's territorial waters, no other state had SAR obligations in the region and the Greek navy was the only center that received a distress call. Since the Greek Coast Guard vessel engaged in the rescue operation within territorial waters, Greece was under an obligation to provide safe haven to the survivors as soon as possible.[245] On the high seas however, things are more complicated from the outset. In numerous cases vessels that received a distress call from a vessel in danger ignored the signal or did not respond in an adequate and timely manner. In the infamous left-to-die incident of 2011, ships controlled by different states as well as a NATO vessel did not respond to a distress call. As a result, another lethal shipwreck

[244]See *supra* no 222, at p.97

[245] It is commonly accepted that when state vessels proceed to a rescue-at-sea operation within territorial waters the responsibility for the rescued persons devolves on the assisting state. UNHCR has suggested that such treatment should be applicable when rescue takes place on the high seas as well; See UNHCR, Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea, available online at http://www.unhcr.org/3e5f35e94.html (accessed 6 January 2016)

took place in the Mediterranean.[246] According to the broader interpretation of the provision, anyone who can assist is under the duty to do so.[247] Commentators supporting this view rely on the wording of article 98(1) UNCLOS[248] and the customary nature of the duty.

In my point of view, receiving a distress call and having the capacity to assist are the two necessary preconditions for a state to be obliged to rescue those in distress. However, this is not an easy task in terms of evidence during a possible dispute. After examining these crucial issues of jurisdiction *ratione personae,* I will now look into the main issue of substance concerning the legal nature and content of the assisting state's obligation.

[246] The incident was brought to light by an article in the British newspaper The Guardian, to which the President of the Parliamentary Assembly of the Council of Europe responded swiftly by calling for an inquiry into 'Europe's role in the death of 61 boat people' on 9 May 2011. The report on the incident was adopted on 29 March 2012 and looked into the responsibility of states and NATO for failing to assist the people in distress. According to the facts, as reported by the Parliamentary Assembly, a small boat loaded with 72 people stated its voyage from Tripoli towards Europe on 26 March 2011, without ever reaching its destination; 15 days later it was washed up on the shores of Libya with only nine survivors. Apart from the number of dead people, two additional factual parameters rendered the incident interesting. On the one hand, the boat had sent several distress calls which were ignored by different fishing vessels, a military helicopter and a large naval vessel and on the other hand at least two boats involved in NATO's operations were near the boat at the time of the distress calls. The helicopter and the military vessel had even come to contact with the boat, without rescuing the people aboard. The military personnel of the former even dropped water and biscuits to the boat and indicated that they would return, while instructing the people on board not to move from their location. This never happened. As the days passed, people aboard started dying and other threw themselves into the sea. Those who survived reached Libya were they were imprisoned and eventually managed to bribe their way out of prison and reach a church for medical assistance. Despite the tragic dimensions of the incident, the question of responsibility of flag states and NATO remains controversial. The incident was characterized by the report as a 'collective failure' of several different agents. The Parliamentary Assembly adopted in June 2012, with 108 votes for, 36 against and 7 abstentions, a resolution which made specific recommendations to member States concerning how search and rescue operations should be carried out in the future. See for further details Report of the Committee on Migration, Refugees and Displaced Persons and Explanatory memorandum by Rapporteur T Strik, Lives Lost in the Mediterranean Sea: who is responsible? (29 March 2012). See also E. Papastavridis, *The 'Left-to-Die Boat' incident of March 2011 :Questions of International Responsibility arising from the Failure to Save Refugees at Sea*, Refugee Law Initiative Working Paper No.1 (October 2013) at p. 9

[247] See *supra* no 222, at p. 99

[248] No criteria are set as to the identity and nationality of the shipmaster, the marine area where the distress situation arises, or the type of vessel

4. Merits of the case: the 'due diligence' obligations in particular

In a hypothetic case brought before an international court or tribunal, the particularities of the rescue at sea regime would pose important questions of substance. The unique character of maritime assistance, when judicially reviewed, entails difficulties for the applicant party in its effort to substantiate a breach of the relevant international rules by the respondent state. Practice has shown that in disputes under maritime salvage law, the judges need to proceed to a different legal reasoning in order to decide on the merits of the case.[249]

Assessing the conduct of a state in this case is a complicated, multifaceted and multifactorial issue. In situations of distress at sea, failure to save all persons in need of assistance does not mean *ipso facto* that coastal states are responsible.[250] If a state makes use of all the means reasonably available which might contribute to preventing tragic events in case of distress at sea and abides by the relevant international obligations, no guarantee of result can be demanded. If, however, a state '*manifestly failed to take all measures [which were within its power]*'[251] to prevent the loss of life at sea, then state responsibility incurs. However, this is not an easy task given that various parameters need to be taken into consideration in order to conclude whether a state in a given case of imminent peril at sea knew or should have known of the situation and whether the state had the capacity to assist. In the examination of these factors, leading to the assessment of state conduct under objective criteria, the notion of 'due diligence'[252] is of paramount importance. In my opinion, this would be the principal added value of a dispute under article 98 UNCLOS for future cases.

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[249] One special feature of this field of international law concerns the perspective of applying the pertinent provision. See supra note S. Freidell, *The Future of Maritime Law in the Federal Courts; A Faculty Colloquium: Salvage*, Journal of Maritime Law & Commerce, Vol.31, 311 (2000) at p.311 ('*In all other areas of the law, courts are asked to decide if a wrong has been done and if so how best to correct it. But in salvage the court is asked if a good idea has been done and how best to reward it.*')

[250] As the Seabed Disputes Chamber stated in its recent advisory opinion, the 'State's obligation 'to ensure' is not an obligation to achieve. ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Advisory Opinion) 1 February 2011, ITLOS Reports 2011. See also with respect to the duty to provide adequate means for the reasons of rescue at sea and its legal character of 'best effort' obligation

[251] ICJ, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina V Serbia and Montenegro), (Judgment) ICJ Reports 2007, p. 43 (26 February 2007) at para 430

[252] Due diligence was a notion of paramount importance in the Pulp Mills case, since the Court clarified that due diligence constitutes the origin of the principle of prevention (para 101). As a result, the Court concluded that 'due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works […] did not undertake an environmental impact assessment on the potential effects of such works' , para 204

Under an obligation of due diligence in international law, a state is called to go further than the '*adoption of appropriate rules and measures*' by showing '*a certain level of vigilance*'[253] in their implementation. The competent state organs must exercise administrative control on both public and private actors and ensure enforcement of the relevant provisions.[254] When a situation of distress arises, the first parameter to be examined in order to decide whether a state has met its due diligence obligations is the capacity to assist in distress.[255] The capacity depends on physical factors, such as the distance of the state vessels from the point where the ship in danger is located and legal criteria, meaning the relevant provisions under international law. Moreover, sufficiency of the available means for assistance and knowledge of the situation are additional factors taken into consideration by state organs.[256]

So far, an outline of the state due diligence obligations can be drawn. Responsibility arises when a state does not take the measures available to ensure the implementation of the regulatory framework by all operators under its jurisdiction. However, not all obligations under the provisions of UNCLOS, SOLAS and SAR Conventions, as presented in Chapter I, have to be met in due diligence. There exist three different categories of due diligence obligations on the face of the pertinent provisions. In order to categorize them, the operator these obligations concern and whether they have to be met before or in the course of SAR operations constitute the two decisive criteria.

Concerning the criterion of the responsible operator, every state is obliged to control whether both state and private vessels of its registries fulfil the criteria under the SAR regime.[257] Attribution of responsibility to the state when a private vessel lacks the necessary equipment is more complicated though. In the case of state vessels, establishment of state responsibility is easier since the state is directly responsible for its actions. Concerning the criterion of the moment to meet the SAR obligations, every state

[253] ICJ, *Pulp Mills on the River Uruguay case* (Argentina V Uruguay) (Judgment) ICJ Reports 2010, p. 14 (20 April 2010) at para 197
[254] *ibid*
[255] See in general for the parameters of assessment in case of due diligence obligations ICJ, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina V Serbia and Montenegro) (Judgment, 26 February 2007) ICJ Reports 2007, p. 43, at paras 430-433. The case concerned, firstly, the events that took place since the declaration of independence of the Republic of the Serb People of Bosnia and Herzegovina on 9 January 1992, in principal areas of Bosnia and various detention camps created by the Serbian Republic. Secondly, the historic background of the case included the 'massacre at Srebrenica', meaning the killing of over 7.000 Bosnian Muslim men following the takeover of the city of Srebrenica in July 1995
[256] *Ibid*, para. 431
[257] As provided by the SOLAS Convention

engaged in the operation must maintain adequate and effective SAR services and cooperate with other states for this cause.[258] These two general duties would constitute obligations of result without a dimension of due diligence, if the criteria of adequateness and effectiveness were not explicitly set under article 98 (2) UNCLOS.[259] The third category of due diligence obligations applies when states deploy a SAR operation. When an operation takes place in its SAR zone, a state is obliged to act and cooperate in order to deliver survivors to a place of safety.[260]

The aforementioned criteria are the ones provided under international law. In the law of the sea in particular, there has been a recent addition to the assessment of state conduct in relation to due diligence obligations. ITLOS, more specifically, looked thoroughly into the due diligence obligations of flag states in the advisory opinion of 2 April 2015 on the Request of the Sub-Regional Fisheries Commission. The first and second matters of the request concerned the obligations of flag states in cases of illegal, unreported and unregulated (IUU) fishing activities outside the territorial waters of the flag state.[261]

The reason why reference to the advisory opinion is necessary at this point is that some general remarks of ITLOS on such obligations can justifiably apply *mutatis mutandis* in the flag state's obligations under scrutiny as well.[262] This is in line with the reasoning of the court that allows for application of the clarifications of the Seabed Disputes Chamber's advisory opinion in cases where they are of relevance.[263] Even though the three cases are not identical, the remarks of ITLOS and the Seabed Disputes Chamber on the notion of 'due diligence' are also applicable in the frame of rescue-at-sea obligations. As to the meaning of the notion, ITLOS referred to the Seabed Disputes Chamber advisory opinion of 1 February 2011[264] and the Pulp Mills case.[265] The flag state

[258] Article 98 UNCLOS; SOLAS Chapter V, Regulation 7
[259] See also supra no 246, E Papastavridis
[260] Amendments to SOLAS Chapter V, Annex 5 (20 May 2004), paragraph 3.1.9 of the rules annexed to the Search and Rescue Convention 1979.
[261] In the Exclusive Economic Zone [hereinafter EEZ] of a third state more specifically. See .ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC), Case No. 21 (Advisory Opinion) (2 April 2015) at paras 16-141
[262] Firstly, in both cases UNCLOS requires from states to ensure that their nationals, shipmasters in the case of article 98 UNCLOS and nationals engaged in fishing within the EEZ of a coastal state in the case of article 62(4) UNCLOS, comply with an international obligation. To put it otherwise, the two situations have a common role order; the leading actor is the individual, yet states incur responsibility under the duty to assist in distress and the duty to comply with the fisheries conservation measures. Secondly, UNCLOS makes reference in both cases to due diligence obligations ('States shall have due regard to the rights and duties of the coastal State' under article 58(3));
[263] See *supra* no 257, Advisory Opinion, Case no.21, at para.125
[264] See ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, (Advisory Opinion), 1 February 2011, ITLOS Reports 2011, paras 110-112
[265] See *supra* no 257, Advisory Opinion, Case no.21, at para 128

is consequently under the 'due diligence' obligation to '*take all necessary measures to ensure compliance and to prevent*' unlawful conduct of the vessels flying its flag in the context of SAR operations.[266]

The flag state must include in the rules of domestic law that incorporate the SAR regime in national legislation, enforcement mechanisms to secure compliance of private vessels with these rules.[267] Although the state enjoys freedom as far as the nature of rules introduced on national level is concerned,[268] the penalties imposed to the operators who do not abide by their SAR obligations must be sufficient to deter violations.[269]

Control of the vessels compliance with the SAR provisions is enhanced through the application of article 94 para 6 UNCLOS in this case.[270] On the face of the ITLOS advisory opinion of 2 April 2015, the control of the ships compliance is not only triggered by the flag state's initiative, under the aforementioned obligation, but also by any other state which suspects reasonably that a ship is not under 'proper jurisdiction and control' .[271] If the flag state receives a report from a state on these grounds, it is under an obligation to conduct investigation on the issue and take adequate measures, if necessary.[272]

In my opinion, this solution to the issue of defective implementation of SAR rules or the lack of any attempt at control could be useful in the context of communication between two cooperative states. It cannot address effectively though the flags of convenience-related problems, due to the lack of means and willingness to cooperate in such issues.[273] Moreover, the solution proposed under article 94 para 6 UNCLOS is most probably insufficient in the Mediterranean basin as well, given the deficit of cooperative will in the region. Conflicting interests of the twenty-two coastal states have repeatedly hindered the fruition of cooperative concepts.[274] Issues of political concern, notably in the relations of

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[266] Application mutatis mutandis of para 129 of the recent advisory opinion of ITLOS

[267] The flag State is nevertheless under the obligation to include in them enforcement mechanisms, in order to monitor and secure compliance with these laws and regulations. See *supra* no 257, Advisory Opinion, Case no.21, at para 138

[268] *Ibid*, para 138 '*While the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system*'

[269] *Ibid*, Sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities

[270] *Ibid*, para.139

[271] Article 94 para 6 UNCLOS provides that a '*State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State'*. The use of the term 'may' suggests that reporting the facts is a right, not an obligation of the State under the convention.

[272] Under article 94 para 6 UNCLOS, '*upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation*'

[273] See further on the insufficiency of article 94 para 6 UNCLOS in the combat against flags of convenience, *supra* no 196, M Gavouneli, at p. 208

[274] See relevant discussion in the context of environmental protection, M Gavouneli, *Mediterranean*

Greece, Cyprus and Turkey, render the delineation of maritime functional zones rather problematic. Existing territorial disputes and concerns of state sovereignty in the Aegean Sea create diplomatic obstacles in SAR issues as well.[275] Even when assistance is provided, cooperation in determining the safe haven for the survivors' disembarkation is quasi-unattainable. In 2009, Spain and Italy submitted a joint statement to the IMO, complaining that even when ships flying their flag assisted persons in distress, '*the Governments responsible for the SAR regions, where persons have been rescued, have failed to provide a safe place for their disembarkation*'.[276] Overlapping SAR zones and Malta's disapproval of the existing regulatory framework for reasons of disregarded '*geographic realities* create the image of a deadlock for political reasons.[277]

This pragmatic approach complements the wider image of speculation, when examining the scenario of a case brought before ITLOS, ICJ or an arbitral tribunal.

Challenges: Between Old Problems and New Solutions, The International Journal of Marine and Coastal Law, Vol. 23,pp 477-497 (2008); E. Raftopoulos and M.L.McConnell, *Contributions to international environmental negotiation in the Mediterranean context*, MEPIELAN Studies in International Environmental Law and Negotiation no. 2 (Ant. N. Sakkoulas Publishers, Athens 2004)

[275] S Trevisanut, *Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?*, International Journal of Marine and Coastal Law, Volume 25, pp. 523-542 (2010) at p. 533

[276] 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)

[277] See *supra* no 74, Trevisanut, at p.9

II. The Judicial Review of Search and Rescue Obligations on European Level

A. The European Court of Human Rights: a Judicial Safe Haven for the Unassisted?

1. The role of the European Court of Human Rights in the context of Search and Rescue obligations

After examining the state-centric scenario of establishing a dispute concerning the interpretation and application of article 98 UNCLOS under the dispute settlement system provided by the Convention, the deficiencies of the state-centric approach have become clear. For this reason, I will look into the role other judicial avenues may play in implementing the SAR provisions.

At this point of the research, one clarification needs to be made. Departing from the UNCLOS system, reference could be made to the human rights bodies which would offer an alternative solution to unassisted migrants. The Human Rights Committee more specifically, the independent expert body established to monitor compliance with the ICCPR, could possibly examine a communication from an unassisted migrant on alleged violation of the right to life, due to a state's inaction to provide assistance at sea.[278] Moreover, the Committee against Torture could take into account a communication on a violation of article 3 of the pertinent convention in this case too.[279]

The main reason why an extended reference is not made to the procedures under the auspices of human rights bodies is that the decisions of the Committees are not binding upon the states parties and cannot be enforced without their consent. In the context of SAR obligations, enforcement is a decisive factor, given the unwillingness of states to abide by their relevant obligations. Furthermore, the settlement of a dispute by the ICJ or ITLOS could present important results in the effort to enforce SAR obligations. Given that the basic provision in this regard is article 98 UNCLOS, I considered important, from a theoretical point of view, to examine the procedure of interpreting and applying the provision in its rightful context, before proceeding to the procedure before other judicial bodies.

The binding character of its decisions is one of the main reasons why the ECtHR

[278] See for further details R Mackenzie, C Romano, Y Shany and P Sands, *The Manual on International Courts and Tribunals* (2nd edition, Oxford University Press, 2010) at p.416

[279] See UN Committee Against Torture, *Sonko v Spain*, Communication no. 368/2010, 47th Session (November 2011)

plays a pivotal role in the context of search and rescue obligations, and will be subsequently examined. Migrants in Europe today have rights under various texts of regional and international human rights law.[280] The case-law of the ECtHR, however, is the parameter of the system under the Council of Europe that renders protection under the ECHR provisions the most effective so far, in the context of SAR operations.

Having presented the SAR regime under international law in the first chapter, more specific issues concerning its implementation will be examined below. The issues of extraterritorial application of the non-refoulement principle under the case-law of the ECtHR, the procedural guarantees provided by the ECHR and the practical implications of the Court's first judgment concerning events in the context of SAR operations will be presented. By examining these issues, I seek to give an answer to the first question of my research paper as well as trace the limits of the protection provided to the unassisted migrants on regional level.

[280] An important legal tool in this field is the International Convention on the Rights of All Migrant Workers and Member of their Families. Although few European states have ratified the convention all states are under a duty to protect migrant workers' rights, since the Convention essentially mirrors rules emanating from international practice on protection of migrant workers tights. For instance, international labor standards protect migrant workers, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment monitors to prevent torture and ill treatment regionally; and the UN Migrant Smuggling and Trafficking Protocols bind the majority of the European states. Most European states are parties to the Trafficking and Smuggling Protocols, and some to the Optional Protocol to the Convention Against Torture Regional and international treaties providing relevant standards include the ECHR, the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture, the Convention on the Elimination of All forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child. Most European states are parties to the Trafficking and Smuggling Protocols, and some to the Optional Protocol to the Convention Against Torture

2. The non-refoulement principle in the context of SAR operations

The ECtHR law on the application of the non-refoulement principle illustrates the innovatory path the Court follows in the context of state operations outside their national territory. Although no explicit prohibition of refoulement exists in the ECHR, the principle has been acknowledged and applied by the ECtHR in an evolutionary way, going beyond the respective guarantees under international law. Since the Soering case, the court has held that

'expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country'[281]

In these cases, the receiving state is under an obligation not to expel the individual to that country.[282] The Court consequently examines the situation in the receiving country under article 3 ECHR.[283] The content of the principle under the ECHR has been briefly outlined by Judge Pinto de Albuquerque in the Hirsi Jamaa case:[284]

'*Under the European Convention, a refugee cannot be subjected to refoulement to his or her country of origin or any other country where he or she risks incurring serious harm caused by any identified or unidentified person or public or private entity. 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. The risk of serious harm may result from foreign aggression, internal armed conflict, extrajudicial death, enforced disappearance, death penalty, torture, inhuman or degrading treatment, forced labour, trafficking in human beings, persecution, trial based on a retroactive penal law or on evidence obtained by torture or inhuman and degrading treatment, or a "flagrant*

[281] ECtHR, *Soering v UK*, App no 14038/88 (7 July 1989) at paras 90-91
[282] Ibid, ECtHR, *Jabari v Turkey*, App no 40035/98 (11 July 2012) at para 38, ECtHR, *Salah Sheekh v The Netherlands*, App no 1984/04 (11 January 2007) at para 135
[283] ECtHR, *Hirsi Jamaa and Others v Italy* [Grand Chamber], App no 27765/09 (23 February 2012) at para 114 [hereinafter Hirsi case]
[284] Separate opinion of Judge Pinto de Albuquerque, ECtHR, Hirsi Jamaa and Others v Italy [Grand Chamber], App no 27765/09 (23 February 2012) at p. 59

violation" of the essence of any Convention right in the receiving State (direct refoulement) or from further delivery of that person by the receiving State to a third State where there is such a risk (indirect refoulement).'

In the Hirsi Jamaa case, Eritrean and Somali asylum seekers challenged the legality of Italy's actions in bringing them on board an Italian vessel and returning them to Libya. In 2012, this was the first case before the Court touching upon events in the context of a SAR operation. The applicants were among two hundred migrants leaving Libya, traveling aboard three vessels to reach the Italian coast. While traveling on the high seas, in the Maltese SAR zone more specifically, they were intercepted by the Italian Revenue Police and the Coastguard. They were transferred afterwards back to Libya, without any information provided by the Italian authorities. All applicants stated they wanted to apply for refugee protection, whereas after their arrival at Tripoli two of them died under unknown circumstances.

The ECtHR ruled that Italy breached its obligations under article 3 of the Convention, based on a two-fold claim. The applicants argued that when the Italian authorities handed them over to the Libyan authorities, at a time when Gaddafi was in power, they ran a double risk. On the one hand they faced the risk of ill-treatment in Libya and on the other hand, the risk of being sent back to their countries of origin, which the fled for reasonable fear of persecution.[285]

In the Hirsi Jamaa case, the Court took into consideration the case-law concerning the application of article 3 ECHR in cases of removal. The ECtHR reiterated the independency of refugee protection from relevant formal procedure. Italy argued that since the migrants on board the vessel had not made a formal claim for refugee protection, the non-refoulement principle did not apply. The court was not convinced and ruled, on the contrary, that the applicants were nevertheless protected under the non-refoulement principle.[286]

The Court introduced important novelties. Firstly, not only is protection irrelevant to formalities, but states must also proactively implement their obligations under article 3 ECHR. More specifically, given the situation in which the applicants were found, the Italian authorities should have looked into the treatment they would face if returned to

[285] This risk would arise in the case of arbitrary repatriation to Eritrea and Somalia, *supra* no 6 *Hirsi case*, paras 139-157
[286] *Hirsi case*, para 7

Libya.[287] Secondly, the applicant does not have to prove the existence of an individualized threat of ill-treatment in order to activate protection under article 3. The Grand Chamber gave paramount importance to reports of independent sources or governmental sources in order to look into the general situation in the country.[288] In assessing the situation in Libya, the Court took into consideration the remarks of the third subjects who intervened. Consequently, the relevant burden of proof placed upon the applicant becomes easier to handle.[289]

Thirdly, the Court held that the existence of a provision in a bilateral or multilateral agreement providing for the return of intercepted migrants does not have an impact on the state's responsibilities under article 3 ECHR. This is true as far as the ensemble of the convention's provisions is concerned.[290] Last but not least, in matters of indirect refoulement, the Court examines whether the defendant state took into consideration the situation in the country where migrants are returned. In the Hirsi case, Italy '*should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees*'.[291] Given that Libya is not a contracting party of the ECHR, nor has it signed the Geneva Convention, Italy's responsibility was even greater.[292]

[287] *Ibid*, para 133
[288] *Ibid,* para 118 The court consequently took into consideration a CPT report, as well as statements of the delegations of UNHCR, Human Rights Watch and Amnesty International in Libya. The bilateral agreements of Italy and Libya were also considered as reliable sources. See Hirsi case, paras 122-128
[289] See also V Moreno-Lax, *Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?,* Human Rights Law Review, Volume 12, pp.574-598 (2012) at p.583
[290] See *Hirsi case*, at p. 584
[291]See *Hirsi case*, at para 157
[292] B Nascimbene, *The Push-back Policy Struck Down Without Appeal? The European Court of Human Rights in Hirsi Jamaa and Others v Italy*, Instituto Affari Internazionali, (2012) at p.4

i. The Non-refoulement principle applied to extraterritorial state action

In the Hirsi Jamaa case, the Grand Chamber made some innovatory remarks on the applicable provisions, in a strong political context. Probably the most important among them was the application of the non-refoulement principle outside national territory. The uniqueness of this remark can be better understood when compared to relevant decisions on international level. I will now look into this parameter, in order to define the extent of the protection provided to the unassisted migrants on the high seas.

a. The territorial approach: a negative answer

The spatial parameter of the Farmakonisi events is clear. The boat was found in the Greek teerritorial waters, an area where the Greek authorities are with certainty bound by their international obligations towards TCNs. If, though, the boat had capsized and was found and towed by the Greek coast guard on the high seas, maybe the duties of the Greek state emanating from the non-refoulement principle towards the survivors would alter. Would the national authorities still be bound by the principle, even though outside their national territory?

If the events had taken place someplace away from Europe, the answer would have probably been negative. According to certain theorists and case-law of national courts,[293] the non-refoulement principle applies exclusively on the territory of the State under the obligation. This interpretation of the principle, as far as its scope is concerned, led to a normative impasse in various cases, as described in the Sale case before the US Supreme Court.[294] In certain cases national courts even avoided the issue of refoulement.[295] In practice, certain states make use of the absence of a detailed legal regime, notably on the scope of application of the non-refoulement principle, when their authorities operate on the high seas. Spain and Malta have interdicted vessels and sought to return those on board to their country of embarkation.[296] Italy in addition has signed various bilateral

[293] US Supreme Court, Sale, Acting Commissioner, *INS v. Haitian Centers Council* (1993)
[294] *Ibid*
[295] In the Tampa case, the Australian Federal Court ruled entirely on the basis of national legislation, namely the Migration Act of 1958, and did not address the issues of non-refoulement and asylum claims of the plaintiffs. The latter were referred to as 'rescuees' instead of asylum-seekers or refugees; See for further details J Goldenziel, *When Law Migrates: Refugees in Comparative International Law*, Boston University School of Law, Research Paper (23 July 2015) at p.13; for the Tampa case see Allen Craig, *Australia's Tampa incident: the convergence of international and domestic refugee and maritime law in the Pacific Rim*, Pacific Rim Law & Policy Journal, Vol.12 No 1, pp. 97-108 (2003)

[296] V Moreno-Lax, *Seeking asylum in the Mediterranean: Against a Fragmentary Reading of EU Member*

agreements with Libya, providing rules on the return of migrants to the latter and Australia has repeatedly argued that refugee obligations do not apply outside Australia's territorial sea.[297] It has even been suggested that relevant state practice and lack of protest from embarkation states to the return practice is indicative of customary international law.[298] The territoriality principle constitutes the legal basis of the view that the Refugee Convention applies only in the context of events taking place in the sovereign territory of a state. This approach allows governments to organize interception operations outside their territorial waters and thus control the number of incoming refugees and migrants.

The aforementioned opinion on the scope of application of the principle is not outdated. In January 2015, the Australian High Court decided on the Australian government's attempt to return approximately 150 asylum seekers to Sri Lanka,[299] in the CPCF v Minister for Immigration and Border Protection case[hereinafter CPCF case].[300] One of the legal issues of the case concerned the existence of an obligation of procedural fairness to the migrants. Interestingly, the question was not examined by the Court as far as the period before bringing the migrants aboard the Australian vessel is concerned. The Court insisted on the fact that the plaintiff '*had no right to enter Australia'*,[301] rather than refer to any rights he might have enjoyed during his detention. On the applicability of the non-refoulement principle on the high seas, the Australian government argued that it applies only within a state's territory.[302] The Australian Government's argumentation was that only national legislation incorporating the non-refoulement principle was applicable

States' Obligations Accruing at Sea, International Journal of Refugee Law (2009) at p. 178–185

[297] See Submissions of the Defendants, High Court of Australia, *CPCF V Minister for Immigration and Border Protection* (Judgement) (2015), at paras 20-21 [hereinafter CPCF case]

[298] Douglas Guilfoyle, 'Shipping, Interdiction and the Law of the Sea' (2nd edition, Cambridge University Press, 2012) at p. 225-226

[299] See *CPCF case*, *supra* no 20

[300] On 29 June 2014, an Indian flagged vessel with 157 migrants aboard, most of them aiming to make a claim for refugee protection, was intercepted by the Australian navy within Australia's contiguous zone. The reason for the interception was suspicion of contravention of national legislation on migration. The migrants were transferred to the Australian vessel and then returned to India, following orders of the Australian Government. See for further details on the facts, Martin Clark, *CPCF V Minister for Immigration and Border Protection*, The University of Melbourne (28 January 2015), available online at http://blogs.unimelb.edu.au/opinionsonhigh/2015/01/28/cpcf-case-page/ (accessed 6 January 2016)

[301] See Paul Daly, *Excluding Procedural Fairness: CPCF V Minister for Immigration and Border Protection*, Administrative law Matters (20April 2015), available online at http://www.administrativelawmatters.com/blog/2015/04/20/excluding-procedural-fairness-cpcf-v-minister-for-immigration-and-border-protection-2015-hca-1/ (accessed 6 January 2016)

[302] See *CPCF case*, *supra* no 20 ('T*he defendants argued that the non-refoulement obligation under the Refugees Convention only applied to receiving States in respect of refugees within their territories. There is support for that view in some decisions of this Court, the House of Lords and the Supreme Court of the United States'*)

and contested the customary nature of the principle.[303] Even if the non-refoulement principle is characterized as a rule of customary international law, extraterritorial application of the principle is not part of the customary rule, since evidence shows absence of conformity in relevant state practice.[304]

The Australian High Court, the House of Lords and the US Supreme Court have repeatedly decided that non-refoulement does not apply extra-territorially.[305] In the CPCF case the court did not explicitly exclude the applicability of the principle on the high seas, yet it decided that the non-refoulement principle was not applicable on the face of the factual background. The court evaluated the reasonableness of the fear of persecution of the plaintiff, even though this question was not examined by the Australian authorities aboard the ship, instead of openly recognizing applicability of the non-refoulement principle.[306]

After presenting the narrow delimitation of the applicability of the principle by national courts, the judgments of the ECtHR in this regard will be examined.

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[303] CPCF case, Submissions of the Defendant, at para 21, available online at http://www.hcourt.gov.au/assets/cases/s169-2014/CPCF_Def.pdf (accessed 6 January 2016)

[304] *Ibid*, paras 20-21(*'Australia's obligations under the Refugees Convention were not enlivened in respect of the plaintiff, because they arise only with respect to persons who enter Australia's territory'*) See also N Klein, *Assessing Australia's Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*, Melbourne Journal of International law, Volume 15, pp1-30 (2015) at p.17

[305] See relevant case law; Minister for Immigration and Multicultural Affairs v Haji Ibrahim [2000] HCA 55; (2000) 204 CLR 1 at 45 [136] per Gummow J; [2000] HCA 55; Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 at 15 [42] per McHugh and Gummow JJ; [2002] HCA 14; R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2004] UKHL 55; [2005] 2 AC 1 at 29–30 [17] per Lord Bingham of Cornhill, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell agreeing at 47 [48], 55 [72] and 66 [108] respectively; Sale v Haitian Centers Council Inc (1993)

[306] See *supra* no 20, *CPCF case*, at paras 445-475 (notably para. 461, ' *Judicial authority in Australia, the United Kingdom and the United States of America suggests that a state's obligations under the Convention arise only with respect to persons who are within that state's territory. The plaintiff does not accept that this body of authority is correct, but it is unnecessary to come to a conclusion on that point. Whatever the true effect of the Convention may be, the terms of the Migration Act are clear*.')

b. The application of human rights at sea

The ECtHR, from very early on, followed the path of attributing responsibility to states for conduct towards persons under their responsibility. Whether a person is subject to a state's jurisdiction does not depend solely on territorial criteria. The territoriality principle remains the basic rule in the view of the Court, yet extraterritorial application of an obligation is possible under exceptional circumstances. The decisive factor on the issue of jurisdiction is whether the person was under the effective control of the state in question.[307] As the Court ruled in the Loizidou case, the concept of jurisdiction under article 1 ECHR[308] does not restrict a right's scope of application to the territory of states, since '*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'*.[309] Consequently, the breach of an ECHR provision may arise at border posts, transit points or on the high seas. As far as the effective control criterion is concerned, the Court took into consideration in the Loizidou case the large number of troops engaged in activities of the Turkish army on the island of Cyprus. The Court thus concluded that

'*The obligation to secure, in such an area [outside the state's territory], the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration'*[310]

The Court does not consider it lacks competence *ratione personae* because the applicants are outside a state's national territory. When jurisdiction of a state over a person is established extraterritorially, the legal consequences are identical to the ones inside its territory. Consequently, the state is obliged to guarantee to that person protection of his rights under the ECHR.[311]In order to decide whether exceptional circumstances justifying

[307]E Lauterpacht and D Bethlehem, The scope and content of the principle of non-refoulement: Opinion in E Feller, V Turk and F Nicholson (eds*), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (1st edition, Cambridge University Press, 2003), at p.110
[308]Under article 1 ECHR, '*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'*
[309] ECtHR, *Loizidou v Turkey* (Preliminary Objections), App no 15318/89 (23 February 1995) at para 62
[310] *Ibid*, at para 63
[311] ECtHR, *Al-Skeini and others v UK*, App no 55721/07 (7 July 2011), at paras 136-137, ECtHR, *Bankovic and others v Belgium and others* (Decision on Admissibility), App no 52207/99, (12 December 2001), at para 75, and Hirsi case, at para 74

extraterritorial jurisdiction exist, the Court examines the particular facts. As the ECtHR stressed in the Al-Skeini case,

'In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.' [312]

In the case of operations on the high seas, full and exclusive control over a ship has been the decisive criterion for the Court.[313] Through its case law, the ECHR has established certain criteria in order to ascertain whether effective control exists over a person or group of people.

The ECtHR case-law thus provides an additional protective dimension for those under a state's control, even outside its national territory. In the Medvedyev case, the Court examined the nature and scope of the actions carried out by French officials on board a Cambodian vessel near Cape Verde. The case concerned the events aboard Winner, a ship registered in Cambodia travelling in the Mediterranean. The Cambodian vessel was suspected of transporting drugs. After exchange of information between the Cambodian and French authorities, it was spotted by the French navy. The French commando team boarded the ship and a member of the crew was lethally wounded by a 'warning shot' during the first hours. The Winner was then directed back to the harbour, with its crew under French military guard. Coercive measures were maintained during the whole voyage of return. After reaching the Brest harbour, the members of the crew were placed under police custody and the criminal procedure mechanism was triggered.

The ECtHR examined the nature and scope of the actions carried out aboard the Winner. The French officials used their weapons and '*kept the crew members under their exclusive guard and confined them to their cabins during the journey to France'*.[314] During the voyage, the Winner was escorted by another French warship. These factual parameters led the Court to the conclusion that France exercised full, continuous and

[312] *Ibid, Al-Skeini case*, at para 132. The case concerned the deaths of six Iraqi civilians in 2003, when the UK was the occupying power in the city of Basra. Five of them were executed by members of the UK militia and one of them was arrested and died while detained by the UK armed forces in a military base. An independent and thorough investigation into the killings was not conducted by the UK authorities. The ECtHR ruled that UK is bound by the ECHR even outside its national territory and that its acts under discussion in Iraq violated the pertinent provisions of the Convention.
[313] ECtHR, *Medvedyev and others v France* (Grand Chamber), App no 3394/03 (29 March 2010) at para 67, and Hirsi case, at para 73
[314] *Ibid Medvedyev*, at para 66

exclusive control over the ship. More specifically,

'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'[315]

In the Xhavara case, the applicants were Albanian nationals traveling on a ship directed to Italy, in 1997. The vessel collided with an Italian warship, after the effort of the Italian crew to board the vessel. At the time, Albania and Italy had jointly decided to control the irregular migration of Albanians to Italy. The two states had signed an agreement which provided authorization to the Italian authorities to board vessels if suspected of carrying irregular migrants. Following the collision with the Italian warship, the Albanian vessel capsized resulting in the death of about sixty migrants. Criminal procedures followed in Italy and the commanding officer of the Italian warship was prosecuted.

On the face of the factual circumstances, the ECtHR clarified that the Albanian applicants were subject to Italian jurisdiction. A decisive parameter was the fact that the collision took place during an Italian operation, based on the bilateral agreement between the two states. That been said, does a multilateral or bilateral agreement constitute sufficient grounds to prove the exercise of jurisdiction? Answering this question relates to the definition of the moment when people aboard a vessel in distress, come under the jurisdiction of a state other than the flag state. This is an important point in defining when the migrants aboard a vessel fall under the jurisdiction of a coastal state. It could be practically decisive for their rescue.

According to existing case law, when national authorities act on the high seas, they are not exempt from their human rights duties. Although no state may declare sovereignty on the high seas and the freedom of navigation gives states great margins of movement, the high seas cannot be seen as a *legibus solutus* area.[316] As clearly stated in the Medvedyev case,[317]

'the special nature of the maritime environment relied upon by the Government in the

[315] *Ibid*, at para 67
[316] E Papastavridis, *Is there a right to be rescued at sea? A skeptical view*, Questions of International Law, Zoom-in 4, pp17-32 (2014)
[317] *Supra* no 36, *Medvedyev case*, at para 81

instant case cannot justify an area outside the law where ships' crews 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, any more than it can provide offenders with a ''safe haven''

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. Certain theorists opine that the existence of an agreement which confers enforcement powers to a state constitutes sufficient proof of jurisdiction.[318] Others opine that such an agreement is an important indicator, yet a decision needs to take into consideration the factual background of the case.[319] Last but not least, some theorists give greater importance to the circumstances of every case, sustaining that an *ad hoc* appreciation of the facts is necessary.[320]

In my point of view, the existence of an agreement conferring enforcement jurisdiction is not decisive for the court. If such an agreement has been signed, the Court may take it into consideration in order to detect the basis of a state's exercise of enforcement powers. If such an agreement does not exist, the Court does not exclude *ipso facto* the possibility that the national authorities exercised effective control over the persons aboard a ship. It is not entirely clear, though, according to the existing case-law, whether both a contractual and factual basis are necessary for effective control to be established. In the Rigopoulos case for instance, which concerned the arrest of a vessel suspected of drug-trafficking on the high seas, jurisdiction on the ship by the Spanish authorities was established according to Spanish law, as well as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Court took into consideration the fact that both Spain and Panama, the flag state of the suspected vessel, were contracting parties to the UN convention.[321] Jurisdiction of the Spanish authorities over the vessel was consequently not contested.[322]

However, the ECtHR has not set binding criteria applicable in all cases in order to decide on the preliminary issue of extraterritorial application. Some commentators

[318] S Trevisanut, *Is there a right to be rescued at sea? A constructive view*, Questions of International Law, Zoom-In 4, pp3-15 (2014), at p. 10
[319] *Ibid*
[320] Supra no 39
[321] ECtHR, *Rigopoulos v Spain*, App no 37388/97(12 January 1999) at p.3
[322] *Supra* no 39, at p. 26

consider the unwillingness of the Court to set common rules through its case-law as the cause of 'rampant casuistry and conceptual chaos'.[323] In my opinion, however, the *in casu* decision on application of human rights on the high seas works as the safeguard of the court when balancing between law and policy. Moreover, conclusions on the applicability of SAR obligations can be drawn from existing case-law, as illustrated above. Reality has also corroborated the efficiency of the position of the Court, since although the extraterritorial application of non-refoulement is the minority's opinion on the international level, the jurisprudence of the European Court has set the regional standards higher by conceiving jurisdiction as a question of fact.[324] In the context of SAR operations, this point underlines the importance of a positive answer to the second question of the research paper. The reticence of national courts to apply the non-refoulement principle extraterritorially can be covered by the jurisprudence of a regional Court.

[323] M Milanovic, *Extraterritorial Application of Human Rights Treaties: An Overview*, EJIL Talk, (30 November 2011), available online at http://www.ejiltalk.org/extraterritorial-application-of-human-rights-treaties-an-overview/ (accessed 6 January 2016)

[324] See supra no Noah Feldman, *Why Europe must help refugees at Sea*, Bloombergview (18 September 2015) (*'This supranational body effectively made policy for its 47 members by holding that rescue efforts at sea automatically trigger the obligation to process refugees for asylum.*')available online at http://www.bloombergview.com/articles/2015-09-18/why-europe-must-help-refugees-at-sea (accessed 6 January 2016)

ii. Effective control in Search and Rescue operations on the high seas: the positive answer

I will now proceed to the examination of effective control that a state has over persons during SAR operations on the high seas. In principle, human rights apply to the rescue of people in distress on the high seas according to the ECtHR. The practical question which follows concerns the exact point when relevant states obligations arise. Before that moment, human rights law related to rescue at sea is not applicable, since the jurisdictional criteria are not met. An important question that needs to be answered is whether national authorities must first board the vessel, in order to establish jurisdiction or the mere delimitation of SAR zones could constitute the basis of establishing jurisdiction. In the latter case, a state would be responsible for providing assistance to all ships within its SAR zone. An omission to assist vessels in this zone would entail the responsibility of the coastal state under human rights law.

In the Hirsi Jamaa case, the Grand Chamber decided that the decisive moment was when the Italian Police and Coastguard boarded the ship. The events that followed took place on board Italian state ships and the persons implicated were Italian military personnel. In the Court's opinion,

' *in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities.* '[325]

The ECtHR reiterated its view that '*de facto* control gives rise to *de jure* responsibilities'[326] and clarified that the activities of national authorities during SAR operations reach the threshold of effective control. The contention of the Italian government that a maritime operation in order to render assistance under article 98 UNCLOS '*did not in itself create a link between the Sate and the persons concerned*'[327] came to no avail.[328] For the Italian government the case was different from the Medvedyev

[325] See Hirsi case, at para 81
[326] ECtHR, *Al Saadoon and Mufdhi v UK*, App no 61498/08 (4 October 2010), at para 88
[327] Hirsi case, at para 65
[328] The Italian government supported that it was not responsible for the persons on board, because of the minimal control exercised by the national authorities in the framework of SAR operations. The argumentation did not convince the court. The Grand Chamber on the contrary insisted on the criterion of 'at least de facto continued and uninterrupted control' under the Medvedyev jurisprudence; see Hirsi case, at paras 79-80

case, whereby the control exercised by the French authorities was exclusive and uninterrupted. In the view of the defendants, no such control could be established in this case. The operation lasted around ten hours, no use of force or weapons was reported and the aim of the intervention was to provide humanitarian and medical assistance rather than exercise control over the ship.[329]

This is a crucial issue, since accepting this argumentation would introduce a major differentiation between rescue and police operations.[330] It would also mean that a state operation's target constitutes one of the criteria to decide on extraterritorial application of human rights. Although the Grand Chamber was not satisfied with the mere fact that the ship was sailing in Italy's SAR zone, the activities on board the ship and the factual control over the Libyan migrants sufficed to subject them to the jurisdiction of Italy for human rights purposes.[331] Relying on the Bankovic[332], Medvedyev and Al-Skeini case-law, the court classified three categories of extraterritorial jurisdiction typologies: control over an area, control over an individual outside national territory and activities of diplomatic and consular agents abroad.[333] By introducing this classification, the court followed the reasoning of the Bankovic decision, where specific categories were also identified.[334] The latter included flag state jurisdiction as a specific situation.[335]

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[329] *Ibid*, at 65-66

[330]*Ibid*, at paras 64-65

[331] See on the issue of control when a distress call is received by a coastal state, *supra* no 39, at p.27 Concerning *de jure* control of the coastal state over ships and people in distress within its SAR zone, accepting that a vessel's entrance to a SAR zone entails the coastal state's jurisdiction would be opposite to the nature to the SAR zone as a functional one. Coastal states do not exercise sovereignty in this zone. Italy's SAR zone stretches in the Mediterranean high seas, apart from Italian territorial waters. Consequently, entering a SAR zone does not ipso facto entail the competent state's jurisdiction. Concerning *de facto* control, awareness of the location or the situation of a vessel in distress is the minimum standard. Receiving a distress call in a rescue coordination center established 'a long distance *de facto* control' of the receiving state and the persons on board the ship. If the view that the life of persons in distress is consequently in the hands of this state is adopted, these persons may be considered to fall within the jurisdiction of the coastal state. As stressed by the author, *'In all other cases, the argument for an a priori de jure or de facto control by coastal States over vessels within their SAR zones can-not be sustained.'*

[332] The Bankovic case concerned the bombing of the Serb television and radio premises by NATO aircraft during the intervention in Kosovo in April 1999. The court ruled that controlling airspace does not amount to an exercise of jurisdiction and thus rejected the claim of the applicants as inadmissible, on the grounds of article 1 ECHR. The decision provoked numerous scholarly reactions; See Goodwin-Gill, The Extraterritorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction in B de Chazournes and Kohen (eds), I*nternational Law and the Quest for Implementation* (1st edition, Brill, 2010) at p. 293. For the connection to the Hirsi Jamaa case see also *supra* no 12, at p. 579

[333] *Hirsi case*, at para 75, *supra* no 35, Al Skeini case, at paras 136-137, *supra* no 34, *Bankovic case*, at para 75

[334] *Ibid*, *Bankovic case*, at para 71 (*In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government*.)

[335] *Ibid*, at para 73

3. Procedural guarantees under article 13 ECHR

As mentioned in the second question of the research paper, national courts constitute the first resort of the unassisted migrants. However, national procedures do not always offer adequate protection and the rules of international law on search and rescue obligations of the state are not always applied. In certain cases, such procedures are not even provided by domestic legislation. This reality causes additional suffering to persons who survived from a ship that capsized and was not left unanswered by the ECtHR. Article 13, a key provision of the ECHR recognizes the right to effective remedy of 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' [336]

The provision is connected to the prerequisite of exhaustion of local remedies in order to resort to the ECtHR. This condition needs to be fulfilled only if an effective remedy exits in the domestic judicial system for the alleged breach.[337] The aim of the provision is to provide relief for violation of the Convention rights on national level and thus permit a reduction of the ECtHR's workload.[338]

In the context of alleged violations of articles 2 and 3 ECHR, several conditions must be met in order for the investigation to be effective. Firstly, the person responsible must not be connected to the persons involved in the case, both in law and in practice.[339] The investigation must also be prompt and thorough and lead to the identification and punishment of those responsible. This is an obligation of conduct rather than result.[340] Therefore, the effectiveness does not depend on the certainty of the positive final result for the applicant. Moreover, the victim should have access to the proceedings and the right

[336] Article 13 ECHR. See also relevant case-law of the ECtHR, including ECtHR, *Ilbeyi Kemaloglou and Meriye Kemaloglou case,* App no 19986/06 (10 July 2012) at paras 38-39('*The State's positive obligation also requires an effective independent judicial system to be set up so as to secure legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim.*[…] *For the Court, and having regard to its case-law, the State's duty to safeguard the right to life must also be considered to involve the taking of reasonable measures to ensure the safety of individuals in public places and, in the event of serious injury or death, having in place an effective independent judicial system securing the availability of legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim'*) and the *Medvedyev case, supra* no 36

[337] See the relevant ECtHR case-law, as cited above

[338] Council of Europe, 'Guide to Good Practice in Respect of Domestic Remedies' (2013) at p.7

[339] See ECtHR, *Mocanu v Romania* [Grand Chamber] App nos 10865/09, 45886/07, 32431/08 (17 September 2014)

[340] *ibid*

to participate in the investigation, in order to protect his or her legitimate interests.[341]

In the case of removal, article 13 ECHR combined with articles 2 and 3 ECHR provide for a suspensive remedy in order to express complaints of exposure to a real risk of treatment contrary to the aforementioned provisions.[342] Another procedural safeguard in this case is to inform the persons concerned of the formal procedure to avoid return, in order to put forward an 'arguable complaint'.[343] As stated in the Hirsi case, it is important to guarantee '*anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant proceedings'*.[344]

In Hirsi, the violation of the non-refoulement principle becomes evident due to the lack of access to any means of recourse. None of the aforementioned guarantees were respected by the Italian government in order to assess possible requests before the removal measures.[345] The latter acknowledged that no identification procedures was provided aboard the ships, nor were any interpreters and legal advisers available.[346] As a result, some applicants testified that they were even led to erroneously believe that they would be transferred to Italy.

The Court also reiterated that the suspensive effect is an essential criterion to assess whether effective remedy is provided. This is an evolution of the court's position since the Conka judgment, where automatic suspensive effect was not considered necessary.[347] Since the MSS judgement, however, non-suspensive remedies are not considered effective under article 13 ECHR.[348] This case-law is corroborated by the Hirsi judgment, where the Court clarified that access to a remedy is not sufficient in case of '*criminal proceedings brought against military personnel […], in so far as that does not satisfy the criterion of suspensive effect'*.[349]

[341] ECtHR, *Seidova and others v Bulgaria*, App no 310/04 (18 November 2010), at para 52
[342] ECtHR, *Conca v Belgium*, App no 51564/09 (5 February 2002), at paras 81-84
[343] Hirsi case, at para 197
[344] *Ibid*, para 204
[345] *Ibid*, at 205
[346] I*bid*, at para 202
[347] The court only held that the remedies would not be effective if the measures are '*executed before the national authorities have examined whether they are compatible with the Convention'*; See ECtHR, Conca v Belgium, App no 51564/09 (5 February 2002) at para 79
[348] See also fore reference to relevant ECtHR jurisprudence, *supra* no 12, at p. 591
[349] Hirsi case, at para 206

4. The aftermath of the Hirsi Jamaa case

I will now seek to illuminate the role of the ECtHR in the protection of the unassisted migrants by looking into the example offered by the Hirsi Jamaa case in 2012. I will thus try to answer the first question of my research paper, as far as the implementation of the international legal framework by the jurisprudence of a court outside the national sphere is concerned.

i. The Hirsi Jamaa Judgment in a political context

Whether the Hirsi Jamaa judgment would alter the position of the Italian government was not granted. The political aspect of the case was underlined by the defendants during the proceedings.[350] Doubts became stronger after the declaration of Roberto Maroni, the Italian Minister of Interior in 2009, that the ECtHR decision was incomprehensible and political, whereas the court itself is 'politicised' and consequently unreliable.[351] It is true that the ECtHR decision was an important blow to the Italian policy, followed by the recent Khlaifia and others judgment. According to the latter, operations of returning Tunisians reaching Italy by sea to their home country, during the Arab Spring did not respect the ECHR provisions.[352] In both cases the Court held that Italy violated the prohibition of collective expulsion of aliens under article 4 of Protocol 4 to the ECHR. The gravity of this conclusion is underlined by the fact that three out of the five cases in which the Court found a violation of the said provision, concern the Italian government.[353]

Assessing Italy's migration policy since 2012 is not the aim of this study. Nor is it

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[350] See Hirsi case, at para 100, where the Italian government complains about the applicants being engaged in 'a political and ideological diatribe […] against the action of the Italian government'

[351] V Polchi, *Strasburgo, l'Italia condannata per i respingimenti verso la Libia,* La Republica (23 February 2012), available online at http://www.repubblica.it/solidarieta/immigrazione/2012/02/23/news/l_italia_condannata_per_i_respingimenti-30366965/ (accessed 6 January 2016); See also F Messineo, *Yet another mala figura: Italy breached non-refoulement obligations by intercepting migrants' boats at sea, says ECtHR*, EJIL Talk (24 February 2012), available online at http://www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/ (accessed 6 January 2016)

[352] ECtHR, *Khlaifia and others v Italy*, App no 16483/12 (1 September 2015)

[353] These are the Hirsi Jamaa case, the Khlaifia case and the Sharifi case. The other two are Conka v Belgium 2002, Georgia v Russia 2014. The reason why a violation of article 4 Protocol 4 is hard to substantiate is that concluding whether the individualized identification and processing by the authorities criteria were met or not is a demanding legal procedure. As the court has ruled, '*the mere implementation of an identification procedure is not sufficient to exclude the existence of collective expulsion'* (*supra* no 75, *Khlaifia case*, para 156). In Hirsi the applicants were embarked by the Italian authorities onto military ships without any identification procedure (Hirsi, para 185); See also N Frenzen, *ECHR: Italy's Use of Summary Procedures to Return Tunisian Migrants Constituted Unlawful Collective Expulsion*, Migrants at sea blog (3 September 2015), available online at http://migrantsatsea.org/tag/european-court-of-human-rights/ (accessed 6 January 2016)

possible to speak with certainty of the impact the ECtHR decision had on the country's operations at sea. Many factors in the Mediterranean basin have changed since then and so has Italy's approach in matters of rescue at sea. Turmoil in Libya, Tunisia and Egypt turned the country's attention to consequent migratory flows. Italy called upon the European Union to take necessary measures through a more active role of Frontex. The results were not as reassuring as expected.[354] Meanwhile, the situation in Libya changed Italy's stance and the Italian Defense Minister claimed in 2011 that the 2008 Treaty with Libya was *de facto* suspended.[355] The current situation is not paradisiac, however, since NGO reports record events of deportation or involuntary labor.[356] Migratory flows departing from the Sub-Saharan countries follow their way to Italy, whereas cases of degrading treatment do not belong to the past.[357] Although the link between the Hirsi judgment and recent developments in Italy's migration policy cannot be drawn, one thing becomes clear. The ECtHR's decision was followed by substantial changes.

[354] *Migration into Europe: A surge from the sea*, The Economist(16 August 2014), available online at http://www.economist.com/news/europe/21612228-illegal-migration-causing-strains-across-continent-surge-sea (accessed 6 January 2016)
[355] *Libia: La Russa, 'Trattato con Italia di Fatto Sospeso*, La Republica (26 February 2011), available on line at http://www.repubblica.it/ultimora/24ore/LIBIA-LA-RUSSA-TRATTATO-CON-ITALIA-DI-FATTO-SOSPESO/news-dettaglio/3924294 (accessed 6 January 2016)
[356] Fédération Internationale de Droits de l'Homme (FIDH), Libya: Hounding of migrants continues ; Preliminary findings of an investigation mission', (20 June 2012), available online at: http://www.fidh.org/Libya-Hounding-of-migrants (accessed 6 January 2016)
[357] Se supra no 12, at p.595

ii. Article 46 ECHR: Diplomatic assurances or direct assumption of responsibility?

In addition to its practical effect, the Hirsi judgment included a controversial point on Italy's responsibility arising from its actions aboard the military ship. More specifically, under article 46 ECHR, the states undertake the responsibility to abide by the judgments of the ECtHR to which they are parties. In certain cases important reforms were introduced by states in their national legislation concerning migration and refugee policy, in order to abide by the ECtHR judgments.[358] After the judgement of the Grand Chamber on the Hirsi Jamaa case, some theorists expected that Italy would change its national policy in matters of migration control, thus ensuring full observance of the court's instructions. The amendment of pertinent national legislation was also considered crucial.[359] Another parameter of the judgment could be that cooperation policies with countries on the African shores of the Mediterranean cannot be conducted in breach of non-refoulement obligations.[360]

From a legal point of view however, the ECtHR did not go so far as to demand

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[358] A recent example is the MSS v Belgium and Greece case. After the ECtHR's judgment, Dublin Regulation returns of refugees from European states to Greece were suspended, whereas major amendments on the Greek asylum legislation were introduced. After intensive preparation, the Greek Action Plan on Migration Management was presented to the European Commission in 2010. The most important law in this regard was Law 3907/2011 aiming at three goals. Firstly, the establishment of an independent Asylum Service, secondly a First Reception Service, both under the authority of the Ministry of Citizen Protection, currently Ministry of Interior, and thirdly, the transposition of the European Returns Directive into Greek legislation. See also M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (1st edition, Oxford University Press, 2011)

[359] *Ibid*, at p. 595 and Nascimbene, *The Push-back Policy Struck Down Without Appeal? The European Court of Human Rights in Hirsi Jamaa and Others v Italy*, Documenti IAI 1202E, Instituto Affari Internazionali (March 2012)

[360] The term 'Push-back policy' refers to the policy of intercepting migrants at sea and sending them back to the country they departed from. Since 2004, this was the official policy implemented by the Berlusconi government under bilateral agreements with Libya. This political choice was also due to the difficulties in the implementation of the EU's initiatives for cooperation in the Mediterranean, namely the Euro-Mediterranean Partnership, the European Neighborhood Policy and the Union for the Mediterranean. Italy's bilateral relations with non-EU states of the Mediterranean have been parallel to its EU obligations in the past and consequently created tension. One of those cases was the bilateral relationship with the Gheddafi regime in Libya, especially after the rise of unauthorized migration since 2004. The 2008 Treaty on Friendship, Partnership and Cooperation between the two states introduced major changes in the sector of security at sea. The agreement provided for joint patrols in the Mediterranean on vessels supplied by Italy, as well as satellite control of the Lybian land borders by means of a detection system funded by Italy and the EU. The following operations were criticized for breaches of the human rights of those returned to Libya (See UNHCR, *UNHCR deeply concerned over returns from Italy to Libya* (7 May 2009), available online at http://www.unhcr.org/4a02d4546.html accessed 6 January 2016) Italy's pragmatic approach in favor of its national security interests was criticized, whereas inaction of the EU in this regard was not left unnoticed; See also VM Valérie, *Striking a balance Between Norms and Interests in Italian Foreign Policy: The Balkans and Libya*, Instituto Affari Internationali, IAI Working paper 11 (May 2011); M Pavan, *Can/Will Italy be held accountable for its 'push back' policy in relation to international refugee, human rights and European Union Law?*, LSE Migration Studies Unit, Working Paper No.2011/12 (2011)

from Italy to suspend its push-back policy. Instead, the Court decided that under article 46 ECHR, the Italian government should take '*all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected [to refoulement] or arbitrarily repatriated*'.

In his separate opinion, Judge Pinto de Alburquerque stated that it would be preferable to recommend to Italy to provide access to asylum to the applicants.[361] The path of demanding direct assumption of responsibility was not chosen though by the court. In a 'political case', this would go too far. The decision of the court follows the preference of diplomatic assurances over assumption of responsibility in cases concerning asylum and migration policy.[362] This is indicative of the limits that the ECtHR encounters and takes into consideration when dealing with SAR operations. Consequently, the research on the international judicial avenues available to the survivors of a boat that capsized on the high seas cannot end at this point. The examination of a last option available to the unassisted migrants will be the object of the paper's final chapter.

[361] S*upra* no 7, Separate opinion in the Hirsi case, at para 32

[362] See for instance the Abu Qatada case, whereby the ECtHR provided a list of factors in order to assess the quality of the assurances offered by UK (Othman v UK, 2012, paras 186-189) and the MSS case, whereby the Greek government did not specify any individual guarantees; See also s*upra* no 12, at p. 594

B. Establishing a case before the European Court of Justice

Having examined the contribution of a regional Court to the implementation of SAR obligations, the role that the ECJ could play in this field will be examined. In addition to the judicial review of the acts and omissions of the member states of the EU [hereinafter MSs], the possibility of resorting to the ECJ against the EU will be considered.

1. The European Union and migration by sea

The EU has been dealing with issues related to migration by sea for more than two decades. The current situation in the Mediterranean[363] is, however, still an issue of concern for the organs of the EU. In April 2015 the Commission proposed a 10 point action plan to combat the situation[364] and the European Council committed to strengthen the EU's presence at sea. The main method of managing mixed migration flows in the Mediterranean in a more efficient way was to increase the financial resources and the search and rescue possibilities of Frontex.[365] One month later the European Agenda on

[363] According to UNHCR, 50.242 people arrived in Greece in July 2015 compared to 43.500 during 2014. The number of sea arrivals to Greece from 1 January to 14 August 2015 reached 158.456. The vast majority of the arrivals are Syrians and together with Afghans and Iraqis, they amount to 99% of the arrivals. This percentage confirms that the majority of arrivals are persons likely filling the refugee criteria; UNHCR, *Numbers of refugee arrivals to Greece increase dramatically* (18 August 2015), available online at http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=55d32dcf6&query=William%20Spindler (accessed 6 January 2016)

[364] The plan was presented in the Joint meeting of Foreign and Interior Ministers by Commissioner Avramopoulos and received endorsement by the Joint Foreign and Home Affairs Council. Its ten points include:

- Reinforcement of the Joint Operations in the Mediterranean by increasing the financial resources and the number of assets with parallel extension of the operational area
- Systematic effort to capture and destroy vessels used by the smugglers by tightening the exchange of information among EUROPOL, FRONTEX, EASO and EUROJUST
- Joint processing of asylum applications in Italy and Greece through EASO teams
- Tight control of fingerprinting of migrants
- Consideration of options for an emergency relocation mechanism;
- Establishment of a EU wide voluntary pilot project on resettlement and of a new program for rapid return of irregular migrants coordinated by Frontex from frontline Member States
- Engagement with countries surrounding Libya
- Intelligence gathering on migratory flows through Immigration Liaison Officers and EU Delegation See 'Joint Foreign and Home Affairs Council: Ten Point action plan on migration', Press release of the European Commission, (20 April 2015), available online at http://europa.eu/rapid/press-release_IP-15-4813_en.htm (accessed 6 January 2016)

[365] The response of the EU to the Mediterranean tragedy, as the situation is characterized by the European Council is composed of four pillars: strengthening the EU's presence at sea, fighting traffickers in accordance with international law, preventing irregular migration flows and reinforcing internal solidarity, See State of the Union in 2015: Time for Honesty, Unity and Solidarity, Speech of Jean Claude Juncker (9 September 2015), available online at http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm (accessed 6 January 2016)

Migration was adopted by the Commission, stressing the 'need for a comprehensive approach to migration management' and 'a coordinated European response on the refugees and migration front'.

On September 2015 the EU Commission President, Jean-Claude Juncker, demanded 'better joint management of our external borders and more solidarity in coping' in the frame of 'a unique symbol of European integration'.[366] The unprecedented rise of migratory flows during 2015 put pressure on the Schengen Agreement. Germany imposed controls on its border with Austria, whereas the later restricted road and rail traffic on its border with Hungary. Slovakia, Netherlands and Poland also introduced restrictive border measures, while Hungary was strongly criticized for building a fence along its border with Serbia.[367] Such measures and relevant controls are of exceptional character and constitute a last resort solution, as specified in the recent Regulation.

For Greece, the situation became suffocating in November when various EU government officials accused the country of openly denying the responsibility to guard the European external borders.[368] In their point of view, the country had failed during the past months to register people, prepare checkpoints for them and respect the European deadlines on the hotspots and refugees relocation issues. On 27 November, Slovakia's prime minister stated that European leaders considered unofficially the option of pushing Greece out of the visa-free zone.[369]

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[366] *Ibid*

[367] BBC News, Chris Morris, *Schengen: Controversial EU free movement deal explained*, (14 September 2015), available online at http://www.bbc.com/news/world-europe-13194723 (accessed 6 January 2016)

[368] A Fotiadis, *Kicking Greece out of Schengen won't stop the refugee crisis*, The Guardian (2 December 2015), available online at http://www.theguardian.com/commentisfree/2015/dec/02/refugee-crisis--greece-schengen-europe-border-controls (accessed 6 January 2016)

[369] *Why Greece was almost kicked out of Schengen,* The Economist (7 December 2015), available online at http://www.economist.com/blogs/economist-explains/2015/12/economist-explains-5 (accessed 6 January 2016)

2. The obligations of the European Union in Search and Rescue matters

i. The competence of the European Union in Search and Rescue matters

a. Frontiers and border policy

I will firstly examine the EU's competences in order to define the SAR issues which are of concern to the Union. Since the Lisbon Treaty, EU competences have been codified and divided into three categories, as identified by the ECJ and mentioned in previous treaties. Under the division of exclusive, shared and supporting competences,[370] the EU has exclusive competence in five policy areas which refer mainly to internal market and monetary issues.[371] The issue of assistance and disembarkation of persons in distress in the Mediterranean touches upon three domains, in which the EU has competence: asylum, migration, and border management.

The EU acquired competence on immigration policy[372] and asylum[373] under the Amsterdam Treaty, which clearly distinguishes these two issues.[374] The Council then acquired the ability to adopt external border crossing measures.[375] The issue of external border management is also regulated by the Schengen founding treaties, Council regulations and decisions, as well as bilateral agreements signed with third countries.[376]

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[370] Article 3,4 and 6 Treaty on the Function of the European Union [hereinafter TFEU] respectively

[371] The domains where the EU has exclusive competence are: customs union, establishment of the competition rules necessary for the functioning of the internal market, monetary policy for the Eurozone MSs, fisheries and common commercial policy. See also Jean-Claude, *The Lisbon Treaty: A Legal and Political Analysis* (1st edition, Cambridge University Press, 2010) at p.75

[372] Articles 79 and 80 TFEU. The EU has shared competence on aspects of legal migration, integration of legally resident TCNs, prevention of irregular migration and readmission agreements. The Lisbon Treaty introduced codecision and qualified majority voting on legal migration and a new legal basis for integration measures. See for further information, Fact Sheet on Immigration policy, http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.12.3.html (accessed 6 January 2016)

[373] Articles 67(2) and 78 TFEU and article 18 EUCFR constitute the legal basis for measures on matters of asylum. Since the Treaty of Lisbon, these measures were transformed into common policy. Although the decision-making procedure within the EU didn't change, provisions on the creation of a common system with a uniform status and uniform procedures were introduced. See for further details, Fact Sheet on Asylum Policy, http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.12.2.html (accessed 6 January 2016)

[374] Treaty of Amsterdam (2 October 1997)

[375]The legal basis for measures on management of the external border is found in articles 67 and 68 TFEU; See also Treaty of Amsterdam, art. 62(2) title IV , European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders* (19 June 1990) art. 95-100

[376] P Hobbing, *Integrated Border Management at the EU Level*, CEPS Working Document No. 227, 2005, p.10 available online at http://www.ceps.eu/book/integrated-border-management-eu-level (accessed 6 January 2016) Communication from the Commission to the Council and the European Parliament: Towards

These legal texts include measures on burden-sharing responsibilities between states,[377] databases for border management and migration,[378] penalization of irregular entry, smuggling and trafficking.[379]

In historic terms, the Schengen Agreement[380] followed by the Implementation Convention was the first decisive initiative towards a common external border management policy. The agreement abolished the EU's internal frontiers and enabled passport-free movement to a great extent, resulting in a shift of the control of the EC borders to the states on the periphery.[381] The Agreement didn't alter the international protection obligations of states towards asylum seekers, yet their access to European soil was hampered.

Difficulties during the process of managing access and movement of third country nationals within the EU coupled with the diverse implementation of common border policy by the MSs resulted in the demand for a new initiative. The request was expressed by the European Council and the Commission came forward with the proposal of Integrated Border Management (IBM).[382] The concept of the proposal was introduced in EU law by the Treaty of Lisbon, which called for an integrated management system for external borders.[383] The Commission remained seized on the matter for a long period of time and in 2008 introduced a new border proposal which included a new EU wide database for registration of incoming TCNs and measures for enhancing security.

The aforementioned sectors are englobed in the area of freedom, security and justice, where stronger EU political action has been called for during the past years.[384] The

integrated management of the external borders of the Member States of the European Union, COM(2002) (7 May 2002)

[377] This is implemented through the External Borders Fund

[378] These are the Schengen Information System, Visa Information System, Eurodac

[379] J Rijpma, *EU Border Management after the Lisbon Treaty*, Croatian Yearbook of European Law and Policy (2009)

[380] Twenty-six states participate in the Schengen Zone, comprising twenty-two EU members, Iceland, Norway, Switzerland and Liechtenstein. The six EU MSs outside the Schengen zone are UK, Ireland, Cyprus, Croatia, Romania and Bulgaria. Greece signed the Schengen Agreement in 1992 and joined the Area in 2000, five years after the agreement entered into force.

[381] V Kalaydzhieva, *Right to asylum and Border Control: Implications of European Union Policies on Access to EU Territory of People in Need of International Protection* (2002), at p.82

[382] The Commission's proposal identified five essential elements; burden-sharing between MSs, staff and inter-operational equipment, common corpus of legislation, common integrated risk analysis and common coordination and operational cooperation mechanism. See for further details Commission Communication to the Council and the European Parliament, Towards integrated management of the external borders of the MSs of the European Union. Brussels, Com(2002)

[383] Article 77(1)(c) TFEU

[384] As a result of the recent complaints on EU inaction in issues of border surveillance and data protection in particular, the new Commission has a First Vice-President in charge of rule of law and the EU Charter of Fundamental Rights.

ambitious project of an Area of Freedom, Security and Justice, '*without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border control, asylum, immigration, and the prevention and combating of crime*'[385] has an impact on the way states exercise their jurisdiction and thus do not affect the division of competences between the EU and MSs. The reasons behind Justice and Home Affairs [hereinafter JHA] are not only connected to the freedom of movement and other fundamental freedoms in the EU,[386] but to economic motivations too. During the Council's meetings, certain states representatives insisted that a non-operational external border would eventually jeopardize the entire single market, by undermining collective trust and consequently leading to the reintroduction of internal controls.[387] No clear delineation of the EU's and MSs competence on the matter is included in the conclusions of the Tampere meeting, yet the Council proposed certain measures for common European border management, upholding a balanced approach in respecting refugee rights and managing external borders.

In the marine area, the EU border control policy was in need of an institution to implement it, since the implementation of EU law on border policy issues by MSs lacked homogeneity. The need for a better coordination of the EU external frontiers administration was stressed by the Laeken European Council on December 2001. The Commission received a mandate by the Council to elaborate a proposal for a mechanism or common services to control EU external borders.[388] As a result of the lengthy negotiations within the Council and the Commission, the European Agency for the Management of Operational Cooperation at the External Borders of the MSs of the European Union, known as Frontex was established in 2004 by the Council Regulation 2007/2004.[389] The role and functions of Frontex are further examined below.[390] What

[385] Article 3(2) TEU

[386] According to article 3(2) TEU '*The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*'

[387] S. Bertozzi, *Schengen: Achievements and Challenges in Managing an Area Encompassing 3.6 million km²,* CEPS Working Document No. 284, CEPS, Brussels (February 2008)

[388] 'to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created'; European Council, Presidency Conclusions, European Council Meeting in Laeken. (14 and 15 December 2001) at para 42

[389] 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 MSs of the European Union, L 349/1 (25.11.2004)

[390] See infra chapter 3.ii 'The activities of Frontex'

needs to be stressed at this point is that the establishment of the agency did not entail a transfer of the competence of control and surveillance of external borders from the MSs to the EU. Frontex mandate concerns explicitly coordination and technical support to the MSs.[391] This issue will be of particular relevance in the effort to define the EU's responsibility for activities of Frontex.

[391] As article 1(1) of the Regulation 2007/04 stresses, '*While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency shall facilitate and render more effective the application of existing and future Community measures relating to the management of external borders*.'

b. The European Union's Search and Rescue obligations

Since UNCLOS became binding on the institutions of the EU and MSs, the ECJ can declare null and void European law provisions contrary to UNCLOS.[392] The EU signed UNCLOS on 7 December 1984 and became a fully-fledged member of the convention by acceding formally to it in 1998 on the basis of shared competence.[393] Given the division of competences in the then EEC, the declaration of the Union included clarifications on its competence with regard to matters governed by UNCLOS.[394] The only exclusive competences of the EU at the time of ratification of UNCLOS referred to the conservation and management of sea fishing resource, as well as protection and preservation of the marine environment.

The first and only reference to article 98 UNCLOS was made indirectly in the EU declaration of 1 April 1998, as a provision included in Part VII UNCLOS which concerns the high seas. In matters of safety of shipping on the high seas, the EU has exclusive competence only if the provisions of UNCLOS affect '*common rules established by the Community'*. The EU has shared competence if such community rules exist but are not affected by UNCLOS. Otherwise the competence rests with the MSs.[395] Therefore, in order to answer the question of EU competence on assistance in situations of distress at sea, the legislative initiatives undertaken by the EU on the matter need to be examined.

The Regulation establishing Frontex specifies that Frontex must respect and implement international law obligations regarding Search and Rescue. The obligation to assist people in distress is indeed part of public international law, as enshrined in UNCLOS and further elaborated in other legal instruments, it consequently binds all MSs and Frontex. In addition, Regulation 656/2014 established the rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex, clearly stating that '*border surveillance is not limited to the detection of attempts at unauthorised border crossings but equally extends to […] arrangements intended to*

[392] M Reuss, J Pichon, *The European Union's Exercise of Jurisdiction over Classification Societies: An International Law Perspective on the Amendment of the EC 'Directive on Common Rules and Standards for Ship Inspection and Survey Organisations and for the Relevant Activities of Maritime Administrations'*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaoRV 67 2007) at p. 119-144

[393] Council Decision 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, Official Journal 1998, L 179/1 (1998)

[394] EU declaration made upon signature of UNCLOS, available online at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#European%20Community%20Upon%20signature (accessed 6 January 2016)

[395] Declaration made pursuant to article 5(1) of Annex IX to the Convention and to article 4(4) of the Agreement, (1st April 1998)

address situations such as search and rescue that may arise.'[396] Article 3 of this Regulation further specifies that '*measures taken for the purpose of a sea operation 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*'.[397] Regulation 656/2014 also makes explicit reference to search and rescue situations and specifies the parameters of the relevant operational plan.[398]

As far as UNCLOS provisions are concerned, under the Schengen Borders Code [hereinafter SBC][399] MSs are obliged to control the external borders. The SBC does not limit geographically the places 'out in the sea' where MSs, supported by Frontex, can exercise surveillance. Under international law,[400] a coastal state may exercise powers of control of its sea borders not only in its territorial waters but also in the contiguous zone, extending up to 24 nautical miles beyond the territorial waters.

The aforementioned texts show that the EU is bound by UNCLOS, yet they do not constitute 'common rules established by the Community'. Given that European law includes provisions relevant to rescue at sea, the Union doesn't enjoy exclusive competence on SAR matters, neither do these matters remain within the purview of the MSs. Consequently, the EU has shared competence on SAR measures and its organs are bound by the relevant provisions of international law. A shared competence allows both the Union and its MSs to make the necessary decisions, but MSs' competences may be exercised only to the extent that the Union has not exercised its own.[401]

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[396] Preamble, European Parliament and Council Regulation 656/2014 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, I.189/94, 27.6.2014 [hereinafter Reg 656/14]
[397] *Ibid*, article 3
[398] *Ibid*, article 9
[399] European Parliament and Council Regulation 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), I.105/1, 13.4.2006 [hereinafter Reg 562/2006]
[400] Article UNCLOS
[401] Article 2 para 2 TFEU

ii. The European Union and the non-refoulement principle

The principle of non-refoulement as already presented, is a binding rule of international law for the MSs of the EU. The question is whether the EU is also bound by this principle and, as a result, whether international responsibility of the EU may arise from the breach of the principle of non-refoulement.

a. The principle of non-refoulement as customary international law

The EU, endowed with legal personality,[402] is a subject of international law exercising rights and bearing responsibilities. As such, the Union is bound by customary international law and 'shall contribute to the strict observance and the development of international law'.[403] Nevertheless, the ECJ has been criticized for following a dualist conception, by restricting the effects of international law within the European legal order.[404] This conclusion does not describe the position of the court on the interplay between EU and public international law, since the ECJ has repeatedly stressed that the EU is bound by international law in the exercise of its powers.[405] The EU is consequently bound by the principle of non-refoulement as a rule of customary of international law.

[402] Article 57 TEU
[403] Article 3(5) TEU
[404] In the Kadi case, the ECJ ruled that 'obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty' para 285 In the Intertanko case, the Court ruled that the powers previously exercised by the MSs in the field to which the regulation under discussion applied had not been transferred to the Community. As a result, in the view of the ECJ, the Community was not bound by its provisions. See also G de Burca, *The European Court of Justice and the International Legal Order After Kadi*, Harvard International Law Journal, Vol.51, No 1 (2010)
[405] In order to decide on the validity of community measures, the ECJ has repeatedly examined whether they were contrary to a rule of international law. (See ECJ, *Racke case*, C-162/96, I-3655, at para 27; ECJ, International Fruit Company NV and others v Produktschap voor Groenten en Fruit *case*, C-41/70 (13 May 1971) at para 6; In the Racke case, the ECJ ruled that 'in the absence of an express clause in the EC Treaty, the international law rules referred to in the order for reference may be regarded as forming part of the Community legal order' para 38 The ECJ decided that the rules of customary international law on the termination and the suspension of treaty relations due to a fundamental change of circumstances are binding upon the EC and 'form part of the Community legal order'. Para46 In the Poulsen and Diva Navigation case the Court concluded that 'the European Community must respect international law in the exercise of its powers' para 9 See ECJ, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, C-366/10 (21 December 2011) at para. 101 ; See also V Kronenberger, MT D'Alessio, V Placco , *De Rome à Lisbonne : les juridictions de l'Union européenne à la croisée des chemins* (1ère édition, Editions Bruylant, 2013)

b. The Non-refoulement principle in primary and secondary law of the European Union

Article 78 TFEU, which is found in Title V of the Treaty, concerning the Area of Freedom, Security and Justice, refers explicitly to the rules of the Geneva Convention and other relevant treaties.[406] The provision further provides that

'[T]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement.'

The principle is also enshrined in the ECHR and consequently binds the EU as a rule of human rights law.[407] As interpreted by the ECJ, fundamental rights guarantee the constitutional autonomy of the EU legal order.[408] The principle can also be found in article 19 of the European Union Charter of Human Rights [hereinafter EUCHR],[409]

'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'

Although the provision does not refer explicitly to non-refoulement, it has the same legal content and prohibits return to a state where fear of persecution arises for a person.[410] As far as the scope of application of the Charter is concerned, article 51 clarifies that

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.'

Therefore, as far as the EU is concerned, the provisions of the Charter apply on its

[406] Article 78 TFEU

[407] 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'; Article 6(3) TEU

[408] Mengozzi P, *Les caractéristiques spécifiques de l'Union Européenne dans la perspective de son adhésion à la CEDH*, Il Diritto dell'Unione Europea (2010) at p.231

[409] An important step towards the consolidation of human rights as a parameter of EU law, was the inclusion of the Charter of Fundamental Rights of the European by the Treaty of Lisbon. By virtue of article 6(1) TEU, the EUCHR is legally binding since 2009. This development, however, does not constitute a breach of the principle of conferral and an extension of the EU's competences contrary to article 6(1) TEU

[410] The ECtHR has clearly stated that the non-refoulement principle is 'eshrined in Article 19' EUCHR; See Hirsi case, at para.135

institutions, bodies, offices and agencies activities, Frontex being one of them.[411] Emphasis should be given to the principle of subsidiarity, according to the wording of the article. Search and rescue does, however, constitute a shared competence of the EU and as a result, the EUCHR applies in relevant EU action. Secondary EU law also incorporates the principle of non-refoulement, notably in the Asylum Procedures Directive,[412] the Return Directive[413] and the SBC. This point needs to be taken into consideration in order to define the legal basis of EU responsibility for SAR matters. I will now proceed to the examination of the role of Frontex in applying some of the aforementioned provisions.

[411] Under article 51(1) EUCHR, '*the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'*. On 15 July 2009 Mr Jacques Barrot, then Vice-President of the European Commission drew the link between the non-refoument principle and border control activities, such as border surveillance activities on the high seas. These activities include SAR operations ('*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. Furthermore, States may not send refugees back to territories where their life or freedom would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion. That obligation must be fulfilled when carrying out any border control in accordance with the SBC, including border surveillance activities on the high seas. The case-law of the ECHR provides that acts carried out on the high seas by a State vessel constitute cases of extraterritorial jurisdiction and may engage the responsibility of the State concerned*') See letter of 15 July 2009 from Mr Jacques Barrot to the President of the European Parliament Committee on Civil Liberties, Justice and Home Affairs, Response to the request for a legal opinion on the "return to Libya by sea of various groups of migrants by the Italian authorities". See also Hirsi case, at para.34

[412] European Parliament and Council Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), L 180/60 (29.6.2013)

[413] European Parliament and Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, L 348/98 (24.12.2008)

3. The role of Frontex in Search and Rescue Operations

i. The structure and responsibilities of Frontex

The European Agency for the Management of Operational Cooperation at the External Borders of the MSs of the European Union [hereinafter Frontex] is a Community Body established in 2004, with a view to '*improving the integrated management of the external borders of the Member States*'.[414] The name Frontex stems from the French term *Frontières extérieures*. The agency's legal framework has been reformed in 2007[415] and 2014[416]. At the time of its set up as a Community agency, the legal basis for its establishment was found in articles 62 para 2 (a) and 66 Treaty of the European Community [hereinafter TEC],[417] under the case law on implied powers.[418] The application of Community measures on management of external borders, included in these provisions, would have to tackle grave practical obstacles if the Community did not have a supportive and monitoring role through an independent agency.[419] The legal and administrative vehicle of an agency was chosen by the Commission[420] as a way to focus on sectoral know-how and dispose resources on core tasks.[421]

Based in Warsaw, Frontex has a Management Board, an Executive Director and a Deputy Executive Director. The Management Board consists of operational heads of

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[414] Article 1.1, Reg 2007/04

[415] *Ibid*

[416] European Parliament and Council Regulation 863/2007 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, L 199/30, 31.7.2007

[417] L Marin, *Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An analysis of Frontex Joint Operations at the Southern Maritime Border*, Journal of Contemporary European Research, Volume 7, Issue 4, 468-487 (2011) at p. 471

[418] ECJ, Case 22/70, Commission of the European Communities v Council of the European Communities, ECR 263 (31 March 1971) [hereinafter AETR case] The case concerned external community competence in international matters for the first time before the Court. Although the TEC vested on the Commission extensive internal powers to regulate matters of common transport policy, it did not refer to relevant external powers. The ECJ judged that if the Community was not endowed with the power to pursue its objectives and policies abroad, this would render impractical and illogical the exercise of its competence on common rules applicable to international transport. The external competence of the EC should therefore cover the whole range of internal competences, including the relevant external powers. The scope of implied Community powers was however left partially unclear, since the ECJ relied on a Regulation which expressly allowed for the EC to conclude agreements with third countries. Furthermore, controversy arose as to whether internal measures constitute a prerequisite for the existence of implied powers. In this case, the relevant case law still applies in the establishment of Frontex, since in 2004 relevant EU law already existed. See also L Holdgaard and R Holdgaard, *The External Powers of the European Community*, Retsvidenskabeligt Tidsskrift (RETTID) pp 108-200 (2001) at p.112

[419] *Supra* no 140, at p. 472

[420] Other examples include Europol and Eurojust

[421] S. Leonard, *The Creation of FRONTEX and the Politics of lnstitutionalisation in the EU External Borders Polky,* Journal of Contemporary European Research, Volume 5, pp. 371-388 (2009)

national border guard services and representatives of the European Commission. The agency thus presents intergovernmental characteristics. Its main functions concern the coordination of MSs actions in the field of EU border policy and the provision of technical support and expertise to the MSs and the Commission. Frontex, therefore, presents both a regulatory and a coordinating dimension. Under its mandate to reinforce solidarity among states, it coordinates the exchange of information and establishment of contacts, while creating a network of domestic border guard agents. This is the reason why the establishment of Frontex and the following European initiatives should not be seen as a delegation of powers of the Commission, but rather as '*Europeanization of the functions*'[422] of the MSs' administrations. The tasks fulfilled by the agency do not emanate from powers of the Commission or the Council, but mostly from powers of the national authorities.

The agency is endowed with six categories of responsibilities which include risk analysis, coordination of operational cooperation, training of national border guards, including the establishment of common training standards, facilitation of research and development on the control and surveillance of external borders, provision of rapid crisis response and support in joint return operations.[423] Having presented the regulatory framework of the agency, I will now look into its activities, in order to clarify whether Frontex participates in SAR operations.

[422] See D Curtin, *Executive Power of the European Union* (1st edition, Oxford University Press, 2009)
[423] Article 2 Reg 2007/04

ii. The activities of Frontex

A first category of Frontex activities is constituted by the Joint Sea Operations. These operations, provided by article 3 of the Regulation 2007/2004, were introduced in 2006. The first joint operation called 'Poseidon' took place in the region of the Aegean Sea and the Eastern Mediterranean Sea in Greece, both at land and sea borders. The aim of the operation was to tackle irregular migration flows in the area by means of surveillance of vessels, checks on suspicious ships, detection of transportation means used for illegal activities and apprehension of persons involved in activities of smuggling and trafficking.[424] At the sea borders, the operation took place in Eastern and Central Aegean Sea. The two states that participated actively in the operation were Greece and Italy.

Furthermore, under article 8 of the Regulation 2007/2004 which established Frontex [hereinafter Reg 2007/04], when a state is in need of increased technical and operational assistance in matters of control and surveillance of borders, the agency may offer technical support and expertise, after the request of the aforementioned state. The assistance provided by Frontex can consist in direct support to the national authorities in change of external border issues, such as the coast guards, or assistance on matters of coordination between two or more MSs, such as neighboring coastal states.[425]

The first request for assistance under article 8 Reg 2007/04 was made by Malta and the response included two operations in the region under the name 'Nautilus'. Direct assistance to the national authorities was provided through a group of experts on matters of migrants' identification on 1 August 2006. Indirect assistance was offered through a joint sea operation in which Malta, Greece, Italy, France and Germany participated between 5 and 15 October 2006.[426] The aim of the operation was to tackle the migration flow towards Malta and Italy.

The second request, originating from Spain, came shortly after Malta's. Operation 'Hera' has been the longest and most expensive joint operation so far,[427] deployed in

[424] Gil Arias Fernandez, *Frontex. The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 5th International Seminar on Security and Defense in the Mediterranean, Fundacio CIDOB, at p.125
[425] Article 8(2) Reg 2007/04
[426] *Supra* no 147, Gil Arias Fernandez, at p. 126
[427] COWI (Consultancy within Engineering, Environmental Sciences and Economics), 'External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union', Final Report (January 2009) at 38, available online at: http://www.frontex.europa.eu/download/Z2Z4L2Zyb250ZXgvZW4vZGVmYXVsdF9vcGlzeS82Mi8xLzE/cowi_report_final.doc (accessed 6 January 2016)

several phases and different EU MSs.[428] The two modules formula was chosen once again by Frontex and the deployment of 'Hera I', a group of experts who arrived in the Canary Islands on 30 June 2006, as well as 'Hera II' lasted until December 2006. 'Hera II' was a joint surveillance operation in which MSs' participation was wider than 'Nautilus' and targeted the area between the West African Coast and the Canary islands. During this operation Spanish helicopters, as well as Italian and Finnish aircraft were included for the first time. It thus becomes clear that the actors engaged in Frontex activities are always provided by states.

Last but not least, the Rapid Border Intervention Teams [hereinafter RABITs] are the most recent category of Frontex activities. Regulation 863/2007 which amended the founding Regulation,[429] established RABITs mechanism for situations of mass influx at the external borders of the EU.[430] The mechanism is activated after a request by a MS facing urgent and exceptional migratory pressure at its external borders. RABITs aim at the provision of rapid operational assistance by mandating MSs to contribute border guards and equipment for the operation.[431] In addition to border guards coming from other MSs, the requesting state is obliged to provide national officers and team leaders to work alongside. All border guards deployed by Frontex in a RABIT operation work under the command of the national authorities of the requesting member state. In October 2010 Greece made a request for the deployment of RABITs. On 10 December 2015 a new request of Greece, after evaluation of the migratory flows reaching Greek territory was accepted by Frontex.[432] These are the only two requests for activation of the RABIT mechanism, both coming from Greece.

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[428] For the Member States participating in Hera 2006 and 2007, refer to the Commission staff working document accompanying the report on the evaluation and future development of the Frontex Agency SEC(2008) 150 final, 13 Feb. 2008. Regarding Hera 2008, refer to Frontex General Report 2008, at p. 40, available online at http://www.frontex.europa.eu/gfx/frontex/files/justyna/frontex_general_report_2008.pdf (accessed 6 January 2016). Concerning Hera 2009, refer to Frontex General Report 2009, available online at http://www.frontex.europa.eu/gfx/frontex/files/general_report/2009/gen_rep_2009_en.pdf (accessed 6 January 2016)

[429] European Parliament and Council Regulation 863/2007 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, L 199/30, 31.7.2007 [hereinafter Reg 863/07]

[430] Reg 863/07

[431] Greece asks Frontex for Rapid Intervention Teams in the Aegean Islands, (4 December 2015), available online at http://frontex.europa.eu/news/greece-asks-frontex-for-rapid-intervention-teams-in-the-aegean-islands-0swm9L (accessed 6 January 2016)

[432] Frontex accepts Greece's Request for Rapid Border Intervention Teams, (10 December 2015), available online at http://frontex.europa.eu/news/frontex-accepts-greece-s-request-for-rapid-border-intervention-teams-amcPjC (accessed 6 January 2016)

iii. Assessment of the role of Frontex in matters of Search and Rescue

I will now seek illumination on the connection between the aforementioned activities of Frontex and the SAR regime. The main target of Frontex is to halt irregular migration and contribute to the implementation of the EU external border policy. As it has been pointed out, '*Frontex's problem is that they were designed to protect from illegal migration. That is a different profile from what we're seeing'*.[433] Even the normative framework, therefore, is not adequate to the search and rescue needs in migration issues. Frontex's main regulatory framework, coupled with the agency's budgetary and operational difficulties,[434] lead to an alarming reality in the Mediterranean. Despite recent naval tragedies, certain EU MSs refuse to participate in marine rescue operations, considering them as an incentive for more migrants to reach Europe.[435]

According to Reg 2007/04, the mission of Frontex is to improve the integrated border management and facilitate the application of community measures on the issue. Nevertheless, external border policy does not necessarily go along with search and rescue activities. In 2011, although Frontex's budget increased and its operations widened, 2.000 people were reported as dead or disappeared in the Mediterranean.[436] As the PACE Rapporteur put it, '*in the year the Mediterranean region was subject to the most surveillance, the largest amount of deaths or disappearances were recorded*'.[437]

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[433] Nick Mathiason, 'Europe's Refugee Crisis: Is Frontex bordering on chaos? There isn't much Frontex can do', (15 september 2015), available online at http://labs.thebureauinvestigates.com/is-frontex-bordering-on-chaos/ (accessed 6 January 2016)

[434] In April 2015, the Council decided to increase Frontex's budget by €26.8m to intensify the search and rescue operations at the EU's external borders. Five months later, the Management Board examined the possibility of returning the granted money to Brussels, due to the MSs inaction in providing the equipment and border guards. The emergency grant was eventually signed-off by the representatives of EU MSs at a high-level summit. Due to the lack of cooperation and willingness, Frontex was forced to ask Commissioner Dimitris Avramopoulos to intervene; See *ibid*. Furthermore, the latest Frontex report shows shortages of Frontex-requested border staff ranging from 4% to 20% in various roles including first line officers and interview experts; See Frontex Report 205, Annual information on the Commitments of Member States to the European Border Guard Teams and the Technical Equipment Pool. Due to the MSs' practice of lending equipment for single months only, Frontex encounter difficulties in ensuring continuity in its emergency operations. See *ibid*.

[435] Naina Bajekal, *Italy to End Naval Operation That Rescued Thousands of Migrants*, Time (28 October 2014), available online at http://time.com/3543082/italy-navy-mare-nostrum-migrants/ (accessed 6 January 2016)

[436] See *supra* no 140, at p.10

[437] ECRE (European Council for Refugees and Exiles) Interview with Tineke Strik (9.12.2011), member of the
PACE: its Migration Committee is currently investigating on 2011 accidents in the Mediterranean. The interview is available online at http://migrantsatsea.wordpress.com/2011/12/12/ecre-interview-with-tineke-strik-regardingpace-investigation-into-migrants-deaths-in-mediterranean/ (accessed 6 January 2016)

Inefficiency of Frontex's efforts and resources to assist migrants found in distress in the Mediterranean became evident after termination of the 'Mare Nostrum' operation in Italy. Operation 'Triton', conceived to support and latter substitute 'Mare Nostrum' was much smaller in size and budget. It was also given a reduced remit, with the emphasis being on '*effective border control and at the same time to provide assistance to persons or vessels in distress'*. SAR obligations were once again left unimplemented.

In addition to the alarming number of losses, the SAR legal framework was not always duly implemented during joint operations. Practice shows that interdiction and SAR operations are not clearly distinguished. Until Reg 2007/14 no specific reference was made to the latter.[438] Frontex and MSs seem to opt for interdiction and provision of humanitarian aid to the migrants instead of assistance and disembarkation, as if these two operational avenues are parallel and interchangeable.[439] This is contrary, in my opinion, to the binding legal character of the obligation to assist in distress. States should not use minimal intervention and international cooperation as a means of detouring their duties under law of the sea.

Another issue concerning the application SAR provisions by Frontex is the disembarkation procedure. When boats were found near the Canary Islands during joint operation 'Hera', the vessels were intercepted and diverted back to the country of embarkation or the Canary Islands.[440] In the case of operation 'Hera III', the report refers to 3887 migrants intercepted aboard small boats close to the African coast and then diverted. No information is provided on a screening process or the countries where the migrants were redirected to.[441] Moreover, joint operation 'Nautilus' was reorganized as 'Chronos', after disagreement with Malta on the disembarkation of migrants saved at sea,[442] whereas NGOs report migrants disembarked in Libya during the operation.[443] After admitting that 75 migrants had been handed over to a Libyan patrol boat during operation 'Nautilus IV', Frontex Director denied responsibility by sustaining that the reported

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[438] V Moreno-Lax, *Seeking asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea, International Journal of Refugee Law*, (2009), at p.4

[439] *Ibid*

[440]Frontex Annual Report 2006, Coordination of Intelligence Driven Operational Cooperation at EU Level to Strengthen Security at External Borders, at p.12; See also *supr*a no 140, at p.10

[441] S Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, Max Planck Yearbook of United Nations Law, Vol 12, pp 205-247 (2008) at p. 245

[442] M. Tondini, *Fishers of Men?The lnterception of Migrants in the Mediterranean Sea and Their Forced Return to Libya*, INEX Paper (October 2012)

[443] S. Klepp, *A Contested Asylum System: the European Union between Refugee Protection and Border Control in the Mediterranean Sea*, European lournal of Migration and Law, Volume 1 (2010) at p. 16.

Italian push-backs took place outside the operational area of the agency.[444] This statement, however, does not suffice in order to close the debate on Frontex responsibility to apply the SAR regime.

[444] See *supra* no 165, at p.17 and *supra* no 19, Moreno-Lax, at p.10

iv. Responsibility of Frontex in the framework of Search and Rescue operations

As it has already been stressed, Frontex coordinates and offers assistance to MSs in the framework of their responsibilities to implement EU border policies. Therefore, an important question arises: does Frontex bear responsibility for its acts and omissions concerning the implementation of the SAR obligations or MSs are the only ones competent on such matters?

On the one hand, no reference to an obligation of Frontex to render assistance or to participate in the disembarkation process is made in the relevant legal texts. The respective obligations concern MSs rather than the agency. This position flows in the same direction with the clear delineation of Frontex responsibilities under article 1 para 2 Reg 2007/04 and the general idea behind the establishment of Frontex that the '*responsibility for the control and surveillance of external borders lies with the Member States*'.[445] Reg 656/14 refers exclusively to MSs' obligations of search and rescue. Under article 9, '*Member States shall observe their obligation to render assistance to any vessel or person in distress at sea and, during a sea operation, they shall ensure that their participating units comply with that obligation, in accordance with international law and respect for fundamental rights'*. In addition to the competent national authorities, a National Coordination Center, an International Coordination Center, and a Rescue Coordination Center are mentioned in the pertinent provision. All three structures are, however, national units[446] and Frontex does not appear at any point of the process. Even the International Coordination Center [hereinafter ICC] is established within the host MS, with participants from local authorities and national authorities of other member states.

On the other hand, Frontex coordinated joint operations at sea can be seen as search and rescue operations, since they include activities of assistance to people in distress. As such, these operations represent Europe's biggest SAR operation.[447] Furthermore, Reg 656/14 included two additional articles on Search and Rescue situations and Disembarkation, meaning that Frontex is concerned by these operations[448]. Therefore, in my opinion, Frontex is not limited to mere coadjutor functions in SAR operations. The agency goes further than neutral cooperation. However, this does not lead to the

[445] Reg 2007/04
[446] As defined by article 2(6),(7),(13) Reg 656/2014
[447] The wording comes from the official Frontex site, available online at http://frontex.europa.eu/operations/types-of-operations/sea/ (accessed 6 January 2016)
[448] Articles 9,10 respectively

conclusion that the agency can be considered *de facto* competent to render assistance at sea.

Firstly, the role of Frontex goes farther from coordination activities, since the agency may carry out risk analyses and base its joint operations on the final results.[449]Frontex may also launch initiatives for joint operations in agreement with the MSs concerned,[450] organize border guards' training activities[451] and proceed to intelligence and information gathering for its purposes.[452] The important role of the agency and its decisive participation in joint operations would be underestimated if the participating MSs bore exclusive responsibility for the final outcome. Secondly, should Frontex be an agency of an exclusively on mainly consultative nature, its participation in the SAR activities would be peripheral. Coordination of MSs authorities and technical assistance constitute, nonetheless, its principal functions. The operational nature of both cannot be neglected. The agency's strong operational dimension is also corroborated in practice.

Frontex Joint Operation 'Triton' after the end of the 'Mare Nostrum' operation in Italy was a case in which Frontex actively participated in the procedure of rendering assistance to people in distress. The ICC in the 'Triton' operation was composed of Italian authorities, the coordinating officer of Frontex and representatives of border guard authorities from various MSs,[453] whereas participation of Frontex was visible in all stages. Borders patrols took place under the coordination of Frontex and all information when a boat was found in the Mediterranean was transmitted to the ICC, in order to assess it as an emergency situation. Furthermore, during the rescue operation, the vessels provided to Frontex for the joint operation participated and the ICC transmitted information on their exact position. After disembarkation of survivors to Italy, Frontex assisted in the identification process as well and gathered information on the voyage of the survivors.

For the aforementioned reasons, I will now proceed to the issue of EU's responsibility on the account of Frontex in the area of SAR obligations. As far as the international responsibility of the EU arising from the duty to render assistance at sea is concerned, it is a complex issue.[454] On the face of article 3 Articles on the Responsibility of

[449] Article 2(1)c Reg 2007/04. For the recent analyses published by Frontex, Publications, available online at http://frontex.europa.eu/publications/?c=risk-analysis (accessed 6 January 2016)
[450] *Ibid*, article 3(1)
[451] *Ibid*, article 5
[452] *Ibid*, article 6
[453] European Commission, How does Frontex Joint Operation Triton support search and rescue operations?, available online at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/frontex_triton_factsheet_en.pdf (accessed 6 January 2016)
[454] M. Evans and P. Koutrakos, The International Responsibility of the European Union (1st edition, Oxford

International Organizations,[455] an act or omission of the EU which constitutes a breach of international law entails its international responsibility. It would therefore be easy to say that judicial proceedings against the EU due to a breach of an international obligation constitute a feasible scenario. This is not absolutely true though, since the EU legal structure and division of competences between the Union and the member states fend it from the list of 'classical' international organizations. The question of division of competences in the EU into three categories under article 2 TFEU, introduces a peculiarity in the question of EU's international responsibility. In order for the EU to be held accountable for the breach of a rule of international law, it needs to have competence on the matter subject of the breach.

Firstly, in order for the EU to be held internationally responsible for the acts or omissions of Frontex, the wrongful act needs to be specified under article 4 ARIO.[456] Furthermore, the EU should be competent for the regulatory object of the violation. Concerning the coordination of the joint sea operations, as well as the application of the relevant provisions of the law of the sea, they constitute a shared competence of the EU. Consequently, the EU bears responsibility to the extent that the European agency undertakes action in this field.

According to article 7 ARIO, the conduct of an agency of an international organization is considered attributable to the organization, without taking into consideration the legal relationship between the organ and the organization. The precondition for the attribution of the act is that the organization exercises effective control over the conduct. However, the most important obstacle to substantiating a claim on Frontex's responsibility concerns the acts and omissions of the agents provided by the member states. According to article 6 ARIO,

'*'The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization*''

Hart Publishing, 2013)

[455] Article 3 ARSIWA, *'[e]very internationally wrongful act of an international organization entails the international responsibility of that organization'*

[456] Article 4 ARIO provides that *'There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization.'*

According to the aforementioned provision, Frontex is not exempt of its international responsibility due to the norms regulating the national character of its agents. According to relevant jurisprudence, the fact that the agency's competences are awarded by the organization,[457] the activation of the agency's organs as official members of Frontex[458] and their contribution to the latter's operations, irrespective of the position and character of their contribution, entails the international responsibility of the Agency.[459] Moreover, the fundamental criterion for the attribution of responsibility to the organization is the effective control of the organ's conduct by the organization.[460] In the case of Frontex, the effective control over the activities of the member states' organs participating in the operations, is ensured in all stages. Frontex bears, therefore, international responsibility for the acts and omissions of the agents coming from the member states and participating in the joint operations, which is consequently attributed to the EU.

Having examined on theoretical level the issue of Frontex's responsibility for the conduct of the agents implicated in its operations, the procedural perspective needs to be examined. The deficiency of the state-centric system of dispute resolution which has been illustrated and the uncertainty of the final decision in a possible dispute concerning the EU's international responsibility for Frontex activities, led my interest to a more feasible scenario. Consequently, I will now look into the option of resorting to the ECJ.

[457] ICJ, Advisory Opinion, Reparation for injuries suffered in the service of the United Nations (1949) ICJ Reports 1949, p.177

[458] ICJ, Advisory Opinion, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (1999) ICJ Reports 1999, p.88-89, para 66

[459] According to decision of the Swiss Federal Council, the relevant criteria concerning the United Nations according to the jurisprudence, apply also to the responsibility of an international organization due to the conduct of its organs. For further information, Swiss Federal Council (30 October 1996) VPB 61.75

[460] As stressed in article 14 ARIO, '*The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct'*

4. Judicial Proceedings before the European Court of Justice

A migrant, having survived a situation of distress in the context of an operation at sea under the auspices of Frontex, would have two options in order to institute proceedings against the EU before the ECJ. On the one hand, under article 263 TFEU, he or she could institute proceedings under an action for annulment. On the other hand, he or she could choose to resort to article 340 para 2 TFEU and an action for damages for non-contractual liability of the EU. The feasibility of these two scenarios will now be examined.

As far as article 263 TFEU[461] is concerned, it could constitute the backdoor of holding Frontex accountable for its actions and omissions.[462] The action for annulment may refer to an agency's act, as long as it is intended to produce legal effect towards third parties.[463] In the case of Frontex, the agency's annual reports or risk analyses could be reviewed by the Court. However, it is necessary in order to proceed to the review, that the act addresses the person or concerns her individually. When it comes to regulatory acts, the Court examines whether it is of direct concern to the individual.[464]

This is impossible to prove, in my opinion, when it comes to unassisted migrants at sea. Even though the wording of the article since the Lisbon Treaty aims at extending the list of possible applicants, it is necessary to corroborate the existence of such an individualized link with the agency's act. The ECJ has recently clarified that '*whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the final limb of the fourth paragraph of Article 263 TFEU'.*[465] Since Regulations 2007/04 and 656/14 do not refer to a person or individualize those assisted at sea, this scenario fails. Taking into account that Frontex has not proceeded to any acts addressed to particular persons, the possibility of initiating proceedings under article 263 TEU becomes more than obscure.

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[461] The said provision provides individuals, regardless of their nationality, with the possibility of instituting *'proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures'* (article 263 para 4 TFEU) The paragraph under scrutiny was added by the Treaty of Lisbon

[462] Carrera Sergio, De Somer Marie and Petkova Bilyana, *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*, CEPS Paper in Liberty and Security in Europe, No 49 (August 2012) at p.8

[463] Article 263 para 1 TFEU, explicitly referring to 'acts of bodies, offices or agencies of the Union' since the Lisbon Treaty; see also Court of First Instance, Sogelma v EAR, T-411/06 (8 October 2008) at para 33-37

[464] Article 263 para 4 TFEU

[465] ECJ, Telefonica v Commission [Grand Chamber] C-274/12P (19 December 2013) at para 30

Moving to article 340 para 2 TFEU,[466] three conditions need to be met in order to incur the EU's liability for damage. Firstly, a rule of law intended to confer rights on individuals must be infringed by an act or omission of the Union. Secondly, the damage suffered by the applicant must be sufficiently serious. Last but not least, a direct causal link must exist between the acts or omissions of the EU organ and the damage caused to the individual.[467]

As far as the first condition is concerned, Frontex is bound to play a role in the context of SAR operations, as provided by Reg 656/14, whereas during joint sea operations Frontex coordinates the vessels and aircraft provided by MSs. Frontex mission to contribute to the coordination and cooperation of national equipment and personnel is not contrary to accountability for its actions and omissions during its activities, as provided by the relevant Regulations. As a result, an act of refoulement in the context of a sea operation under the functional umbrella of Frontex, as well as a distress call received by the ICC and left unanswered could incur EU's responsibility. Furthermore, as a European agency, Frontex is bound by rules of EU law, as presented in this chapter. As a result, any act of the agency contrary to the SBC, the EUCHR and the non-refoulement principle, as enshrined in the Asylum Procedure Directive and the Returns Directive, can lead to its accountability. As far as damage is concerned, moral damage is included in the typology deriving from the case law of the Court of First Instance.[468]

However, the direct link condition is harder to fill. The notion of direct link between the act or omission and the individual's damage is narrowly interpreted.[469] The damage must constitute 'an objectively foreseeable consequence, in the normal course of events' of the EU's act.[470] Could the foreseeable and direct result of a Frontex action be the damage caused to the unassisted person? Given that the applicant bears the burden of proof,[471] it is certainly a demanding task to answer this question positively.

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[466] Article 340 para TFEU provides that '*In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.*'

[467] See ECJ, Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities, C-352/98 P, I-5310 (4 July 2000) at para 42; The ECJ applies the conditions of MSs liability for damage caused to individuals on non-contractual liability of the EU as well.

[468] Court of First Instance, Agraz and Others v Commission, T-285/03 DEP, II-285 (26 November 2008)

[469] See supra no 90 at paras 41-42, Court of First Instance, Beamglow Ltd v European Parliament and others, T-383/00, II-5459 (14 December 2005) at paras 192-193

[470] Court of First Instance, Dorsch Consult Inrenieurgesellschaft mbH v Council, T-184/95, I-6513 (28 April 1998)

[471] See *inter alia* ECJ, Dreyfus v Commission, T-485/93, ECR II-1101 (1996)

It is not an entirely surreal scenario though. One can support that only in extreme cases, such as unforeseeable weather conditions or urgency situations arising simultaneously in different areas where a joint sea operation takes place, an event intervenes in the connection of the damage with Frontex acts. A counter-argument to this argumentation would be that in the context of Frontex operations, the wrongful conduct is not attributed exclusively to the EU,[472] due to the implication of MSs's personnel. The conduct of the experts and the members of national authorities participating in these activities consequently interrupts the aforementioned link. However, in my point of view as previously stated,[473] Frontex is not limited to mere coadjutor functions and consequently, is exclusively responsible for the activities during sea operations. Even if Frontex is considered to have a limited mandate, restricted to cooperation and coordination activities, the fact that orders are given by the central unit, as well as the important role of the ICC in the accomplishment of the agency's activities, is indicative of the direct connection between Frontex orders, personnel acts and individual damage.

I therefore consider the possibility of resorting to the judicial system of the EU, aiming to establish the Union's responsibility, realistic and apt to provide effective remedy to the survivors of distress situations in the Mediterranean Sea.

[472] *Supra* no 183, at p. 259
[473] See *supra* chapter II.B.3.i

CONCLUSION

Starting from the Farmakonisi incident two years ago, a walkthrough in the search and rescue legal regime under international law leads the research to some concluding remarks and an answer to the two primary questions of the research paper.

The principal provision establishing states obligations to assist persons in distress at sea is article 98 UNCLOS. The duty to render assistance is primarily an obligation of the master of the ship, yet it necessarily extends to states. Under their duty to assist migrants in situations of distress, states must both take precautionary measures and act in cases of emergency. In order to abide by their international obligations, states are also called to cooperate with other national authorities and provide information on their own SAR equipment, personnel and organizational scheme. In practice, these procedural steps are harder to execute than in words and the reticence of certain states to abide by their obligations under the law of the sea creates protection vacuums.

Positive initiatives on national and international level have emerged throughout the time. Notably, the decision of the shipmaster to save the 'boat people' in the Tampa case, the Mare Nostrum operation in Italy during which thousands of lives were saved and pressure upon the EU to act in this regard became evident, as well as the establishment of Frontex and consequent provision of cooperation and coordination services on European level, figure among them. Despite the fact that initiatives in the field of SAR operations have not always been functional, they have offered useful know-how and infrastructure in the SAR domain. Departing, however, from the limited space of successful SAR operations, an ocean of towed boats and loss of life awaits us.

Inaction on national level, lack of means of assisting in certain cases of massive migratory flows, as well as coordination deficiencies in cooperative initiatives have often led to tragic results on the high seas. In other cases, even after incidents of vessels capsizing or returns of refugees and asylum-seekers to their country of origin or the country where they embarked, states continue to disregard their obligations under the law of the sea and the applicable provisions of international refugee law, international human rights law and international criminal law. An important *ex post facto* regulatory parameter concerns the judicial procedure before the national courts of states. In some cases, survivors of deadly events did not have the option of resorting to a court in order to defend their rights and interests, or were never called to the instituted legal proceedings on the

events that led to the capsizing of their boat.

In the Farmakonisi case for instance, the legal framework of search and rescue at sea was not examined by the Prosecutor. Although national legislation on matters of search and rescue exists since 1989,[474] the laws on border patrolling and deterrence operations were the ones taken into consideration by the prosecuting authorities. Furthermore, the competent Greek criminal court convicted a 19-year-old Syrian passenger of the boat to 145 years of prison for trafficking and illegal entry to the country.[475]

It becomes evident that after surviving the sea, a person is not always capable of defending himself or herself and finding justice. Nor is a state or international organization accountable, in the majority of cases, for its acts and omissions in the SAR zone. Even when the responsibility of an international actor can be substantiated, the judicial fora available are not seized on such matters.

Reality has led the research to the scrutiny of the solutions offered in the context of international adjudication. After shedding light on the fictional scenario of a dispute concerning SAR obligations before the ICJ, ITLOS, or special arbitration under article 287 UNCLOS, the infeasibility of the venture reveals the inefficiency of an exclusively state-centric approach on the issue. If, however, the jurisdictional preconditions are met and a state, either the flag state of the capsized ship or a state with enforcement jurisdiction over the ship on the high seas, resorts to the dispute settlement system provided by UNCLOS, ITLOS would be in my opinion the preferable international tribunal. The majority of cases brought before the Tribunal comprise applications for prompt release of vessels and applications for provisional measures orders. Consequently, one could argue that a Court with long-lasting experience in disputes concerning the law of the sea would be adept at deciding upon issues of states obligations to rescue on the high seas. However, in my opinion, the time limits for completion of steps in the proceedings before ITLOS, the specialized character of the Tribunal and the content of its latest advisory opinion on the 'due diligence' obligations of states in the law of the sea, are the decisive criteria in this regard.

Departing from the idea of such an international dispute, without setting aside the SAR rules under the law of the sea, human rights bodies constitute the next possible

[474] The SAR Convention was ratified by Greece with law N. 1844/1989 and amended by the Presidential Decree 201/2000

[475] Λ Γιάνναρου, *145 έτη φυλάκισης σε Σύρο για το Φαρμακονήσι*, Kathimerini (7 February 2015) available online at http://www.kathimerini.gr/802514/article/epikairothta/ellada/145-eth-fylakishs-se-syro-gia-farmakonhsi (accessed 6 January 2016)

solution. Through a brief examination of the ECtHR case-law, it becomes evident that an unassisted survivor of a shipwreck in the Mediterranean has the prerogative of resorting to the only court on regional level that has dealt with incidents in the context of SAR operations. As macabre as it may be to localize the most advantageous, from the jurisdictional point of view, place of capsizing, the ECtHR jurisprudence reinforces the protection of persons in need of assistance in the field of human rights. The application of human rights provisions does not entail though, the needlessness of the law of the sea provisions. Article 98 UNCLOS as well as the SAR Convention and the UN Migrants Smuggling Protocol have been taken into consideration by the Court in order to define the meaning of the right to life in the context of operations on the high seas. Nonetheless, even the ECtHR operates in an area with realistic limits, which in cases related to SAR obligations become more strict than usual.

The political dimension of SAR operations at sea, evident in the argumentation of connecting SAR operations to border patrolling and deterrence operations as well as the implication of actors orientated to police and security activities, imposes certain *termina* on the international judiciary. SAR operations on the high seas relate *de facto* to issues of national sovereignty. Disembarkation of the survivors to a country's soil, provision of equipment and personnel for the rescue of TCNs, cooperation with neighboring coastal states and delimitation of SAR zones in fear of exacerbating existing territorial disputes, figure among relevant factors. The political dimension can be detected, in my opinion, in the ECtHR's hesitancy towards direct assumption of responsibility by states in case of a breach of SAR obligations.

The aforementioned pragmatic obstacles as well as the fact that an important institution in the field of SAR operations in the Mediterranean has been neglected so far, highlight the significant role that the ECJ can play in the field of enforcing SAR obligations on states.

This is an intricate issue however. Under the argumentation concerning the lack of transparency in the case of Frontex and the so-called diplomatic deficit of the EU, it is often stressed that the agency is not held accountable for its actions. Instituting proceedings before the ECJ would certainly shed light on the issue. Should an answer be given by the Court, a decision would provide the debate on the role of Frontex with important information on the agency's obligations, legal character of activities in the context of SAR operations and accountability for its acts. Taking into account the political concerns of states when it comes to the agency's activities and the implication of national

board guards, such a case would not be brought by a state before the Court. Consequently, an action for damages for non-contractual liability of the EU, instituting proceedings after an individual's initiative would be the most interesting and enlightening judicial scenario in the contemporary context of operations in the Mediterranean Sea.

The role of individuals in international adjudication has evolved in past decades. The research paper examined the possibility of extending their role beyond the human rights area, where individuals are the leading actors. Although not unlimited in options, the ensemble of international judicial avenues available to persons who survived a situation of distress at sea goes farther from its current status. The judicial review of cases concerning SAR obligations at sea on regional level has already contributed to their implementation by states, through the consequent adaptation of national migration and border control policy. However, the same cannot be said as far as international organizations, such as NATO, and institutions including the EU are concerned. Whether the ECJ will be seized on the matter and play this role of pivotal importance in the future, will be a decisive factor in the discussion on the protection of those crossing the Mediterranean in search of a safe land.

BIBLIOGRAPHY

Books

Ροζάκης Χρήστος, *Το Δίκαιο της Θάλασσας και η Διαμόρφωσή του από τις Διεκδικήσεις των Παράκτιων Κρατών* (1η έκδοση, Εκδόσεις Παπαζήση, 1976)

Χριστιανός Βασίλειος, *Συνθήκη ΕΕ και ΣΛΕΕ: Κατ' άρθρο ερμηνεία* (1η έκδοση, Νομική Βιβλιοθήκη, 2012)

Amerasinghe Chittharanjan Felix, *Local Remedies in International Law* (3rd edition, Cambridge University Press, 2004)

Arnull Anthony, *The European Union and its Court of Justice* (2nd edition, Oxford University Press, 2006)

Brownlie Ian, *Principles of Public International Law* (4th edition, Clarendon Press, 1990)

Curtin Deirdre, *Executive Power of the European Union* (1st edition, Oxford University Press, 2009)

Davies Sara, *Legitimizing Rejection: International Refugee Law in Southeast Asia* (1st edition, Martinus Nijhoff Publishers, 2008)

Dupuy René-Jean and Vignes Daniel, *A Handbook on the New Law of the Sea* (1st edition, Martinus Nijhoff Publishers, 1991), Vol.1, p.420-421

Chandrasekhara Rao P And Rahmatullah Khan, *The International Tribunal for the Law of the Sea: Law and Practice* (1st edition, Kluwer Law International, 2001)

Churchill Robin Rolf & Lowe Alan Vaughan, *The Law of the Sea* (3er edition, Manchester University Press,1999)

Colombos John, *International Law of the Sea* (1st edition, Longman Green & Co., 1954)

Colombos John, *The International Law of the Sea* (6th edition, Longmans 1967)

Dupuy René Jean and Vignes, *A Handbook on the New Law of the Sea* (1st edition, Martinus Nijhoff Publishers, 1991)

Foster Michelle, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (1st edition, Cambridge University Press, 2007)

Goodwin-Gill Guy, *The Refugee in International Law* (1st edition, Oxford University Press1983)

Karaman Igor, *Dispute Resolution in the Law of the Sea* (1st edition, Martinus Nijhoff Publishers, 2012)

Klein Natalie, *Dispute Settlement in the UN Convention on the Law of the Sea* (1st edition, Cambridge University Press, 2005)

Kronenberger Vincent, D'Alessio Maria Teresa, Placco Valerio, *De Rome à Lisbonne : les juridictions de l'Union européenne à la croisée des chemins* (1st édition, Editions Bruylant, 2013)

Lauterpacht Hersch, *International Law: A Treatise by L. Oppenheim* (7th edition, Longmans Green & Co., 1948)

Mackenzie Ruth, Romano Cesare, Shany Yuval, Sands Philippe, *The Manual on International Courts and Tribunals* (2nd edition, Oxford University Press, 2010)

Meyers H, *The nationality of Ships* (1st edition, Martinus Nijhoff, 1967)
Milanovic Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (1st edition, Oxford University Press, 2011)

M.H Nordquist, *United Nations Convention on the Law of the Sea 1982: A commentary* (3rd edition, Martinus Nijhoff Publishers 1995)

Papastavridis Efthymios, *The Interception of Vessels on the High Seas; Contemporary Challenges to the Legal Order of the Oceans* (1st edition, Oxford: Hart, 2013)

Piris Jean-Claude, *The Lisbon Treaty: A Legal and Political Analysis* (1st edition, Cambridge University Press, 2010)

Quoc Dinh Nguyen, *Droit International Public* (2nd edition, Librairie Générale de Droit et de Jurisprudence, 1975)

Shany Yuval, *The Competing Jurisdictions of International Courts and Tribunals* (1st edition, Oxford University Press, 2003)

Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (1st edition, Springer, 2007)

Chapters in books

Gavouneli Maria, Mediterranean Challenges: Between Old Problems and New Solutions, The International Journal of Marine and Coastal Law, Vol. 23,pp 477-497 (2008); E. Raftopoulos and M.L.McConnell, *Contributions to international environmental negotiation in the Mediterranean context*, MEPIELAN Studies in International Environmental Law and Negotiation no. 2 (Ant. N. Sakkoulas Publishers, Athens 2004)

Gavouneli Maria, From Uniformity to Fragmentation? The Ability of the UN Convention on the Law of the Sea to Accommodate New Uses and Challenges, Chapter 8, 205-234 at p.207 from A Strati, M Gavouneli & N Skourtos (editors), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (1st edition, Martinus Nijhoff Publishers, 2006)

Goodwin-Gill, The Extraterritorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction in B de Chazournes and Kohen (eds), *International Law and the Quest for Implementation* (1st edition, Brill, 2010)

Hobbing Peter, The Management of the EU's External Borders from the Customs Union to Frontex and E-Borders in Elspeth Guild, Sergio Carrera & Eggenshwiller Alejandro (eds.) *The Area of Freedom, Security and Justice Ten Years on Successes and Future Challenges under the Stockholm Programme* (1st edition, Centre for European Policy Studies, 2010)

Kalin Walter, Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond, Chapter 10.1, pp. 613-638, in E Feller, V Turk and F Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003)

Lauterpacht Elihu and Bethlehem Daniel, The scope and content of the principle of non-refoulement: Opinion in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (1st edition, Cambridge University Press, 2003)

Mensah Thomas, The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law, p.81-94, in D. Vidas & W. Ostreng (eds.), *Order for the Oceans at the Turn of the Century* (1st edition, The Fridtjof Nansen Institute, 1999)

Nascimbene Bruno and Pascale Alessia, Adressing Irregular Immigration Through Criminal Penalties: Reflections on the Contribution of the ECJ to Refining and Developing a Complex Balance, in N. Boschiero, T. Scovazzi, C. Pitea, C.Ragni, *International Courts and the Development of International Law, Essays in Honour of Tullio Treves* (1st edition, Springer 2013)

Papanicolopulu, Irini, A missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea, pp. 387-404 in Kwon, M-S., C.Schofield and S. Lee (eds.), *The Limits of Maritime Jurisdiction* (1st edition, Martinus Nijhoff)

Papanicolopulu Irini, International Judges and the Protection of Human Rights at Sea, in N. Boschiero, T. Scovazzi, C. Pitea, C.Ragni (eds), *International Courts and the Development of International Law, Essays in Honour of Tullio Treves* (1st edition, Springer, 2013)

Papastavrids Efthymios, The EU and the Obligation of Non-Refoulement at Sea, pp 234-260, Chapter 10 in F Ippolito and S Trevisanut, *Migration in the Mediterranean: Mechanisms of International Cooperation* (1st edition, Cambridge University Press, 2016)

Pascale Alessia, Exceptional Duties to Admit Aliens' in Sir Plender Richard, *Issues in International Migration Law* (1st edition, Brill Nijhoff Publishers, 2015)

Articles and Working Papers

Akehurst Michael, *Jurisdiction in International Law*, British Yearbook of International Law, Volume 46, p. 145-257, (1975)

Alan Arthur, *The Duty to Render Assistance in the Satellite Age*, *California Western International Law Journal*, Vol. 36, No. 2, 377-400 (2006)

Allen Craig, *Australia's Tampa incident: the convergence of international and domestic refugee and maritime law in the Pacific Rim*, Pacific Rim Law & Policy Journal, Vol.12 No 1, p. 97-108 (2003)

Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, The Yale Journal of International Law, Volume 37, pp. 433-461 (2012)

Anderson Andrew, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, Journal of Maritime Law and Commerce, Volume 13, p. 323-336 (1982)

Anderson Edwin, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternative*s, Tulane Maritime Law Journal, Volume 29, p. 150-57 (1996)

Barnes Richard, *Refugee Law at Sea,* The International and Comparative Law Quarterly, Volume 53, No 1, pp. 47-77 (2004)

Bennett Allyson, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the*

Drug Trafficking Vessel Interdiction Act, The Yale Journal of International Law, Vol.37, 433-361 (2012)

Boyle Francis Anthony, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, International and Comparative Law Quarterly, Vol 46, 38-79 (1997)

Carrera Sergio, De Somer Marie and Petkova Bilyana, *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*, CEPS Paper in Liberty and Security in Europe, No 49 (August 2012)

Churchill Robin, *Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2010*, The International Journal of Marine and Coastal Law 26 (2011) 495-523

Davies Martin, *Obligations and Implications for ships encountering persons in need of assistance at sea*, Pacific Rim Law & Policy Journal Association, 109-141, (2003)

Eckes Christina, *International Law as Law of the EU: The Role of the Court of Justice, Centre for the Law of EU External Relations*, Cleer Working Papers 2010/6 (2010)

Freidell Steven, *The Future of Maritime Law in the Federal Courts; A Faculty Colloquium: Salvage, Journal of Maritime Law & Commerce*, Vol.31, 311 (2000)

Gavouneli Maria, *Mediterranean Challenges: Between Old Problems and New Solutions', The International Journal of Marine and Coastal Law*, Vol. 23, 477-497 (2008)

Goldenziel Jill, *When Law Migrates: Refugees in Comparative International Law, Boston University School of Law*, Research Paper (23 July 2015)

Hathaway James and Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence*, University of Michigan Law School Scholarship Repository, Law and Economics Working Papers, Paper 106 (2014)

Goodwin-Gill Guy, *Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from the South pacific*, Pacific Rim Law & Policy Journal Association, Vol.12, No.1, 23-47 (2003)

Jason Patent, *No Duty to Save Lives, No Reward for Rescue: Is that Truly the Current State of International Salvage Law?,* Annual Survey of International and Comparative Law, Vol. 12, Issue 1, Article 6, 87-139 (2006)

Klein Natalie, *Assessing Australia's Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*, Melbourne Journal of International law, Volume 15, pp1-30 (2015)

Long P, *The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea*, Buffalo Law Review. 591-628 (2000)

Moreno-Lax Violeta, *Seeking asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, International Journal of Refugee Law, (2009)

Moreno-Lax Violeta, *Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?,* Human Rights Law Review, Volume 12, pp.574-598 (2012)

Noyes John, *The International Tribunal for the Law of the Sea*, Cornell International Law Journal, Volume 32, Issue 1, p. 110-142 (1999)

O' Brien Killian, *Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem*, Goettingen Journal of International law, Volume 3, pp. 715-732 (2011)

Papastavridis Efthymios, *Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law*, Syracuse Journal of International Law & Commerce 145, 160-181 (2009)

Papastavridis Efthymios, *The 'Left-to-Die Boat' incident of March 2011: Questions of*

International Responsibility arising from the Failure to Save Refugees at Sea, Refugee Law Initiative Working Paper No.1, (October 2013)

Papastavridis Efthymios, *Is there a right to be rescued at sea? A skeptical view, Questions of International Law*, pp17-32 (2014)

Patent Jason, *No Duty to Save Lives, No Reward for Rescue: Is that Truly the Current State of International Salvage Law?* , Vol. 12, Issue 1, Article 6, 87-139 (2006)

Pavan Marianna, *Can/Will Italy be held accountable for its 'push back' policy in relation to international refugee, human rights and European Union Law?,* LSE Migration Studies Unit, Working Paper No.2011/12 (2011)

Rolf Einar Fife, *Elements of Nordic Practice 2006: Norwegian Measures Taken Against Stateless Vessel Conducting Unauthorized Fishing on the High Seas*, Nordic Journal of International Law 301, 302 (2007)

Reuss Matthias, Pichon Jakob, *The European Union's Exercise of Jurisdiction over Classification Societies: An International Law Perspective on the Amendment of the EC Directive on Common Rules and Standards for Ship Inspection and Survey Organisations and for the Relevant Activities of Maritime Administrations*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaoRV 67 2007), 119-144

Trevisanut Seline, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection,* Max Planck Yearbook of United Nations Law, Vol 12, pp 205-247 (2008)

Trevisanut Seline, *Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?* , The International Journal of Marine and Coastal Law, Vol. 25, 523-542 (2010)

Trevisanut Seline, *Is there a right to be rescued at sea? A constructive view, Questions of International Law,* Zoom-In 4, pp3-15 (2014)

Wessel Ramses, *Division of international responsibility between the EU and its member*

states in the area of foreign policy, security and defense policy, Amsterdam Law Forum, Vol 3, No 3 (2011)

Yankov ALexander, *The International Tribunal for the Law of the Sea: Its Place within the Dispute Settlement System of the UN Law of the Sea Convention*, The Indonesian Journal of International and Comparative Law, Volume 37(3), p. 356-371 (1997),

Trevisanut Seline, *Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?* , International Journal of Marine and Coastal Law, Volume 25, pp. 523-542 (2010)

Valérie Vicky Miranda, *Striking a balance Between Norms and Interests in Italian Foreign Policy: The Balkans and Libya*, Instituto Affari Internationali, IAI Working paper 11 (May 2011)

Articles online

M Milanovic, *Extraterritorial Application of Human Rights Treaties: An Overview*, EJIL Talk, (30 November 2011), available online at http://www.ejiltalk.org/extraterritorial-application-of-human-rights-treaties-an-overview/ (accessed 6 January 2016)

F Messineo, *Yet another mala figura: Italy breached non-refoulement obligations by intercepting migrants' boats at sea, says ECtHR*, EJIL Talk (24 February 2012), available online at http://www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/ (accessed 6 January 2016)

L Ankersmit, *Boat refugees, the Democratic Deficit and EU Constitutional Law*, European Law Blog (6 September 2012) available online at http://europeanlawblog.eu/?p=798 (accessed 25 November 2015)

D Guilfoyle and E Papastavridis, *Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea* (Background Paper) (4 March 2014) at p.15, available online http://www.refworld.org/docid/5346438f4.html, (accessed 25 November 2015)

Human Rights Watch, *Greece: Human Rights Watch Submission to the United Nations Committee against Torture* (24 March 2014) available online at https://www.hrw.org/news/2014/03/24/greece-human-rights-watch-submission-united-nations-committee-against-torture (accessed 6 January 2015)

Martin Clark, *CPCF V Minister for Immigration and Border Protection,* The University of Melbourne (28 January 2015), available online at http://blogs.unimelb.edu.au/opinionsonhigh/2015/01/28/cpcf-case-page/ (accessed 6 January 2016)

N Frenzen, *ECHR: Italy's Use of Summary Procedures to Return Tunisian Migrants Constituted Unlawful Collective Expulsion*, Migrants at sea blog (3 September 2015), available online at http://migrantsatsea.org/tag/european-court-of-human-rights/ (accessed 6 January 2016)

Noah Feldman, *Why Europe must help refugees at Sea*, Bloombergview (18 September 2015) available online at http://www.bloombergview.com/articles/2015-09-18/why-europe-must-help-refugees-at-sea (accessed 6 January 2016)

Reports

Special Rapporteur of the ILC, François, ILC, Report on the Regime of the High Seas (Yearbook of 1954)

ILC, Report of the International Law Commission covering the work of its eighth session (23 April-4 July 1956) UN Doc A/5139

UNHCR Reports to GA, Supplement No 12, A/34/12/Add.1 (1979) Official Records of

the UNGA, 34th Session

UNHCR ExCom, Report of the Working Group on Problems Related to the Rescue of Asylum-Seekers in Distress at See (1982)

COWI (Consultancy within Engineering, Environmental Sciences and Economics), 'External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union', Final Report (January 2009)

Report of the Committee on Migration, Refugees and Displaced Persons and Explanatory memorandum by Rapporteur T Strik, 'Lives Lost in the Mediterranean Sea: who is responsible?' (29 March 2012)

Case-law

PCIJ

PCIJ, *The case of S.S. Lotus* (France V Turkey) P.C.I.J. Reports 1927, Series A, No. 10 [1927]

ICJ

ICJ, *Reparation for Injuries case* (Advisory Opinion) ICJ Reports 1949 (11 April 1949)

ICJ, *Nottebohm case* (Liechtenstein V Guatemala), [Judgment of 6 April 1955], ICJ Reports 1955, p.4

ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), ICJ Reports 2002, p.3 [2002] diss. Dissenting Opinion of Mme Van Den Wyngaert

ICJ, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina V Serbia and Montenegro), [Judgment, 26 February 2007], ICJ Reports 2007, p. 43

ICJ, *Pulp Mills on the River Uruguay case* (Argentina V Uruguay), [Judgment, 20 April 2010], ICJ Reports 2010, p. 14

ITLOS

ITLOS, *The M/V 'SAIGA' (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea)

(1999)
ITLOS, *Southern Bluefin Tuna Cases* (Australia V Japan) (Provisional Measures), Order of 27 August 1999
ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, (Advisory Opinion), 1 February 2011, ITLOS Reports 2011
.ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC), Case No. 21 [Advisory Opinion of 2 April 2015]

ECtHR

ECtHR, *Soering v UK*, App no 14038/88 (7 July 1989)
ECtHR, *Loizidou v Turkey* (Preliminary Objections), App no 15318/89 (23 February 1995)
ECtHR, *Rigopoulos v Spain*, App no 37388/97(12 January 1999)
ECtHR, *Bankovic and others v Belgium and others* (Decision on Admissibility), App no 52207/99, (12 December 2001)
ECtHR, *Conca v Belgium*, App no 51564/09 (5 February 2002)
ECtHR, *Salah Sheekh v The Netherlands*, App no 1984/04 (11 January 2007)
ECtHR, *Medvedyev and others v France* (Grand Chamber), App no 3394/03 (29 March 2010)
ECtHR, *Al Saadoon and Mufdhi v UK*, App no 61498/08 (4 October 2010)
ECtHR, *Al-Skeini and others v UK*, App no 55721/07 (7 July 2011)
ECtHR, *Hirsi Jamaa and Others v Italy* [Grand Chamber], App no 27765/09 (23 February 2012)
ECtHR, *Ilbeyi Kemaloglou and Meriye Kemaloglou v Turkey,* App no 19986/06 (10 July 2012)
ECtHR, *Jabari v Turkey*, App no 40035/98 (11 July 2012)
ECtHR, *Khlaifia and others v Italy, App no 16483/12* (1 September 2015)

National Courts

US Supreme Court, Lauritzen v Larsen (1953) 345 US 571

US Supreme Court, Sale, Acting Commissioner, INS v. Haitian Centers Council (1993)

Pamuk and others, Italy, Crotone Court (27 September 2001), 84 Rivista di Diritto Internationale (2001) p.1155-9

High Court of Australia, CPCF V Minister for Immigration and Border Protection (Judgement) (2015)

Online sources

UN, http://www.un.org/

UNHCR, http://www.unhcr.org/cgi-bin/texis/vtx/home

Refworld, http://www.refworld.org/

IMO, http://www.imo.org/en/Pages/Default.aspx

Council of Europe, http://www.coe.int/en/

Frontex, http://frontex.europa.eu/

ICJ, http://www.icj-cij.org/

ECJ, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm

European Commission, http://ec.europa.eu/

ECtHR, http://hudoc.echr.coe.int/eng

Eurostat, http://ec.europa.eu/eurostat

Hellenic Ministry of Justice,
http://www.ministryofjustice.gr/site/en/Leadership/Greetings.aspx

Hellenic Coast Guard, http://www.hcg.gr/

Amnesty International, https://www.amnesty.org/en/

Human Rights Watch, https://www.hrw.org/

EJIL Talk, http://www.ejiltalk.org/

BBC, http://www.bbc.co.uk/

Economist, http://www.economist.com/

Kathimerini, http://www.kathimerini.gr/

Republica, http://www.repubblica.it/