

PROTECTION OF MIGRANTS AT SEA



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Fishing boat off the coast of Dili, Timor-Leste.
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LIST OF ACRONYMS

| | |
|----------------|--|
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| EEZ | exclusive economic zone |
| Frontex | European Border and Coast Guard Agency |
| HRC | United Nations Human Rights Committee |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Social, Economic and Cultural Rights |
| ICRMW | International Convention on the Protection of the Rights of All Migrant Workers and their Families |
| ICS | International Chamber of Shipping |
| IMO | International Maritime Organization |
| IOM | International Organization for Migration |
| MLC | Maritime Labour Convention |
| NATO | North Atlantic Treaty Organization |
| OHCHR | Office of the United Nations High Commissioner for Human Rights |
| RCC | rescue coordination centre |
| SAR | search and rescue |
| SOLAS | International Convention for the Safety of Life at Sea |
| SRR | search and rescue region |
| STCW-F | International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel |
| STCW-S | International Convention on Standards of Training, Certification and Watchkeeping for Seafarers |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNCRC | United Nations Convention on the Rights of the Child |
| UNGA | United Nations General Assembly |
| UNHCR | United Nations High Commissioner for Refugees |
| UNHRC | United Nations Human Rights Council |
| UNODC | United Nations Office on Drugs and Crime |
| UNTOC | United Nations Transnational Organized Crime Convention |



INTRODUCTION

In September of 2015, images of three-year old Aylan Kurdi lying lifeless on the shores of the Mediterranean Sea shook the conscience of the world. Aylan became a symbol of the plight of thousands of people forced to risk such a fate to escape threats at home. These images shone a light on the failure of the international community to rally in support of refugees, and raised a multitude of questions about how we – being members of that community – could have prevented it.

This phenomenon is not a new one; people have long turned to the sea in flight from poverty, conflict, persecution and oppression. In the last century, European refugees fled across the Mediterranean to seek asylum in North Africa and the Middle East. Following World War II, thousands embarked on irregular migration journeys from Europe attempting to reach the Palestinian Territories. These included the 4,515 people on the ill-fated SS *Exodus*, most of whom were ultimately deported back to Germany.¹ Following the Viet Nam War in the 1970s and 1980s, Vietnamese “boat people” took to rickety boats in a bid to find a new life elsewhere in the region, some even sailing as far away as Australia. In the same era, Albanians, Cubans and Haitians were drawn to the United States of America in the hope of better opportunities across the sea. More recently, Eritreans, Ethiopians and Somalis from the Horn of Africa have crossed the Gulf of Aden towards Yemen, and persecuted groups in Myanmar and Bangladesh have set off in search of safety on the other side of the Bay of Bengal and the Andaman Sea, many of them ending up in situations as dangerous as those that they have left. More recently, unprecedented numbers of sub-Saharan Africans and Syrians have taken to the Mediterranean and Aegean Seas in a bid to find safety and opportunity on the other side.

Meanwhile, criminals have become increasingly adept at taking advantage of people's need to move and their limited choices for doing so, to generate enormous illicit profits by facilitating unsafe migration. Migrant smuggling has been the focus of significant international laws and policies owing to the particular dangers posed to migrants smuggled in perilous conditions at sea. Smuggling by sea has been detected in several regions, including the Gulf of Aden, the Pacific Ocean, the Bay of Bengal, the Andaman Sea and the Mediterranean Sea. Smugglers often increase their profits by reducing safety and keeping conditions poor on board, which usually means cramming people into unseaworthy, disposable vessels. To minimize risks to themselves, the profit-makers often do not pilot the smuggling vessels themselves, but instead recruit migrants to captain or crew boats in lieu of a smuggling fee (or a discount on it) or some other incentive. Discounts may also be given to those who undertake sea crossings in winter, or under treacherous conditions where there are slim chances of survival.²

¹ See, for instance: I. Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge University Press, New York, 2016), pp. 37–38; and Jewish American Society for Historic Preservation (JASHP), ““Doing the Right Thing”: S.S. Exodus”, JASHP website, International Programs section. Available from www.jewish-american-society-for-historic-preservation.org/internationalprograms/exodusmemorialisrael.html

² M. McAdam, “Smuggling of Migrants by Sea”, issue paper (United Nations Office on Drugs and Crime, Vienna, 2011), pp. 30–31. Available from www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf. For more on sea-smuggling modus operandi to Europe and criminal profits, see, for instance: European Commission, DG Migration and Home Affairs, “A study on smuggling of migrants: Characteristics, responses and cooperation with third countries”, final report (European Migration Network, Dublin, 2015), pp. 39–40 and 44–45. Available from www.emn.lv/wp-content/uploads/study_on_smuggling_of_migrants_final_report_master_091115_final_pdf.pdf

In the case of lucrative smuggling across the Mediterranean, small vessels depart from North African shores in a bid to make the entire journey. Alternatively, smugglers may transfer migrants from larger vessels onto smaller ones for the final stretch of the journey, deliberately place lives in danger and launch a distress call to the rescue service of the concerned European State so as to trigger a rescue operation.³ The increasingly callous methods used by smugglers – and the rising number of migrants attempting these crossings – have resulted in an unprecedented rise in the number of deaths at sea. The International Organization for Migration (IOM) estimates that at least 5,400 people died trying to cross borders in 2015, 3,784 of whom in the Mediterranean Sea alone. In 2016, 5,098 migrants lost their lives in the Mediterranean, with another 3,119 in 2017.⁴

While significant efforts have been made to strengthen the apparatus used to prevent lives from being lost at sea, State practice has also shown a worrying pattern of either failing to carry out rescues, scrambling to prevent people who have been rescued from reaching their territorial waters, or even pushing them back when they do. Such reactions are grounded in an understanding of State sovereignty that focuses on border integrity instead of a more nuanced approach to the notion of statehood and sovereignty in a global community of actors.⁵ Yet it has been argued that in today's globalized world, protection obligations should be considered an important aspect of what State sovereignty entails, rather than something that trespasses upon it. On this point, Mallia (2009) is of the view that such a “mental shift” would mean that:

Rather than the two issues being juxtaposed, however, perhaps what is needed is a mental shift in approach whereby humanitarian principles of protection are considered a facet of sovereignty—not something which hampers a State in the exercise of its sovereign powers, but which helps it in upholding its international obligations. In this way, protection principles will not be considered as exceptions to State sovereignty, to be interpreted as restrictively as possible; rather, [they must be] perceived as an aspect of a State's sovereign powers, [as] humanitarian principles of protection contribute to our understanding of a State.⁶

³ The result in these cases is that it is humanitarian or State rescue services that facilitate the actual border crossing of migrants, raising questions as to whether migrants have illegally crossed a border.

⁴ International Organization for Migration, “Mediterranean”, Missing Migrants website, Regions section. Available from <https://missingmigrants.iom.int/mediterranean> (accessed 6 February 2018).

The figure 3,770 is noted in *Fatal Journeys Volume 2: Identification and Tracing of Dead and Missing Migrants* (IOM, 2016). IOM notes these figures relate to recorded deaths; the actual number is likely to be higher.

⁵ United Nations General Assembly Resolution 2625 of 24 October 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations). Available from www.un-documents.net/a25r2625.htm.

Perceived threats to sovereignty are a key incentive for border control and are commonly referred to by States in justifying actions taken against irregular migration and migrant smuggling. UNGA Resolution 2625 declares thus: “All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements: (a) States are juridically equal; (b) each State enjoys the rights inherent in full sovereignty; (c) each State has the duty to respect the personality of other States; (d) the territorial integrity and political independence of the State are inviolable; (e) each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.”

⁶ P. Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Brill, Boston, 2009), p. 26.

In support of this approach is a significant body of international law obliging States to render assistance and afford protection. Several key points emerge from a study of this framework. The high risk of death is not a deterrent and cannot be the basis of viable policy options.⁷ As the Special Rapporteur on the human rights of migrants has stated: “The priorities should be clear: fighting smuggling operations is less important than saving lives.”⁸

Of course, not all protection gaps are of political design. Indeed, many States are working concerted and conscientiously to save lives at sea, and to protect and assist rescued persons thereafter. But while the law of the sea is a longstanding and entrenched body of international law, confusion in its interpretation and gaps in its application mean that lives are still lost. At the time of its conception in the late nineteenth century and beginning of the twentieth century, international maritime law did not foresee the phenomenon of maritime migration that would later become commonplace in the latter twentieth and early twenty-first centuries. The search and rescue obligations it prescribes, for example, assume that those retrieved are willing or able to return to their home countries. Yet many migrants rescued at sea, far from wanting to return home, have risked their lives to leave their countries and reach another one, whether for political, economic or social reasons.⁹ Whose responsibility rescued persons become in situations where they cannot be returned is not clearly addressed by international law.¹⁰ Even the notion of “distress,” which triggers search and rescue obligations in international law, is one that was borne of another time. Traditionally understood to refer to situations in which vessels were at risk of capsizing due to poor weather conditions or mechanical failure, the term must now also be applied to situations in which people knowingly place themselves in precarious conditions, for example, by setting out in overcrowded and unseaworthy vessels – even sabotaging their boats to effect a rescue, threatening their own lives in a bid to compel others to save them. Similarly, rules on interception and “hot pursuit” were established to address situations of piracy and slavery in the “Middle Passage” during the time of the trans-Atlantic slave trade, which involved manageably few people.¹¹ They were not created with a view to responding to thousands of people stranded in international waters, as was the case in the Bay of Bengal in May 2015; to those who venture across the vast Pacific Ocean in the hope of safely reaching a small island State;¹² or to those who set off in smuggling vessels from North Africa across the Mediterranean towards Europe, sometimes in so large a

⁷ See, for instance: United Nations Human Rights Council (UNHRC), “Report of the Special Rapporteur on the human rights of migrants, François Crépeau – Addendum 2” (United Nations, Geneva, 2015). Available from www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx

⁸ Ibid.

⁹ The Office of the United Nations High Commissioner for Refugees (UNHCR) reports 362,376 sea arrivals in Europe in 2016; the origins of those people speak to the role that poverty, persecution, violence and conflict play in pushing people towards the sea. (See, for instance: UNHCR, “Mediterranean Situation”, UNHCR Operational Portal website, Situations section. Available from <http://data2.unhcr.org/en/situations/mediterranean>)

¹⁰ P. Mallia, *Migrant Smuggling by Sea*, pp. 96–97.

¹¹ The rules were also intended to enforce policies related to fishing or maritime pollution. The 1926 Convention to Suppress the Slave Trade and Slavery (hereinafter the “Slavery Convention”), signed 25 September 1926 and entered into force 9 March 1927, in Article 1(1) defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” Article 1(2) defines the slave trade as including “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.”

¹² For example, one incident involving 53 individuals, primarily from India and Nepal, who had paid for transit to the United States and were detected near Yap Island by the Federated States of Micronesia. (See, for instance: United Nations Office on Drugs and Crime (UNODC), *Transnational Organized Crime in the Pacific: A Threat Assessment* (UNODC, Vienna, 2016), p. 40.)

number of vessels as to deliberately overwhelm the State coast guard response. The United Nations High Commissioner for Refugees (UNHCR) estimated that more than 1,015,078 people reached Europe by sea in 2015, 84 per cent of whom came from the world's top ten refugee-producing countries.¹³ Figures such as these were unprecedented even during World War II, let alone at the time the law of the sea was drafted.

Against this background, it becomes clear that contemporary mass maritime migration has put the international legal framework under intense pressure and represents one of the most urgent and complex humanitarian challenges of our epoch. States are understandably often not clear on and may even dispute their obligations to protect lives in the contexts they encounter migrants at sea. Nor are they equally equipped with the capacity and resources required to meet their obligations in areas of the ocean for which they are responsible. The allocation and assumption of responsibility in the maritime context is further complicated by the number of actors that may be involved. Two or more States are often involved, raising questions of positive or negative conflicts of jurisdiction and uncertainty regarding the applicable rights regime and who is responsible for protecting persons. Consider the following example: A vessel with irregular migrants on board flying the flag of State A may find itself in distress on the high seas near the shores of State B, but in the search and rescue region for which State C is responsible. The vessel in distress itself may be on its way from a transit country, State D, to State E (the neighbouring country of State B), which is the closest port of call. Moreover, a ship registered to State F may be in the vicinity of the vessel in distress and be the first to react to the distress signal. Additionally, the migrants on board the vessel in distress have the nationality of State G, as well as of State D. Finally, the rescuing ship may decide to disembark those rescued on the shores of State H. In this scenario, no less than eight States have legal links to the incident and potentially have jurisdiction depending on the details of the case. Engaging with and protecting migrants then becomes a multi-actor undertaking that requires clear and detailed legal guidance and effective coordination and cooperation. Without such a concerted effort, transnational criminal networks can continue to exploit the confusion to profit from smuggling people by sea, with little risk of being detected and prosecuted. Answers to unresolved issues of international law do not come easily, but it is increasingly clear that the more time is spent avoiding the responsibility of filling gaps in the law, the more answerable the international community becomes for the deaths that happen in those spaces. In the meantime, action to protect people must be based on basic notions of morality and humanity where it finds no basis in law.

¹³ See, for instance: "Over one million sea arrivals reach Europe in 2015"; United Nations Refugee Agency website, News section, 30 December 2015. Available from www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html

Adding to these complexities in protection is the fact that migrants are not only encountered at sea while they are in the process of migrating. They may also be encountered in situations where they are being exploited or otherwise harmed in ways that raise acute protection needs and trigger corresponding obligations for States. Global awareness has risen in recent years about the exploitation of fishers and seafarers – including the migrants among them – in the oceans of Asia, Africa, Europe and Oceania and in the international waters beyond.¹⁴ Under international maritime law, distinctions are drawn between who is a fisher and who is a seafarer, the type of work that each performs, and the laws and regulations that apply to each. Fishing vessels and their employees are often excluded from protection by legal instruments because the treaties or protocols concerned exclude vessels below a certain gross tonnage, length or manning capacity, which by far leave out fishing vessels.¹⁵ In addition, some of those instruments apply only to registered seafarers rather than migrants, who are often in irregular situations and may have been forced to work on cargo ships. The labour violations and exploitation of migrants – including the children among them – often amount to extreme abuses that call into play other legal regimes, including international human rights law. Indeed, largely because of its harsh and hidden setting at sea, exploitation in the fishing industry is considered to be among the most severe of all sectors.¹⁶

The situations in which migrants are encountered at sea call into play complex and often overlapping international legal obligations. The challenges of fulfilling these obligations are not arguments to suggest that such obligations are of fading relevance. Rather, they offer a foundation for and impetus to collectively sharpen relevant instruments in confronting the scale and scope of protection needs today.

¹⁴ Migrants are acknowledged as being particularly vulnerable to exploitation in the fisheries sector. (International Labour Organization (ILO), *Caught at Sea: Forced Labour and Trafficking in Fisheries* (International Labour Office, Geneva, 2013), pp. 47–48.)

¹⁵ Such distinctions are made in, for example, Article 1 of the 1949 and 1970 Accommodation of Crews Conventions; Chapter I, Regulation 3 of the International Convention for the Safety of Life at Sea (SOLAS); Article 1(4) of the 1976 Merchant Shipping Convention; Article II of the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW-S Convention); and Article II[4] of the 2006 Maritime Labour Convention. However, some legal instruments allow State authorities to expand the scope of rules applicable to fishing boats and fishers. These include Article 1(2) of the 1987 Health Protection and Medical Care (Seafarers) Convention; Article 1(2) of the 1996 Recruitment and Placement of Seafarers Convention; and Article 1(3) of the 2003 Seafarers' Identity Documents Convention. Other legal instruments are specifically concerned with fishing boats and fishers, such as the 1995 International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F Convention); the 2007 Work in Fishing Convention; and the Cape Town Agreement of 2012.

¹⁶ See, for instance: IOM, London School of Hygiene and Tropical Medicine and Anesvad Foundation, *Health and Human Trafficking in the Greater Mekong Subregion: Findings from a Survey of Men, Women, and Children in Thailand, Cambodia and Viet Nam* (IOM, Geneva, 2014); and IOM and Coventry University, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry* (IOM, Geneva, 2016), p. 34.

PART

1

Moon boat on the shores of Cox's Bazar, Bangladesh.
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JURISDICTION AND MARITIME ZONES

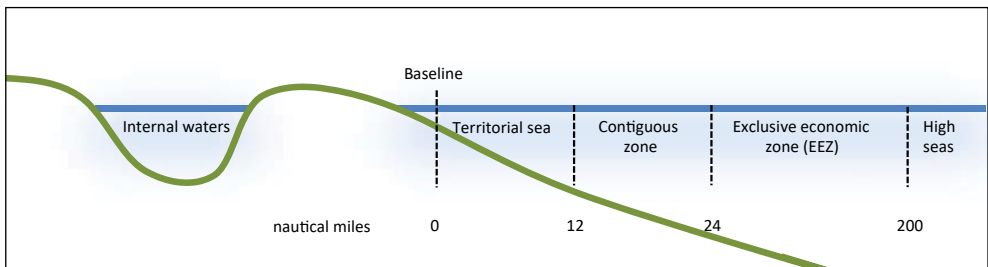


The question of which State has protection obligations to an individual migrant is determined by jurisdiction, which concerns what a State may do (i.e. its rights), as well as what it is required to do (i.e. its duties)¹⁷ “under international law to regulate the conduct of natural and juridical persons.”¹⁸ It determines all government activities – from its powers to make laws (prescriptive jurisdiction) to its power to take executive or judicial action to implement those laws (enforcement or adjudicative jurisdiction). Jurisdiction is “territorial” and, in the maritime context, is largely determined by maritime zones; this means that a State can only prescribe, enforce or adjudicate within its territorial waters.

A note on enforcement jurisdiction in the smuggling of migrants at sea

Where migrants are smuggled at sea, the conduct that is criminalized by the Protocol against the Smuggling of Migrants by Land, Sea and Air (hereinafter the “Migrant Smuggling Protocol”) is “smuggling of migrants.” Under the Protocol, it is not a crime to be smuggled. Where States are not party to the United Nations Convention against Transnational Organized Crime (UNTOC) and the Migrant Smuggling Protocol, and without any other treaty provision to assert jurisdiction, migrants themselves should not be subject to detention or arrest where they have not entered territories of the coastal State and, therefore, are not in violation of immigration laws. States should refrain from arresting persons, but should carry out rescue where the vessel is in distress or the persons on board are seeking asylum.¹⁹

Figure 1: Maritime zones under UNCLOS



¹⁷ U. Khaliq, “Jurisdiction, ships and human rights treaties”, in: *Jurisdiction Over Ships: Post-UNCLOS Developments in the Law of the Sea* (H. Ringbom (ed.)) (Brill Nijhoff, Leiden, 2015), p. 330.

¹⁸ J. Crawford, *Brownlie’s Principles of Public International Law* (Eighth edition, Oxford University Press, New York, 2012), p. 456.

¹⁹ E. Papastavridis, “Combating transnational organized crime at sea”, issue paper (UNODC, Vienna, 2013), p. 23. Available from www.unodc.org/documents/organized-crime/GPTOC/Issue_Paper_-_TOC_at_Sea.pdf

UNCLOS is the key treaty relevant to jurisdiction at sea.²⁰ UNCLOS is silent on the protection of migrants beyond basic humanitarian rescue provisions, but is rather concerned with the delineation of the sea into maritime zones and the areas of State responsibility within each.²¹ Maritime zones are measured from the State's baselines (i.e. the low-water line), those zones being:²²

- (a) where freedom of navigation and exclusive flag State jurisdiction apply:
 - (i) high seas;
 - (ii) exclusive economic zone (EEZ);
 - (iii) contiguous zone;
- (b) where a State has exclusive territorial jurisdiction:
 - (i) territorial sea;
 - (ii) internal waters.

Table 1: Maritime zones and applicable regimes

| Maritime zone | Description | Applicable regime |
|-------------------------|--|--|
| High seas | All parts of the sea not included in a State's internal waters, territorial sea, contiguous zone or exclusive economic zone | Freedom of navigation and exclusive jurisdiction of the flag State |
| Exclusive economic zone | The area beyond and adjacent to the territorial sea which does not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured | |
| Contiguous zone | The area adjacent to the territorial sea which cannot extend beyond 24 nautical miles from the same baselines from which the limits of the territorial sea (also often referred to as "territorial waters") are measured | |

²⁰ Prior to the entry into force of UNCLOS, key treaties were the 1958 Geneva Conventions, namely: the Convention on the Territorial Sea and the Contiguous Zone (signed 29 April 1958 and entered into force 10 September 1964); the Convention on the Continental Shelf (signed 29 April 1958 and entered into force 10 June 1964); the Convention on the High Seas (signed 29 April 1958 and entered into force 30 September 1962; hereinafter "the High Seas Convention"); and the Convention on Fishing and Conservation of the Living Resources of the High Seas (signed 29 April 1958 and entered into force 20 March 1966). Many provisions of these instruments were incorporated into UNCLOS.

²¹ UNCLOS Article 309 states that the Convention is to be accepted in its entirety, with any and all reservations strictly prohibited.

²² According to UNCLOS Article 5, the baseline is taken to be the "low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

| Maritime zone | Description | Applicable regime |
|-----------------|--|------------------------------------|
| Territorial sea | The adjacent belt of sea of a coastal State which extends up to 12 nautical miles from the baselines (also often referred to as “territorial waters”) | Exclusive territorial jurisdiction |
| Internal waters | The waters lying landward of the baselines from which the territorial sea is measured, and includes a State’s harbours and ports, internal gulfs, bays, estuaries, straits, lakes and rivers | |

Key principles of maritime zones

Gallagher and David (2014) summarize the key principles of maritime zones as follows:

- (a) States have the capacity to prevent and punish breaches of their immigration laws and regulations within their territorial seas and (with some qualifications) their contiguous zone.
- (b) States must respect the right of others States’ vessels to innocent passage.
- (c) Flag States enjoy exclusive jurisdiction over vessels on the high seas, subject only to limited exceptions, namely, the “right to visit” and the right of “hot pursuit.”²³

These and other principles are explored in greater detail in the succeeding paragraphs.²⁴

Extraterritorial jurisdiction is the principle that allows States to assert jurisdiction beyond their territorial waters (i.e. their territorial seas) and is fundamental to protecting migrants at sea. UNCLOS codifies the principle with two key criteria: (a) the flag of the vessel that the State is engaging and (b) the maritime zone to which the act of jurisdiction pertains.²⁵

The flag flown by a given ship, thus giving it “nationality,” establishes the link between the State and the migrant involved. (Just like natural persons or legal entities such as corporations, each ship at sea has a nationality.)²⁶ Article 94 of UNCLOS details the responsibilities that arise for a flag State to “effectively exercise its jurisdiction and control in administrative, technical and social matters” over ships flying its flag.²⁷ Ships can fly only one flag at a time, and with

²³ Added to these exceptions may be situations where universal jurisdiction applies, as discussed in the succeeding paragraphs.

²⁴ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling* (Cambridge University Press, New York, 2014), p. 273.

²⁵ IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea). Available from [www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MS.C.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MS.C.167(78).pdf)

²⁶ UNCLOS Articles 90–92 mirror provisions found in Articles 4–6 of the High Seas Convention. There must be a genuine link between the ship and the flag State, which, at a minimum, means that a ship is registered in the registers (whether closed or open) of a State..

²⁷ In practice, this means that the flag State applies shipping and maritime laws, as well as criminal and other laws, to ships flying its flag. Certain measures must, therefore, be taken with respect to life at sea, including the seaworthiness of the ship and labour conditions on board. (D. Rothwell and T. Stephens, *The International Law of the Sea* (Second edition, Hart Publishing, Oxford, 2016), p. 169.)

some exceptions, a State always has jurisdiction over vessels flying its flag, including over any crimes committed on board. However, the flag State is not the only State responsible for rights abuses that occur on board; the situation gets more complicated where the ship flies no flag, is flying a “flag of convenience,” or is in a certain maritime zone.²⁸ Vessels at sea that are transporting migrants with irregular legal statuses are often flagless because they do not fulfil basic standards of seaworthiness to be allowed to fly a flag, or because the absence of a flag hampers deportation, or because smugglers have an interest in not being detected by law enforcement.²⁹ Failing to fly a flag, or losing the right to invoke it, has important legal consequences. Flagless vessels do not have rights, freedoms and protections under international law, which means that States can claim de jure jurisdiction over and intercept them.³⁰

1.1. HIGH SEAS

“I was not brave enough to return home with the export ship because I heard that they threw Myanmar nationals to the sea once they were on the waters.”³¹

– Trafficked fisherman

The high seas consist of all parts of the sea not included in a State’s internal waters, territorial sea, contiguous zone or exclusive economic zone.³²

1.1.1. Applicable regimes: Freedom of navigation and exclusive jurisdiction of the flag State

The fundamental principle applicable to this maritime zone is that of “freedom of the high seas,” described in Article 87 of UNCLOS as the freedom of all ships to use the high seas, provided that they do so in conformity with international law.³³ The high seas remain for the benefit of all States; no State can acquire sovereignty over any part of the high seas. Accordingly, no State, in principle, has legal basis for interfering with foreign vessels traversing the high seas. On the contrary, the right to exercise either prescriptive or enforcement jurisdiction over a ship on the high seas lies exclusively with the flag State. This rule, known as “exclusive jurisdiction of the flag State,” is expressed thus in UNCLOS: “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided in international

²⁸ A “flag of convenience” is a flag of a State that avoids ratifying international treaties and/or does not enforce its legal obligations over vessels flying their flag. Convenient flag States may be those that have not ratified the Migrant Smuggling Protocol and other treaties relevant to the protection of migrants at sea.

²⁹ F. Jaensch, “Migrants and refugees at sea”, Master of laws thesis, Ghent University (Ghent, 2012), p. 8.

³⁰ De jure jurisdiction is sufficient evidence for de facto control to trigger human rights obligations. (A. Klug and T. Howe, “The concept of State jurisdiction and the applicability of the non-refoulement principle to extraterritorial interception measures”, in: *Extraterritorial Immigration Control: Legal Challenges* (B. Ryan and V. Mitsilegas (eds.)) (Martinus Nijhoff Publishers, Leiden, 2010), p. 95.)

³¹ IOM and Coventry University, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry* (IOM, Jakarta, 2016), p. 84.

³² The “high seas” are defined by Article 1 of the High Seas Convention as “all parts of the sea that are not included in the territorial sea or in the internal waters of a State” and by Article 86 of UNCLOS as “all parts of the sea that are not included in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”

³³ United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982, Article 87. Available from www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”³⁴ Among other duties prescribed in UNCLOS, States must effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying their flag.³⁵ They should also take all measures necessary to ensure safety at sea.³⁶ The specific exercise of jurisdiction and control is not only prescribed in the law of the sea, but also in other international instruments that provide either obligatory (i.e. required as a duty) or discretionary (i.e. to be enjoyed as a right) legal grounds to exercise jurisdiction in the context of protection at sea.³⁷ The flag State can give its consent to another State to take law enforcement action against a vessel flying its flag, or give consent to some actions (such as boarding), while withholding consent for other actions (such as arrest).³⁸

The *SS Lotus* case: Exclusive jurisdiction of the flag State

The landmark 1927 *Case of the SS Lotus (France v. Turkey)* (hereinafter the “*SS Lotus* case”) involved the collision on the high seas between two steamers, namely, the French *SS Lotus* and the Turkish *SS Boz-Kourt*. The Permanent Court of International Justice stated that, except in limited instances expressly recognized by international law, ships are not subject to any authority but that of their flag State; “what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.”³⁹ However, the Court did impose limits on this extraterritorial enforcement jurisdiction:

. . . vessels on the high seas are subject to no authority except that of the State whose flag they fly. [By] virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial

³⁴ UNCLOS, Article 92(1).

³⁵ UNCLOS, Article 94(1) and (2); and the High Seas Convention, Article 6(1). Available from www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf

³⁶ UNCLOS, Articles 94(3) and 94(4)(c).

³⁷ See, for instance: United Nations General Assembly Resolution 55/25 of 15 November 2000 (Convention against Transnational Organized Crime (UNTOC)), Article 15, available from www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC) of 15 November 2000, Article 8, available from www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf; UNCLOS, Article 99; ILO Resolution 188 of 14 June 2007 (Work in Fishing Convention), Article 40, available from www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_208084.pdf; ILO Maritime Labour Convention of 23 February 2006, Article V[2], available from www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_554767/lang--en/index.htm; ILO Convention 92 of 18 June 1949 (Accommodation of Crews Convention (Revised)), available from www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C092; ILO Convention 133 of 30 October 1970 (Accommodation of Crews Convention (Supplementary Provisions)), available from www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C133; ILO Convention 147 of 29 October 1976 (Merchant Shipping (Minimum Standards) Convention), available from www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C147; and ILO Convention 182 of 17 June 1999 (Worst Forms of Child Labour Convention), Article 1, available from www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182.

Article 1 of the Worst Forms of Child Labour Convention specifically requires States to “take immediate and effective measure to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.”

³⁸ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 420.

³⁹ *The Case of the SS Lotus (France v. Turkey)* (Judgment), Series A No. 10, Permanent Court of International Justice, 7 September 1927, Paragraph 65.

sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas.⁴⁰

Accordingly, the *SS Lotus* case came to be understood as representing “clear international judicial support for the existence of a presumption in favour of territorial sovereignty, and that derogations from this are to be handled with care.”⁴¹ The Court further explained that this conclusion could only be overcome by a rule of customary international law establishing exclusive jurisdiction of the flag State, but that such a rule has not been conclusively proven.⁴² The decision came to denote the principle that restrictions upon States on the high seas cannot be presumed,⁴³ although it has been criticized and contradicted by international law, including by UNCLOS.⁴⁴ Notably, Article 98(1)(c) of UNCLOS obliges every State to require shipmasters flying its flag to render assistance to the other ship, its crew and passengers following a collision.⁴⁵

In addition to being established in UNCLOS, exclusive jurisdiction of the flag State is a principle also established in customary international law. Therefore, with respect to migrants encountered on the high seas, a State may not exercise jurisdiction – even if the vessel concerned is destined for its own territory – unless the State has obtained consent of the flag State to take action, or can establish any of the limited exceptions for intervention.⁴⁶

⁴⁰ Ibid.

⁴¹ M.E. Davies et al., “Appendix 4: Legal analysis: prescription, enforcement and observance”, in: “Study on the economic, legal, environmental and practical implications of a European Union System to reduce ship emissions of SO₂ and NO_x (Final report)” (BMT Murray Fenton Edon Liddiard Vince Ltd and European Commission, Brussels, 2000).

⁴² “. . . there is no rule in international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown On the contrary, there is concurrent jurisdiction where, as here, the offence consists in an act originating on board a vessel under one flag and whose effects make themselves felt on another vessel under another flag.” (*The Case of the S.S. Lotus* (1927), Paragraph 30.)

⁴³ For more on the merit and continuing relevance of the *Lotus* case, see: A. Orakhelashvili, “State jurisdiction in international law: complexities of a basic concept”, in: *Research Handbook on Jurisdiction and Immunities in International Law* (A. Orakhelashvili (ed.)) (Edward Elgar Publishing, Cheltenham, 2015), pp. 21–23.

⁴⁴ United Nations Treaty 6332 of 10 May 1952 (International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or other Accidents of Navigation), available from <http://123.30.50.199/medias/public/Archives//head/Cac%20DUQT/UBBG.DUDP04.pdf>; High Seas Convention, Article 11; and UNCLOS, Article 97(1).

⁴⁵ UNCLOS does not define “ship,” which means that it is unclear whether small fishing boats, life rafts or dinghies are included. However, there is nothing in UNCLOS to prohibit a broad interpretation.

⁴⁶ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 242.

1.1.2. Exceptions to exclusive jurisdiction of the flag State: Right of visit and right of hot pursuit

While, in principle, the general rule is that flag States enjoy exclusive authority to regulate their vessels on the high seas,⁴⁷ coastal States may exercise the “right of visit” and the “right of hot pursuit”⁴⁸ where vessels are engaged in piracy,⁴⁹ slave-trading⁵⁰ or unauthorized broadcasting.⁵¹ States also have significant leeway to engage migrant vessels at sea that fly no flag and are, effectively, stateless.⁵²

CASE STUDY 1

Filipino fishermen and seafarers

There are several documented cases of Filipino fishermen and seafarers trafficked through Singapore onto fishing vessels in Malaysia, Singapore and Taiwan Province of the People’s Republic of China. Victims are often recruited by friends or agents in Manila or Singapore, with promises of profitable and decent work. They are often unaware that they would be working on fishing vessels; even in cases where the victims are aware, their situations nevertheless degenerate. The plight that they endure are as severe as those in cases documented by IOM and other humanitarian organizations in South-East Asia and Eastern Europe, marked by subhuman living conditions, excessive working hours (18–22 hours a day, 7 days a week), inadequate food and rest, lack of medical care and, often, violence. Notwithstanding the similarities, a point of differentiation is the extraterritorial jurisdiction issues that arise. Men deployed on boats through Singapore are beholden to their Singaporean agencies if they break the contracts they have made there, in contrast to migrants who are exploited on Thai fishing vessels but are often not deployed by Thai-based agencies. Problems also arise from the fact that vessels from Taiwan Province of the People’s Republic of China are not governed by provisions of the Maritime and Port Authority of Singapore, as these apply only to Singapore-registered

⁴⁷ As an example, freedom of fishing is one of the key freedoms of the high seas that is recognized in Article 87 of UNCLOS. However, the Convention also imposes “conditions” (UNCLOS, Articles 116–120). According to Rothwell and Stephens (2016), fishing on the high seas is essentially subject to three broad constraints: (a) the special interests of coastal States concerning stocks; (b) measures for the conservation and management of living resources on the high seas; and (c) other bilateral, regional or global multilateral treaty obligations. (D. Rothwell and T. Stephens, *The International Law of the Sea*, pp. 166–167.) Accordingly, treaties relevant to non-exploitation of fishers, including the ILO Convention Framework and the Trafficking Protocol, may come into play.

⁴⁸ Gallagher and David (2014) note that the “right of hot pursuit” is not formally recognized as an exception to exclusive flag State jurisdiction but, in practice, operates as an exception. (A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 244.) The “right of visit” and “right of hot pursuit” are discussed in Part 2.1.

⁴⁹ UNCLOS, Article 105; and High Seas Convention, Article 19.

⁵⁰ UNCLOS, Articles 99 and 110(1)(b); and High Seas Convention, Articles 13 and 22(1)(b).

There have been efforts to expand the notion of slavery to include other exploitative practices, including those in the context of trafficking in persons. Slavery itself is also a form of exploitation subsumed within the notion of trafficking in persons. It is also possible that the concept will expand to include situations of migrant smuggling where smuggled migrants are exploited. In current practice, slavery offers only a limited window of exception to the principle of flag State jurisdiction on the high seas.

⁵¹ UNCLOS, Articles 109(4) and 110.

⁵² UNCLOS, Article 110(1)(d) and (e); and High Seas Convention, Article 22. According to Articles 92(2) and 110(1)(e) of UNCLOS, a State flying flags of convenience or refusing to show its flag can be considered a ship without nationality, as discussed in Part 2.

vessels, leaving gaps in responsibility.⁵³ Furthermore, while Singapore's ratification of the 2007 International Labour Organization (ILO) Maritime Labour Convention extends important protections to seafarers who pass through Singaporean ports, many exploited Filipinos fall outside the scope of that protection, as they are not accredited seafarers. The lack of a provision in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter the "Trafficking Protocol") concerning trafficking on the high seas also leaves a protection gap, suggesting that the UNCLOS provision pertaining to the slave trade may prove useful if the situation of these men can be considered as amounting to slavery.⁵⁴

1.2. EXCLUSIVE ECONOMIC ZONE (EEZ)

The exclusive economic zone (EEZ) is the area which extends 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.⁵⁵

1.2.1. Applicable regimes: Freedom of navigation and exclusive jurisdiction of the flag state

Absent explicit and specific rules, the regime of the high seas (discussed in Section 1.1) is applicable to the EEZ and, hence, the freedoms associated with it. The principal rule governing foreign ships in the EEZ is freedom of navigation, yet there exist specific competences for coastal States. A coastal State has sovereign rights in its EEZ that are essentially limited to economic exploration and exploitation. According to UNCLOS Article 73(1), the coastal State exercises enforcement and prescriptive jurisdiction, regardless of the nationality of persons or vessels, which means that measures provided for under this article can be applied to foreign vessels in the EEZ. This article stipulates that:

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary, to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.⁵⁶

⁵³ For more about flags of convenience, see, for instance: S. Tolbanen et al., "The inconvenient truth of Taiwan's flags of convenience", report (Greenpeace, Taipei, 2010). Available from www.greenpeace.org/eastasia/publications/reports/oceans/2011/Taiwan-FOC-report

⁵⁴ S. Yea and S. Thio, "Troubled waters: Trafficking of Filipino men into the long-haul fishing industry through Singapore", report (TWC2, Singapore, 2012), pp. 22, 41, 47, 57–58 and 60. Available from http://twc2.org.sg/wp-content/uploads/2013/01/Troubled_waters_sallie_yea.pdf

⁵⁵ UNCLOS, Articles 55 and 57.

UNCLOS maintains that the coastal State must claim the EEZ; that is, rights to the EEZ are not automatic.

⁵⁶ UNCLOS, Article 73.

While UNCLOS provisions relevant to the EEZ primarily concern resource exploitation and exploration, these can be activated to protect migrants at sea. An example relating to human trafficking and labour exploitation is the granting of fishing licences to (foreign) ships within a State's EEZ. A reading of UNCLOS Article 73, in conjunction with Article 62 (on the utilization of living resources), suggests that this is permissible under international law. The latter article stipulates that:

4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, inter alia, to the following: (a) licensing of fishermen, fishing vessels; . . . [and] (k) enforcement procedures.⁵⁷

CASE STUDY 2

Human trafficking and exploitation in the Thai fishing industry in Indonesia

In 2015, thousands of migrants from Cambodia, Lao People's Democratic Republic, Myanmar and Thailand were found stranded on the Indonesian islands of Ambon and Benjina. They had been trafficked from their home countries and forced to work in inhumane conditions on fishing boats at sea. Although physically in Indonesia, most of the victims were recruited by the Thai fishing industry. Significant overfishing had elevated Thailand to become one of the world's major seafood suppliers. While much of its fishing was previously done on the high seas, other countries in the region began declaring exclusive economic zones (EEZs) under UNCLOS, which had an enormous impact on activities in those zones.⁵⁸ Thai fishing vessels had no permission to fish in those EEZs, leading to the seizure of Thai fishing trawlers in Indonesia, Malaysia, Myanmar, the Philippines and Viet Nam. However, the deterrent effect of those arrests is hard to gauge, as they only account for a tiny proportion of the enormous (more than 50,000-strong) Thai fishing fleet. Thailand entered into joint venture agreements with countries in the region to allow it to fish in their EEZs. Complications relating to overlapping EEZs between maritime neighbours have created confusion among fishers as to where the EEZ borders are. As a result, illegal, unreported and unregulated (IUU) fishing in foreign waters continues, and with it, trafficking of migrants in the fishing industry.⁵⁹

⁵⁷ UNCLOS, Article 62(4).

An important condition for the use of this practice of anti-abuse clauses in licences is that due notice is given of these laws and regulations (cf. UNCLOS, Article 62(5)).

⁵⁸ IOM and Coventry University, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry*, p. 38.

⁵⁹ *Ibid.*, pp. 35–39.

1.3. CONTIGUOUS ZONE

The contiguous zone extends 24 nautical miles from the same baselines from which the limits of the territorial waters (i.e. the territorial sea) are measured,⁶⁰ and must be claimed by the coastal State.

1.3.1. Applicable regimes: Freedom of navigation and exclusive jurisdiction of the flag State

UNCLOS contains one specific provision concerning coastal State jurisdiction in the contiguous zone. Therefore, unless norms can be established by reference to the provisions on internal and territorial waters, the rules that govern the EEZ and high seas are applicable.

1.3.2. Exceptions to applicable regimes: Infringement of laws and regulations

UNCLOS guarantees ships freedom of the high seas in the contiguous zone, although the coastal State may act to prevent and punish infringements of certain laws and regulations occurring within its territory or territorial sea, including immigration laws.⁶¹ According to this provision, coastal States “may exercise the control necessary” to:

- (a) Prevent infringement of its immigration laws and regulations within its territory or territorial sea;
- (b) Punish infringement of [these] laws and regulations committed within its territory or territorial sea.⁶²

Given that an incoming vessel cannot commit an offence until it crosses the limits of the territorial sea, Subsection (a) of Article 33(1) (concerning prevention) applies only to incoming ships (given that prevention cannot arise in relation to a ship leaving the contiguous zone), while Subsection (b) (concerning punishment) applies only to outgoing ships.⁶³ The power to prevent may be relevant for vessels where it can be anticipated that an immigration or related law will be violated within the territory or territorial waters of the coastal State. A notable exception to punishing only outgoing ships concerns the use of “mother ships” by migrant smugglers to dispatch migrants to smaller vessels within the coastal State’s territory.⁶⁴

Different conclusions can be drawn as to what is permissible in the contiguous zone. On the one hand, a narrow interpretation of UNCLOS Article 33(1) would find that enforcement jurisdiction, but not prescriptive jurisdiction, can be exercised, which means that laws cannot be extended to the contiguous zone. A broader interpretation posits that a coastal State can regulate violations of domestic laws within the contiguous zone for some limited purposes.⁶⁵

⁶⁰ UNCLOS, Article 33(2).

⁶¹ UNCLOS, Article 33(1)(a) and (b).

⁶² UNCLOS, Article 33(1).

⁶³ Y. Tanaka, “Jurisdiction of states and the law of the sea”, in: *Research Handbook on Jurisdiction and Immunities in International Law*, p. 127.

⁶⁴ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 240.

⁶⁵ However, in reality the contiguous zone becomes part of the EEZ where the State claims it; in addition, both enforcement and prescriptive jurisdiction can be exercised in the EEZ. (Y. Tanaka, “Jurisdiction of states and the law of the sea”, p. 128.)

The bulk of reasoning points to the conclusion that a coastal State has no prescriptive jurisdiction in the contiguous zone and only very limited enforcement jurisdiction, such that only offences that are committed or anticipated within the State's sovereign territory or territorial sea can be punished or prevented. Scholars have accordingly concluded that UNCLOS does not support the exercise of jurisdiction in the contiguous zone where the vessel is transporting migrants and intends to disembark them in another coastal State.⁶⁶

Continuing Questions and Controversies

- Does the coastal State exercise prescriptive jurisdiction in the contiguous zone? If so, to what extent does it exercise such jurisdiction?
- How much enforcement jurisdiction can the coastal State exercise in the contiguous zone?
- What powers does a State have to “exercise the control necessary” in the context of punishing infringements of immigration law?
- What can a State do if it finds something untoward during an inspection or if its warnings are ignored?
- What constitutes an infringement of immigration law in the contiguous zone?
- At what point would measures taken to prevent infringement of immigration law amount to a violation of the obligation of non-refoulement?

1.4. TERRITORIAL SEA

The territorial sea is the adjacent belt of sea of the coastal State extending up to 12 nautical miles, measured from the baselines.⁶⁷

1.4.1. Applicable regime: Exclusive territorial jurisdiction

Coastal States exercise sovereignty over their territorial seas, subject to international law.⁶⁸ Article 21 of UNCLOS also gives States prescriptive jurisdiction in territorial seas to regulate passage, including through laws concerning immigration, fishing, navigational safety, environmental safety and other issues in line with Article 19. A State's sovereignty includes the power to “enforce its laws, including migration laws, and to intercept and arrest those vessels and individuals on board.”⁶⁹ This seemingly unlimited State capability is restricted by an exception tailored to the uniqueness of the maritime context: the right of ships of all States (whether coastal or non-coastal) to “innocent passage.”⁷⁰

⁶⁶ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 240.

⁶⁷ UNCLOS Articles 3 and 5. For more information on the territorial sea, see: S. Wolf, “Territorial sea”, in: *Max Planck Encyclopedia of Public International Law* (Rüdiger Wolfrum (ed.)) (Oxford University Press, New York, 2009).

⁶⁸ *Ibid.*, p. 7.

⁶⁹ 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*, 15(2):1–30, p. 6.

⁷⁰ UNCLOS, Article 17.

CASE STUDY 3

Worst forms of child labour at sea in Indonesia

A *jermal* is a wooden platform consisting of sleeping and fish-processing facilities often found many miles from shore. Almost all of the people found working on these platforms are boys under 14 years of age. These workers are deceptively recruited from villages and transported to the *jermals*, where they are subjected to excessive working hours and dangerous working conditions, as well as physical and sometimes even sexual abuse. The Indonesian Government considers this practice one of the worst forms of child labour; is prohibited by law and categorized as a form of human trafficking.⁷¹ The 1999 ILO Worst Forms of Child Labour Convention contains an open-ended provision relevant to the protection of migrant children at sea, by having the worst forms of labour comprising “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”⁷² Circumstances that fall within this scope concern situations often faced by “employed” migrant children at sea, namely: (a) work which exposes children to physical, psychological or sexual abuse; (b) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads; and (c) work under particularly difficult conditions, such as long hours or during the night, or work where the child is unreasonably confined to the physical premises of the employer.⁷³

1.4.2. Exception to exclusive State jurisdiction over the territorial sea: Innocent passage

Innocent passage is an exception to a State’s jurisdiction over its territorial sea. Passage of a vessel can be defined, according to Article 18 of UNCLOS, as follows:

1. ...navigation through the territorial sea for the purpose of:
 - (a) traversing the sea without entering internal waters or calling at a roadstead or port facility outside territorial waters; or
 - (b) proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.⁷⁴

⁷¹ See, for instance: IOM and Coventry University, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry*, pp. 83–84.

⁷² Worst Forms of Child Labour Convention, Article 3(d).

⁷³ ILO Recommendation No. 190 of 17 June 1999 (Recommendation concerning the prohibition and immediate action for the elimination of the worst forms of child labour). Available from www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R190

⁷⁴ UNCLOS, Article 18. See also: Convention on the Territorial Sea and the Contiguous Zone of 29 April 1959, Articles 14(2) and 14(3). Available from www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf

Passage is assumed to be innocent when it is “continuous” and “expeditious”; while these terms are undefined, it is commonly understood that “hovering,” “cruising” or “loitering” in the territorial sea falls outside the scope of what is considered “innocent passage.”⁷⁵ Innocent passage can include stopping and anchoring to the extent akin to ordinary navigation or rendered necessary by force majeure.⁷⁶

Article 19(2) of UNCLOS offers further insight, stating that passage is not innocent if it is “prejudicial to the peace, good order or security of the coastal State.”⁷⁷ The parameters of this notion are broadly construed; passage cannot be considered innocent if the vessel engages in one or more of a number of specified activities in the territorial sea, including some that may be of relevance to migrants at sea, as follows:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- ...
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (i) ... any fishing activity;
- ...
- (l) any other activity not having a direct bearing on passage.⁷⁸

Questions remain about whether vessels engaged in irregular migration fall within the innocent passage exception. Coastal States may consider irregular migration to be prejudicial to their “peace, good order or security” where it involves a breach of national migration laws, and thereby constitute a form of non-innocent passage. However, if irregular migration is considered to be non-innocent, thereby permitting States to take “necessary steps” to prevent passage into internal waters, the application of UNCLOS may conflict with obligations under Article 31 of the United Nations Convention Relating to the Status of Refugees (hereinafter the “Refugee Convention”), which prohibits the penalization of refugees for illegal entry, and

⁷⁵ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 234.

⁷⁶ Force majeure refers to a “higher force” or event beyond human control and is a widely accepted principle of international law. (J.P. Grant and J.C. Barker (eds.), “Force majeure”, in: *Parry & Grant Encyclopaedic Dictionary of International Law* (Third edition, Oxford University Press, Oxford and New York, 2009), p. 222.)

⁷⁷ UNCLOS, Article 18(2) and 19.

⁷⁸ UNCLOS, Article 19(2).

Article 32, which requires any expulsions to be subject to due process. Barnes (2010) is of the view that:

... the potential interference posed to the right to regulate navigation in the territorial sea goes far beyond [the] limited aims of the Refugee Convention to restrict the undue penalisation of illegal immigrants. Given the already considerable practical difficulties of regulating maritime activities, the application of the full provisions of the Refugee Convention to the territorial sea would provide an unworkable basis for dealing with migration issues, especially in the context of organised people smuggling.⁷⁹

From a protection perspective, this is a worrying result. Mallia (2009) explains that there is a gap in protection in both the law of the sea and refugee law in terms of a State's powers in its territorial waters; in short:

... while under the law of the sea regime, a State may turn back vessels at the borders of its territorial sea and also order a vessel to leave the territorial sea in furtherance of its powers under Article 25 of UNCLOS, once a claim for asylum is made within the territorial sea, the coastal State is obliged to arrange for the processing of such claim in order to ensure that it does not violate the non-refoulement obligation.⁸⁰

Mere carriage of migrants through territorial waters, where the migrants are destined for a third State, does not make passage non-innocent; however, for migrant smuggling at least, its regulation would not be on the basis of non-innocent passage, but on the criminal jurisdiction that the State has over its territorial sea.⁸¹ The situation of those who have rescued migrants in distress is less clear, as they might be exempt owing to the existence of search and rescue obligations or on account of the initial distress. In the context of protecting migrants in situations of irregular migration, the ambiguities and limitations of Article 19(2) are overcome by the practical reality that States may exercise criminal jurisdiction in their territorial seas.

⁷⁹ R. Barnes, "The international law of the sea and migration control", in: B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers, Leiden, 2010) p. 125.

⁸⁰ P. Mallia, *Migrant Smuggling by Sea*, p. 86.

⁸¹ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 235 and 412.

The authors point to parallels here with vessels carrying material for weapons of mass destruction to a third State. This position is not widely accepted among States and intergovernmental organizations.

A coastal State can exercise criminal jurisdiction in its territorial sea in four circumstances listed in Article 27(1) of UNCLOS:

- (a) If the consequences of the crime extend to the coastal State;
- (b) If the crime is of the kind to disturb the peace of the country or the good order of [its] territorial sea;
- (c) If the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State;
- (d) If such measures are necessary for the suppression of illicit traffic[king] in narcotic drugs or psychotropic substances.⁸²

The first two of these points may be relevant to human trafficking and migrant smuggling, although it is unlikely that this would be the case if the vessel were only passing through the territorial sea en route to a third State, for which prior consent of the flag State is required.⁸³ However, where a vessel has left internal waters and is passing through the territorial sea, the coastal State has jurisdiction to enforce its criminal laws. Once it is established that acts or omissions of a foreign vessel fall within the circumstances listed under Article 27(1), some important conditions apply in the exercise of criminal jurisdiction at sea.⁸⁴ Article 27(5) of UNCLOS obliges the coastal State to respect the “internal economy” of foreign ships, by providing that except for crimes relating to the EEZ or the marine environment, the State “may not” exercise jurisdiction in respect of any crimes committed prior to it entering the territorial sea, if the ship is only passing through the territorial sea without entering internal waters.⁸⁵ This may prove complicated where crimes (including those relating to the exploitation of migrants) have occurred on the high seas but have ceased once in the territorial waters, which means that migrants on board at that stage are merely being transported and not exploited. Unless the flag State or the shipmaster requests the coastal State to exercise jurisdiction, it would not be competent to act in relation to crimes committed prior to the vessel’s entry into the coastal State’s territorial waters. However, Article 27(5) does not exclude jurisdiction over continuous criminal acts, such as when the vessel is engaged in migrant smuggling.⁸⁶

⁸² UNCLOS, Article 27(1).

Article 28 of UNCLOS limits the exercise of civil jurisdiction; foreign ships passing through a State’s territorial sea should not be stopped or diverted for the purpose of exercising civil jurisdiction.

⁸³ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 238.

⁸⁴ UNCLOS, Articles 27(3) to 27(5).

If so requested by the shipmaster, coastal State authorities have to inform a diplomatic or consular agent of the flag State; State authorities shall have due regard to the interests of navigation when exercising jurisdiction. If the ship is only passing through, without entering internal waters, the coastal State cannot take any steps to investigate or arrest in connection with a crime that occurred before the ship entered the territorial sea.

⁸⁵ The language of UNCLOS Article 27(1) is relevant; the phrase “should not” replaced the original draft’s suggestion of “may not,” resulting in an interpretation that gives a coastal State the ultimate legal right to exercise law enforcement action on board a foreign vessel in the territorial sea if it chooses to, even where consequences do not extend to the coastal State itself; in short, a coastal State should not exercise criminal jurisdiction over foreign ships in its territorial waters, but it may. Determining when it should is a subject of significant debate. (A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 414–415.)

⁸⁶ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 239 and 415–16.

A State may transfer or share its enforcement jurisdiction within its territorial waters by entering into agreement with other States. For instance, bilateral agreements are sometimes entered into for joint cooperation in the surveillance and patrol of territorial waters to identify migrant smuggling vessels.

Continuing Questions and Controversies

- Are the grounds set out in Article 19 of UNCLOS for non-innocent passage exhaustive?
- What situations relevant to the protection of migrants at sea does Article 19(2) capture?
- Does travelling at sea to seek asylum constitute innocent passage?
- Under what circumstances, if any, could irregular migration at sea constitute innocent passage?
- Conversely, under what circumstances could irregular migration at sea compromise “peace, good order or security” and, therefore, fall within the non-innocent passage exception to exclusive State jurisdiction over its territorial sea?
- Under what circumstances, if any, could migrant smuggling compromise “peace, good order or security” and, therefore, fall within the non-innocent-passage exception to exclusive State jurisdiction over territorial sea?
- Under what circumstances, if any, would transporting migrants rescued at sea constitute “innocent passage”?
- What constitutes “necessary steps” that States may take in accordance with Article 25 of UNCLOS?
- When should States exercise jurisdiction under Article 27 of UNCLOS?
- How, if at all, can a State exercise its powers to prevent the passage of a vessel of asylum seekers into its territorial waters, without risking violations under the United Nations Convention Relating to the Status of Refugees?
- Could the fact that Article 27(1) of UNCLOS is explicit about allowing the exercise of criminal jurisdiction only in relation to illicit trafficking of narcotic drugs or psychotropic substances, imply that jurisdiction cannot be exercised in relation to other kinds of trafficking, including of people?

1.5. INTERNAL WATERS

*The employers are probably more worried about the fish than the workers' lives . . . They get a lot of money from this type of business.*⁸⁷

– Thai NGO worker

Internal waters consist of the waters that lie landward of the baselines from which the territorial sea is measured.⁸⁸ Internal waters include a State's harbours and ports, as well as its internal gulfs, bays, estuaries, straits, lakes and rivers. In internal waters, foreign States cannot demand any rights for their vessels or subjects, as internal waters are subject to the full territorial sovereignty of the coastal State.⁸⁹

1.5.1. Applicable regime: Exclusive territorial jurisdiction

Because internal waters are largely considered to be part of the territory of a State, over which it has full territorial sovereignty, they are not considered a concern of international law.⁹⁰ Protection of migrants in internal waters is straightforward in that a State has comprehensive jurisdiction within its territory over all material issues and over all peoples regardless of their nationality.⁹¹

In sum, and exceptions aside, “[b]y entering foreign ports and other internal waters, ships put themselves within the territorial sovereignty of the coastal State.”⁹² Accordingly, States can, with some exceptions, assume all sovereign powers to exercise prescriptive, enforcement and adjudicative jurisdiction,⁹³ including over foreign vessels in its internal waters “as if they were part of the land of the State,” with vessels subject to these domestic laws and regulations, similar to an alien on land.⁹⁴ With specific respect to the protection of migrants, port State jurisdiction is particularly relevant for identifying situations of exploitation and trafficking of migrant seafarers and fishers.

⁸⁷ IOM and Coventry University, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry*, p. 25.

⁸⁸ UNCLOS, Article 8(1). See also: Y. Tanaka, *The International Law of the Sea* (Cambridge University Press, New York, 2012) p. 77; and A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 231.

⁸⁹ Customary law is evolving such that foreign vessels should only be refused access to internal waters on compelling grounds. (J.P. Grant and J.C. Barker, “Internal waters”, in: *Parry & Grant Encyclopaedic Dictionary of International Law*, p. 284.)

⁹⁰ Besides its legal delimitation in Article 8, UNCLOS contains few articles touching on internal waters. UNCLOS Article 2(1) provides that “[the] sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”

⁹¹ The legal and practical reality is more complex. When considering stopping and/or searching a foreign vessel in internal waters, several issues must be considered, such as where in the internal waters the ship is, and whether it is voluntarily in the port or not. Legal ambiguities arise from the fact that internal waters are not regulated in international treaties with regard to the prescription, enforcement and adjudication of coastal State laws and regulations. Rather, internal waters are subject to a set of customary international norms and soft law in the form of memoranda of understanding (MoUs) that are not universally agreed upon and are still evolving. UNCLOS does not clearly outline what territorial sovereignty in the internal waters implies in terms of powers and how it differs from the jurisdiction regime of the territorial sea. As a result, UNCLOS can be read to imply that jurisdiction over internal waters is broader than that over territorial waters, if not unlimited.

⁹² R. Churchill and V. Lowe, *The Law of the Sea* (Third edition, Manchester University Press, Manchester, 1999), p. 54.

⁹³ Paris Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment of 26 January 1982. Available from www.parismou.org/inspections-risk/library-faq/memorandum International Maritime Organization Resolution A.787(19) of 23 November 1995, entitled “Procedures for Port State Control”, sets out comprehensive guidance for those conducting port State inspections under IMO regimes so permitting, in order to promote consistency in the conduct of inspections worldwide and harmonize the criteria for the application of control procedures.

⁹⁴ T. McDorman, “Regional port State control agreements: Some issues of international law”, *Ocean and Coastal Law Journal*, 5(2):207–225, p. 210.

Criminal jurisdiction over vessels in internal waters

According to Tanaka (2015), State practice suggests that the coastal State does not exercise jurisdiction over matters solely involving the internal discipline of merchant ships. However, it can exercise criminal jurisdiction in several situations, including some that may be relevant in the context of migrant smuggling or human trafficking – for instance, where an offence on board the ship affects the peace and order or tranquillity of the port or on land; when the captain requests intervention; when a non-crew member is involved, or when the offence on board is of a serious nature.⁹⁵

1.5.2. Port State jurisdiction and port State control

Port State control is an internationally agreed regime for the inspection of a foreign ship in the national ports by port State control officers. The purpose of such inspection is to verify the competence of persons on board and ensure that the condition of the ship, its equipment and its operation are in compliance with international law.⁹⁶ Port State control may offer opportunities to exercise jurisdiction over foreign vessels that are in the internal waters of the coastal State, and potentially identify victims of trafficking or other crimes at sea. In the 1986 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Republic of Nicaragua v. the United States)*, the International Court of Justice (ICJ) established that, by virtue of their sovereignty, coastal States are allowed to regulate access to their ports.⁹⁷ A State may thus impose and enforce conditions related to access upon foreign ships, including requirements relating to the protection of migrants at sea. Literature sometimes distinguishes between port State jurisdiction and port State control, whereby the former refers to the State's powers to prosecute ships and impose fines for violations of international laws and standards, while the latter concerns not prosecutorial but administrative measures, such as detaining a ship until it has taken particular measures or ordering it to undergo repairs.⁹⁸ In practice, then, control and jurisdiction are interrelated, and the notion of port State control falls within the scope of port State jurisdiction.

⁹⁵ Y. Tanaka, "Jurisdiction of states and the law of the sea", pp. 117–119. Tanaka distinguishes between the Anglo-American system, whereby the coastal State has complete jurisdiction over vessels in its ports but may refrain from exercising that jurisdiction on the basis of comity, and the French position whereby the State has no jurisdiction over the internal affairs of foreign vessels in its ports. However, ultimately the difference between the two positions is minimal in light of agreements that the State has territorial jurisdiction over crimes that occur within its territory.

⁹⁶ R. Surtees, *Trafficked at Sea: The exploitation of Ukrainian Seafarers and Fishers* (IOM and NEXUS Institute, Geneva and Washington, D.C., 2013), p. 87.

⁹⁷ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment on Merits), General List No. 70, International Court of Justice, 27 June 1986, Paragraph 213.

⁹⁸ H.S. Bang, "Port State Jurisdiction and Article 218 of the UN Convention on the Law of the Sea", *Journal of Maritime Law & Commerce*, 40(2):291–313, p. 292.

CASE STUDY 4

“Ghost ships” abandoned by migrant smugglers

The importance of port State control is highlighted in the use of ageing cargo ships in only one migrant smuggling venture. The cost of using these large cargo ships is more than recouped by the smugglers through the smuggling fees paid to them. Key examples from January 2015 include the MV *Blue Sky M* (flagged to the Republic of Moldova), which was heading towards Italy and was abandoned by its crew in the Adriatic Sea. Italian officials suspected that the “captain,” who assured Greek authorities that there was nothing amiss with the vessel, was in fact a migrant smuggler who abandoned the ship after locking the steering on course to have it crash ashore in Puglia, Italy. There were almost 800 migrants on board – mostly Syrians – when Italian officials boarded the vessel and unlocked the engines, bringing it under control within 5 miles of the coast. In another incident, after the MV *Ezadeen* (a registered cattle ship flagged to Sierra Leone) set sail from a Turkish port, it was subsequently abandoned by smugglers and sent speeding towards the Italian coast in rough seas, with several hundred migrants and no crew members on board. Italian authorities lowered engineers and electricians onto the vessel from helicopters, and the Icelandic Coast Guard towed the boat to the Italian port of Corigliano. The procurement of these ships by smugglers for use in organized crime raises questions about the effectiveness of port State control and maritime checks on ship movements.⁹⁹

Four conditions can be generally identified for the authorities of a port State to exercise jurisdiction over foreign vessels in its ports:

- (a) **Voluntary presence of foreign vessels in the State’s ports.** In order to stop, board and inspect (and in some cases, eventually seize and detain) a foreign vessel in a port, it must be there on a voluntary basis. This presence can be described as being “in the normal course of its business or for operational reasons.” Instances that do not fall under this category include “where a vessel calls in a port or an offshore installation for reasons of force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.”¹⁰⁰ The element of voluntary presence distinguishes port State jurisdiction from that of the coastal State’s in other maritime zones, where freedom of innocent passage and the freedom of the seas prevail over coastal State jurisdiction, unless otherwise provided in international law.

⁹⁹ See, for instance: “Smugglers abandon migrant ship off Italy in new tactic to force rescue”, *The Guardian (International edition)*, 2 January 2015, available from www.theguardian.com/world/2015/jan/02/smugglers-abandon-migrant-ship-italy-ezadeen; “Abandoned ship Ezadeen with 450 migrants on board being towed to Italy”, *The Guardian (International edition)*, 2 January 2015, available from www.theguardian.com/world/2015/jan/02/abandoned-cargo-vessel-migrants-towed-italy-traffickers; “Abandoned migrant ‘ghost ship’ arrives in Italy carrying hundreds of Syrian refugees”, *The Guardian (International edition)*, 3 January 2015, available from www.independent.co.uk/news/world/abandoned-ghost-ship-carrying-hundreds-of-syrian-refugees-arrives-safely-in-italy-9955399.html; Allianz, Safety and Shipping Review 2015, available from www.agcs.allianz.com/assets/PDFs/Reports/Shipping-Review-2015.pdf; and “Flaws in port State control regime revealed by ‘ghost ships’”, Cleaner Seas website, News section, 10 January 2015, available from www.cleanerseas.com/flaws-port-state-control-regime-revealed-ghost-ships

¹⁰⁰ United Nations Office of Legal Affairs, *The Law of the Sea: Enforcement by Port States: Legislative History of Article 218 of the United Nations Convention on the Law of the Sea* (United Nations, Geneva, 2002).

- (b) **Acts or omissions in the State's waters or ports.** Only once it has been determined that a foreign ship is present in the port on a voluntary basis can subsequent action be taken “[related] to activities of a foreign vessel that take place while the vessel is in port.”¹⁰¹ A corollary of this principle is that the port State can also undertake action and enforce its laws relating to activities that took place in its (territorial) waters prior to a vessel's entry into its port.¹⁰² Customary law does not permit a port State to enforce laws relating to activities that take place on the high seas or the waters of a third State, unless the activity affects the port State.¹⁰³ In practice, this means that a coastal State cannot take measures against vessels with regard to, for instance, labour exploitation of migrants on the high seas, unless grounds for doing so can be established (for instance, where the situation is one of piracy).
- (c) **Domestic legislation.** Domestic legislation should be put in place to regulate the norms that ground jurisdiction, which should be in conformity with international law, regardless of whether it is explicitly based on international legal norms or not. The type of norms that this domestic legislation purports to activate has increasingly come to include rules and standards relevant to the protection of people in general, and of vulnerable peoples, such as migrants at sea, in particular. Previously, legal grounds for the control of, inspection in and jurisdiction over ports were narrow, with inspection a relatively low priority, consisting largely of checking certificates and, later, adherence to technical standards and safety-at-sea regulations. More recently, there has been growing concern for the “human element,” including living and working conditions.¹⁰⁴ Accordingly, the body of international human rights and labour laws are growing in relevance in the exercise of port State jurisdiction. Principally, it is the flag State of the vessel that has jurisdiction over a ship and, therefore, “[a] vessel is required to comply with those treaties binding upon the flag State.”¹⁰⁵ However, the authority of the port State trumps that of the flag State when the vessel is in port.¹⁰⁶ Hence, interactions between domestic and international law create legal dynamics of a special kind, such that where a vessel enters another country's port voluntarily, it becomes subject to the host country's laws and regulations, even when the flag State is not party to the treaties upon which those laws and regulations are based.¹⁰⁷
- (d) **Absence of an abuse of rights by port State authorities.** Satisfaction of the three former conditions does not imply that a State authority can undertake control and jurisdiction arbitrarily or at its fullest discretion. Laws and procedures limit the exercise of control and jurisdiction in internal waters, including in the following ways:

¹⁰¹ Cf. UNCLOS, Article 220(1); and T. McDorman, “Regional Port State Control Agreements: Some Issues of International Law”, p. 216.

¹⁰² T. McDorman, “Regional Port State Control Agreements: Some Issues of International Law”, p. 216.

¹⁰³ Ibid.; and European Commission, “Appendix 4: Legal analysis: prescription, enforcement and observance”, in: “Economic, legal, environmental and practical implications of a European Union System to reduce ship emissions of SO₂ and NO_x (Final report)” (BMT Murray Fenton Edon Liddiard Vince Ltd and European Commission, Brussels, 2000).

¹⁰⁴ E.J. Molenaar, “Port State jurisdiction: Toward comprehensive, mandatory and global coverage”, *Ocean Development and International Law*, 38(1):225–257, p. 240.

Take note that in the previous decade, concern has broadened to also include protection of the marine environment.

¹⁰⁵ T. McDorman, “Regional Port State Control Agreements: Some Issues of International Law”, p. 210.

¹⁰⁶ Ibid., p. 211.

¹⁰⁷ Ibid., p. 212.

- (i) States are required to exercise the rights, jurisdiction and freedoms set out in UNCLOS in a way that does not abuse rights.¹⁰⁸ Unreasonable or discriminatory conditions for port entry may constitute rights abuse and amount to discrimination between flag States, in contravention of the law of the sea.¹⁰⁹
- (ii) There is a limitation or diligence criterion in that “due publicity” of requirements should be communicated to the competent international organization¹¹⁰ and be transparent to visiting vessels.
- (iii) There is a material criterion in that, to the extent jurisdiction reaches into the aspects of litigation and/or prosecution, there must be “[a] sufficiently close or substantial connection [to] the fact, person, or event and the State exercising jurisdiction.”¹¹¹
- (iv) The flag State of any detained vessel is entitled to pursue the prompt release of vessels through the dispute settlement procedures of UNCLOS.¹¹²
- (v) The port State is liable for any damage or loss attributable to it when its enforcement measures are unlawful or exceed those reasonably required in light of available information.¹¹³

Guidelines for port State control officers carrying out inspections

The International Labour Organization (ILO) released guidelines for port State control officers carrying out inspections, in accordance with the Maritime Labour Convention of 2006 (MLC),¹¹⁴ and in relation to the Work in Fishing Convention of 2007.¹¹⁵ Both outline deficiencies that may be identified by port State control officers. In relation to seafarers, deficiencies and situations that may be relevant to identifying migrants in need of protection include (among several others) the following:

- (a) Persons under the age of 16 work as seafarers;
- (b) Seafarers are not paid regularly (at least monthly);

¹⁰⁸ UNCLOS, Article 300.

¹⁰⁹ UNCLOS, Article 227; and E. J. Molenaar, “Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage”.

¹¹⁰ T. McDorman, “Regional Port State Control Agreements: Some Issues of International Law”, pp. 217–218.

¹¹¹ E. J. Molenaar, “Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage”.

It must be noted here that crimes of universal jurisdiction – including slavery – would create a sufficient connection between the state and the crime.

¹¹² T. McDorman, “Regional Port State Control Agreements: Some Issues of International Law”, p. 223.

Article 292 of UNCLOS permits the flag State of the vessel detained to seek its release.

¹¹³ UNCLOS, Article 232.

The article requires States to provide for recourse in their courts for actions in respect of such damage or loss. (See also: International Convention for the Prevention of Pollution from Ships of 17 February 1973, as modified by the Protocol of 1978 (“MARPOL 73/78”), Article 7(2). Available from www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofMARPOL/Pages/default.aspx)

¹¹⁴ ILO, “Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention, 2006” (International Labour Office, Geneva, 2009). Available from www.ilo.org/global/standards/maritime-labour-convention/WCMS_101787/lang-en/index.htm

¹¹⁵ ILO, “Guidelines for port State control officers carrying out inspections under the Work in Fishing Convention, 2007” (International Labour Office, Geneva, 2011). Available from www.ilo.org/sector/Resources/codes-of-practice-and-guidelines/WCMS_177245/lang-en/index.htm

- (c) Sleeping rooms and recreational facilities do not conform to standards;
- (d) Heating, lighting or ventilation is inadequate or is not functioning correctly;
- (e) Separate sleeping rooms/sanitation facilities are not provided for both males and females;
- (f) Sanitary facilities are inadequate or are not functioning correctly;
- (g) Seafarer accommodation or recreational facilities are not well maintained;
- (h) Food and drinking water are not of appropriate quality, nutritional value and quantity;
- (i) Seafarers are charged for food and/or are not provided with drinking water;
- (j) Seafarers are denied shore leave by the shipmaster and/or shipowner to go ashore for medical care;
- (k) Seafarers are not provided with appropriate health protection and medical care on board;
- (l) Medical equipment fall below national standards; no medical report forms are available on board;
- (m) Protective equipment are in poor condition, or are incorrectly used or not being used at all;
- (n) Seafarers are unaware of measures adopted by the management to prevent accidents;
- (o) Risks posed to young seafarers are not addressed;
- (p) Occupational accidents are not investigated or reported;
- (q) There is no document setting out on-board complaint procedures;
- (r) On-board complaint procedures are not operational;
- (s) Seafarers are victimized for making complaints.

The guidelines outline measures to be taken in relation to deficiencies. Not all of these deficiencies would warrant detention of a ship; however, some require action to be taken, including the presence of under-16 seafarers on board and deficiencies that amount to violations of fundamental rights and principles in Articles 3 and 4 of the ILO's Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention.¹¹⁶

¹¹⁶ ILO, "Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention, 2006", (International Labour Office, Geneva, 2009). Available from www.ilo.org/global/standards/maritime-labour-convention/WCMS_101787/lang--en/index.htm

Table 2: Treaty provisions for port State jurisdiction relevant to the exploitation of migrants at sea

| Provision | Possible grounds to oblige State action |
|---|--|
| Human rights law | |
| International Covenant on Civil and Political Rights (ICCPR) (1966), Article 2 | A port State may be required to extend human rights protection to individuals on foreign-flagged vessels in certain circumstances, including grave abuses of rights, such as torture; cruel, inhumane or degrading treatment or punishment; and slavery, servitude or forced labour ¹¹⁸ – for instance, where fishermen or seafarers are held in situations of trafficking or slavery. A port State may also be required to extend human rights protection where there is a real, substantial risk that a person will be subject to such treatment on board a foreign-flagged ship when it leaves the State’s territorial waters ¹¹⁹ – for instance, in the context of exploitation of fishermen and seafarers who leave one port towards exploitation that takes place elsewhere. |
| Transnational organized crime law | |
| United Nations Convention on Transnational Organized Crime (UNTOC) (2000), Article 15 | When a transnational crime (such as migrant smuggling or human trafficking) takes place in internal waters, it can be qualified as falling within the territory of the State party (Article 15(1)(a)) when the offence is committed against a national of the port State, or by a national of the port State or by a stateless person who has his/her habitual residence there (Article 15(2)(a) and (b)). |
| International maritime law | |
| International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW–S Convention) (1978) | When ships are in its ports, a State can verify whether the seafarers (or fishermen) on board are certified or hold appropriate dispensation. ¹²⁰ |
| International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW–F Convention) (1995) | A port State may take action when any incompetency, act or omission is reported that may pose a direct threat to the safety of life at sea. ¹²¹ |

| Provision | Possible grounds to oblige State action |
|--|--|
| International maritime labour law | |
| ILO Convention No. 143 on Migrant Workers (1975) | To determine systematically whether there are illegally employed migrant workers on, or are leaving from, passing through or arriving on its territory for the purpose of employment during the journey or on arrival, where employment conditions contravene relevant multilateral or bilateral instruments or agreements, or national law or regulations, a State's port authorities may take measures necessary to rectify any conditions on board a ship that are clearly hazardous to safety or health. |
| ILO Convention No. 147 on Merchant Shipping (Minimum standards) (1976) | The convention provides grounds for port authorities to board and inspect a foreign ship in its port, when complaints are made regarding the State's own nationals on board the said foreign ship, ¹²² or when complaints are received or evidence is obtained that a foreign ship in its port does not conform to convention standards. ¹²³ |
| Maritime Labour Convention (MLC) (2006) (applicable to seafarers) | The convention provides grounds for port authorities to inspect a ship in its port to determine whether the ship is in compliance with the convention, ¹²⁴ including with respect to the working and living conditions of seafarers on the ship. ¹²⁵ |
| 2007 Work in Fishing Convention (No. 188) (applicable to fishers) | A port State may act when a complaint is received or evidence is obtained that a ship in its port does not conform to convention standards. ¹²⁶ (Note: This convention is not yet in force.) |

¹¹⁷ U. Khaliq, "Jurisdiction, ships and human rights treaties", in: *Jurisdiction over Ships* (H. Ringbom (ed.)), pp. 347–349. It has been suggested that this obligation to prevent further rights violation extends to the gravest abuses, including torture; cruel, inhumane or degrading treatment or punishment; slavery, servitude or forced labour, as well as violations to the right to life – regardless of whether the actor perpetrating these offences is acting in a private or public capacity.

¹¹⁸ *Ibid.*, pp. 349–350. In the case of *Ng v. Canada* (1993), Canada's Human Rights Committee (HRC) pointed out the practical challenge of this obligation. (*Ng v. Canada* (Views), Communication No. 469/1991, Human Rights Committee (Canada), 5 November 1993).

¹¹⁹ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW-S Convention), Article X[1], available from www.imo.org/en/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx; and International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F Convention), Article 8(1), available from www.imo.org/en/OurWork/HumanElement/Pages/STCW-F-Convention.aspx

¹²⁰ STCW-F Convention, Article 7(1).

¹²¹ Subject to overall supervision by the competent authority, after tripartite consultation among that authority and the representative organizations of ship owners and seafarers, where appropriate.

¹²² Merchant Shipping (Minimum Standards) Convention, Article 4.

A complaint may come from a member of the crew, a professional body, an association, a trade union or, generally, any person with an interest in the safety of the ship. Port authorities may then take measures necessary to rectify any conditions on board a ship that are clearly hazardous to safety or health. This State is then required to notify the nearest maritime, consular or diplomatic representative of the flag State of the ship and have, if possible, such representative present.

¹²³ Maritime Labour Convention, Article V(4).

¹²⁴ Maritime Labour Convention, Regulation 5.2.1. Available from www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:91:0:::P91_SECTION:MLCA_AMEND_A5

See also the text box after this table, titled "PROMISING PRACTICE: Re-flagging fishing vessels to increase protection of migrant fishers."

¹²⁵ Work in Fishing Convention, Article 43.

Any person with an interest in the safety of the vessel can submit a complaint (Article 43(4)). If non-compliance is found, the port State may prepare a report addressed to the Government of the flag State of the vessel with a copy to the Director-General of the International Labour Organization, and may take measures necessary to rectify conditions on board which are clearly hazardous to safety or health.

Promising Practice

Re-flagging fishing vessels to increase protection of migrant fishers

Given that fishers in need of protection in New Zealand's territorial waters or ports were neither New Zealanders nor working on New Zealand-flagged vessels, there was a gap in the protection that could be afforded to them. In deciding how to address the exploitation of fishermen, the Government decided to re-flag vessels entering territorial waters with a New Zealand flag to subject them to New Zealand law.¹²⁶

1.5.3. Challenges and limitations of port State control in protecting migrants at sea

There are several limitations to the use of port State control to increase the protection of migrants. One key limitation is legal, given the fact that the International Convention for the Safety of Life at Sea (hereinafter the "SOLAS Convention") is not applicable to fishing vessels, nor to cargo ships smaller than 500 tons (gross tonnage), heavily diminishing its relevance to the protection-at-sea framework.¹²⁷ Similarly, the STCW-S Convention does not apply to fishing vessels, nor to "wooden ships of primitive build."¹²⁸ The International Ship and Port Facility Security (ISPS) Code – developed in response to perceived threats to ships and port facilities in the wake of the 9/11 terrorist attacks – likewise does not address the situation of fishing vessels.

There are also practical limitations to the value of port State control from a migrant protection point of view. Generally, migrant smuggling vessels do not embark at ports, but in other areas where they are less likely to be detected. Where the modus operandi is to evade detection, neither will they enter ports but attempt to land elsewhere. Similarly, irregular employment of migrants, as well as labour exploitation, often takes place on the high seas and beyond the jurisdictional grasp of most States.¹²⁹ Many migrants who are exploited or otherwise harmed at sea are kept at sea for months or even years; "mother ships" collect catch from and drop supplies to such vessels that remain at sea.¹³⁰ Moreover, in practice, port State control inspections are normally only triggered if a complaint has been issued. Where port State control does take place, inspectors must be sufficiently skilled to be able to identify potential human trafficking and other crimes, and be committed and equipped to assist them. The sheer number of people present at ports makes identifying those with protection needs

¹²⁶ S. Yea and S. Thio, "Troubled waters".

¹²⁷ STCW-S Convention, Article III(d).

¹²⁸ Article II(h) of the STCW-S Convention defines a fishing vessel as "a vessel used for catching fish, whales, seals, walrus or other living resources of the sea."

¹²⁹ ILO, *Caught at Sea*; E. de Coning, *Transnational Organized Crime in the Fishing Industry* (UNODC, Vienna, 2011); A. Derks, "Migrant Labour and the Politics of Immobilisation: Cambodian Fishermen in Thailand", *Asian Journal of Social Science*, 38(6):915–932; and International Transport Workers' Federation (ITF), *Out of Sight, Out of Mind: Seafarers, Fishers and Human Rights* (ITF, London, 2006).

¹³⁰ See, for instance: P. Robertson, *Trafficking of Fishermen in Thailand* (IOM, Geneva, 2011), p 25; and R. Surtees, *Trafficked at Sea*, p. 127.

a challenging task, particularly when language barriers are present. Migrants may be reticent to speak to authorities where they fear their power to detain and deport them.

A further challenge is the lack of willingness of port authorities to implement laws, particularly where they are susceptible to corruption and profit from the perpetration of crime.¹³¹ The fact that ports are largely commercial in purpose means that port authorities lack incentives to support lengthy enquiries and investigations that can hemorrhage profits.¹³² Competition between ports disincentivizes authorities to enforce laws and regulations if others do not do so.¹³³ Another challenge is that port authorities are concerned they will be exposed to actions for possibly wrongful detention of vessels in exercising jurisdiction.¹³⁴

Notwithstanding these challenges, the potential of port State control to identify situations in which migrants have protection needs underscores the need to strengthen the capacity of port State controllers to do so by increasing their understanding of the risks of exploitation in the fishing and seafaring industries, and equipping them with training and tools to screen individuals and vessels, and the legal authority to take action where they encounter such situations.¹³⁵

¹³¹ R. Surtees, *Trafficked at Sea*, p. 87.

¹³² *Ibid.*, pp. 87–89.

¹³³ One mechanism to lessen this competitive tension is for ports in a given region to agree on uniform enforcement of certain laws and regulations through port State jurisdiction memoranda of understanding.

¹³⁴ One means of addressing this concern is for domestic legislation to absolve officials from liability in port State inspections, unless there is direct evidence of corruption. (J. Hare, "Port State control: Strong medicine to cure a sick industry", *Georgia Journal of International & Comparative Law*, 26(3):571–594, pp. 590–591.)

¹³⁵ There are signs that port State control mechanisms have become useful to ensure compliance with labour and safety standards. They are often administered through bilaterally or regionally agreed memoranda of agreement. The 2012 Cape Town Agreement aims to give effect to the 1977 Torremolinos International Convention for the Safety of Fishing Vessels (and the 1993 Torremolinos Protocol and the regulations therein) and foresees a legal mechanism for port State control. Every vessel required to hold a certificate in accordance with the 1993 regulations is subject to control when in a port of another State party by officers duly authorized by the Government of that State party, insofar as this control is directed towards verifying that the certificate issued is valid (Article 4(1)). Again, aspects of informing the flag State of the ship and avoiding unduly detaining and delay apply. (1977 Torremolinos International Convention for the Safety of Fishing Vessels. Available from www.imo.org/en/About/Conventions/ListOfConventions/Pages/The-Torremolinos-International-Convention-for-the-Safety-of-Fishing-Vessels.aspx)

The 1993 Torremolinos Protocol points to improvements in working conditions for fishers. However, its provisions are not yet in force for want of ratification by States parties.

Promising Practice

Port intelligence units

Among increasing efforts to obtain data on movements of people at sea is the Port Intelligence Unit (PIU) Project led by the United Nations Office on Drugs and Crime (UNODC) to gather, analyse and share data between States on movements by sea, with a view to disrupting migrant smuggling and human trafficking networks. Port Intelligence Units consisting of immigration, criminal and maritime police have been established in Cambodia, Indonesia and Thailand and are trained in case development and management, referral to justice authorities and protection mechanisms.¹³⁶

Continuing Questions and Controversies

- To what extent should a coastal State be obliged to exercise criminal jurisdiction on board foreign ships in its internal waters to protect migrants?

¹³⁶ For instance, a Port Intelligence Unit was opened in Sihanoukville, Cambodia in June 2013 for the purpose of strengthening the response to smuggling of migrants. ('Intelligence Unit opens in a key Cambodian seaport to combat migrant smuggling', UNODC website, Stories section. Available from www.unodc.org/southeastasiapacific/en/cambodia/2013/06/migrant-smuggling/story.html)

PART

2



MARITIME INTERCEPTION



It is well established in international law that States, subject to treaty obligations, have the right to control the entry of non-nationals into their territories. It is in this context that States organize maritime border controls and, under certain conditions, intercept migrants at sea. Interception has been defined as encompassing “all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.”¹³⁷ Interception of vessels with migrants on board can also occur for other purposes. States have the legal competence to stop and board vessels suspected of being involved in human trafficking or labour exploitation, as well as migrant smuggling. Where maritime interceptions are carried out for any of these purposes, legally binding protection obligations arise on the basis of the law of the sea,¹³⁸ human rights law, refugee law (including the principle of non-refoulement),¹³⁹ and as well as customary law.¹⁴⁰

For the purposes of this section, interception is broadly understood to include the measures employed at sea (both territorial and extraterritorial) by a State authority aimed at stopping and controlling the movement of a vessel and the people on board. There are different actions a State authority may want to take when intercepting – whether the aim is to stop or redirect the vessel for border control purposes, or to pursue policy goals such as combatting migrant smuggling, human trafficking, slavery, forced labour and labour exploitation, among others.¹⁴¹

¹³⁷ Office of the United Nations High Commissioner for Refugees (UNHCR), “Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach” (United Nations, Geneva, 2000). Available from www.unhcr.org/excom/standcom/3ae68d144/interception-asylum-seekers-refugees-international-framework-recommendations.html

¹³⁸ Article 293 of UNCLOS stipulates that “a court or tribunal having jurisdiction...shall apply the [UNCLOS] and other rules of international law not incompatible with the [UNCLOS].” In practice, the International Tribunal for the Law of the Sea (ITLOS) has occasionally referred to human rights law standards and notions of humanity for the legal assessment of cases brought before it. (See, for instance: *The M/V “Virginia G” Case (Panama v. Guinea-Bissau)* (Judgment), Case No. 19, ITLOS, 14 April 2014; *The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)* (Judgment), Case No. 18, ITLOS, 28 May 2013; *The “Tomimaru” Case (Japan v. Russian Federation)* (Judgment), Case No. 15, ITLOS, 6 August 2007; and *The “Juno Trader” Case (Saint Vincent and the Grenadines v. Guinea-Bissau)* (Judgment), Case No. 13, ITLOS, 14 April 2014.)

¹³⁹ See, for instance: UNHCR, “Maritime interception operations and the processing of international protection claims: Legal standards and policy considerations with respect to extraterritorial processing”, policy paper (United Nations, Geneva, 2010), pp.18–22, available from www.refworld.org/docid/4cd12d3a2.html; and UNHCR, Conclusion No. 97 (Conclusion on Protection Safeguards in Interception Measures) of 10 October 2003, Statement (a)(iv), available from www.unhcr.org/excom/exconcl/3f93b2894/conclusion-protection-safeguards-interception-measures.html

The latter notes that interception measures should not result in asylum seekers and refugees being denied access to international protection or returned, directly or indirectly, to the frontiers of territories where their lives or freedom would be threatened on a Refugee Convention ground or other ground in international law. However, interdiction policy does not in and of itself breach non-refoulement; in exceptional cases, a State may implement interdiction operations on another flag State. (See also: S. Kim, “Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context”, *Leiden Journal of International Law*, 30(1):49–70; and E. Papastavridis (ed.), *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing, Portland and Oxford, 2013), pp. 259–314.)

¹⁴⁰ G. Goodwin-Gill, *The Refugee in International Law*, in: P. Mallia, *Migrant Smuggling by Sea*, p. 133.

¹⁴¹ Referring only to “boarding and inspecting” aims to exclude related actions such as detaining the vessel or persons on board, interdiction, or pushing it back, although the latter often accompanies interception operations. The legality of these actions must be assessed case by case, as they fall outside the specific right to stop a vessel.

Accordingly, several different understandings of “interception at sea” including related notions such as interdiction,¹⁴² “push-back” (or “turn-back”), taking back,¹⁴³ diversion and escorting back, among others,¹⁴⁴ are all captured in this understanding.

Push-backs on the high seas

“Push-back” is a term undefined in international law, but generally refers to measures taken by State officials to push a vessel away from its territorial waters and back in the direction it came from. Push-back (or “turn-back” or “turnaround”) activities on the high seas that fail to examine the individual situations of the persons on board risk violation of the prohibition on collective expulsion. Before persons are returned to a territory of a State other than the intercepting State, they must be afforded due process of the individualized examination of the circumstances of their case, so as to identify their protection needs. Accordingly, where UNCLOS is invoked to intercept a vessel, its provisions should be interpreted and applied in good faith to uphold its protection purpose.

Interception is effectively an exercise of enforcement jurisdiction, in that the State acts to compel compliance with laws it has prescribed.¹⁴⁵ Depending on the flag of the vessel and the maritime zone in which it is found, State competencies to intercept vary from full powers to stop, board, search and detain on the one hand, to total absence of any power over the vessel on the other. From the moment a State vessel starts its pursuit, subsequently stops the vessel and thereby limits its freedom of navigation (an action which can only be undertaken at sea under very specific legal grounds), the intercepted vessel can be considered to be under the effective control of the State authorities and, henceforth, under its jurisdiction.¹⁴⁶ Therefore, maritime interception always triggers State jurisdiction over the migrants concerned.

¹⁴² Guilfoyle describes interdiction as a two-step process: “first, the boarding, inspection, and search of a ship at sea suspected of prohibited conduct; second, where such suspicions prove justified, taking measures, including any combination of arresting the vessel, arresting persons abroad or seizing cargo.” (Guilfoyle, Shipping Interdiction and the Law of the Sea, in: A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 405.)

¹⁴³ The Australian Government draws a distinction between “turn-backs” (where a vessel is removed from Australian waters and returned to just outside the territorial seas of the country from which it departed) and “take-backs” (where Australia works with a country of departure to effect the return of passengers and crew, and there is an at-sea transfer from one sovereign authority to another). (Andrew and Renata Kaldor Centre for International Refugee Law (“The Kaldor Centre”), “Turning back boats”, fact sheet (Kaldor Centre, Sydney, 2017), p. 3. Available from www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Turning_Back_Boats.pdf)

¹⁴⁴ For a more detailed discussion, see, for instance: B. Miltner, “Irregular maritime migration: Refugee protection issues in rescue and interception”, *Fordham International Law Journal*, 30(1):79–83.

¹⁴⁵ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 408.

¹⁴⁶ *Al-Skeini et al. v. the United Kingdom* (Judgment), Application No. 55721/07, European Court of Human Rights, 7 July 2011, Paragraphs 132 and 137.

States have law enforcement rights against vessels transporting migrants irregularly at sea in the following cases:

- (a) In their territorial sea, where it is clear that persons on board intend to disembark at the coastal State without complying with legal entry requirements;
- (b) In limited cases, in the contiguous zone (where a crime is reported to have occurred in the territorial sea or territory of the coastal State);
- (c) On the high seas, where permitted under UNCLOS or another treaty.¹⁴⁷

When encountering a foreign vessel without nationality on the high seas, a State has the express right to visit it.¹⁴⁸ A fortiori, then, a State has this right in its EEZ,¹⁴⁹ contiguous zone,¹⁵⁰ territorial sea and internal waters.

Table 3: State power and limitations to intercept

| State power over vessels... | Type of power and limitations to power |
|---|--|
| ...flying the flag of the intercepting State ¹⁵² | State has full power. Maritime zone where the vessel is sailing is of little significance. |
| ...flying a foreign flag | State has full power, except in some situations. Maritime zone where the vessel is sailing is of some significance. |
| ...flying no flag | Power depends on the legal regime of the maritime zone. |
| ...on the high seas | The principle of freedom of navigation means that only flag States have jurisdiction over their vessels, with some limited exceptions, including where vessels are unflagged, in which case coastal States have leeway to intercept. |
| ...in its exclusive economic zone (EEZ) | States can create protection measures for migrant workers within their fishing licence system and the enforcement of that system. |
| ...in its contiguous zone | States can prevent potential infringement of their national laws. However, States cannot detain vessels and persons in this zone for mere potential breaches of the law. Its powers are limited to preventative action, which may include, among others, stopping, boarding, inspecting and pushing back. ¹⁵³ |

¹⁴⁷ UNCLOS, Article 19(2)(g).

¹⁴⁸ Ships are not allowed to change their flag during a voyage or when in a port of call, unless for real transfer of ownership or change of registry. Therefore, when changing or using flags of convenience, the vessel may not claim any of the nationalities in question with respect to any other State, and may be treated as a ship without nationality. (UNCLOS, Articles 92(1), 91(2) and 110(1)(d).)

¹⁴⁹ Within the EEZ, States can create protection measures for migrant workers within their fishing licence system and the enforcement of that system.

¹⁵⁰ States can prevent potential infringement of their national laws but cannot detain vessels and persons in this zone for mere potential breaches of the law. Its powers are limited to preventative action, which may include, among others, stopping, boarding, inspecting and pushing back.

¹⁵¹ Subject to exclusive jurisdiction of flag State on the high seas. (UNCLOS, Article 92(1).)

¹⁵² The legality of pushing back a vessel away from one's territorial waters depends on other legal requirements, including non-refoulement.

| State power over vessels... | Type of power and limitations to power |
|------------------------------|--|
| ...in its territorial waters | States have territorial sovereignty, limited by vessels' right of innocent passage. ¹⁵⁴ Ships without nationality cannot rely on the right of innocent passage: they can be stopped, searched and detained. |
| ...in its internal waters | States have full power to intercept. |

States have also extended their extraterritorial jurisdiction to intercept in the territorial seas of other States through bilateral or multilateral agreements (including joint patrol and ship rider agreements), or by consent of the State in whose jurisdiction the interception takes place.

CASE STUDY 5

Operation Sovereign Borders

The Australian response to migrant smuggling by sea is Operation Sovereign Borders (OSB), under which Australian authorities intercept and turn boats around, forcing them back into international waters.¹⁵⁴ Under this response, the Australian Government purchased a number of lifeboats onto which migrants were transferred if the boat they were initially encountered on was unsafe.¹⁵⁵ The policy unquestionably reduced smuggling by sea to Australia and effectively stopped deaths at sea, but has not necessarily prevented deaths that occur by other means. Implementation of the policy has raised serious concerns about violations of other human rights, including in relation to the protection obligations Australia has committed to in the Migrant Smuggling Protocol, as well as its adherence to the principle of non-refoulement when persons are returned to States that are not party to the Refugee Convention or are otherwise ill-equipped to meaningfully protect migrants that they receive.¹⁵⁶ The turn-back operations performed under OSB have been criticized for risking the lives and safety of migrants, the crew members of smuggling vessels and Australian personnel carrying out the operations. For example, such operations have been reported to include situations in which Australian Navy officers repaired vessels and informed migrants

¹⁵³ Given that vessels allegedly with irregular migrants on board can be considered in breach of national laws, their passage is generally viewed as non-innocent according to UNCLOS.

¹⁵⁴ Operation Sovereign Borders (OSB) is an initiative by the Department of Immigration and Border Protection. The OSB website is available from <http://osb.homeaffairs.gov.au>

¹⁵⁵ This differs from earlier Operation Relex, where even unseaworthy vessels were turned back to Indonesia, resulting in the deaths of many people subsequent to their interdiction by Australian authorities. (A. Schloendhardt and C. Craig, "Turning back the boats: Australia's interdiction of irregular migrants at sea", *International Journal of Refugee Law*, 27(4):536–572.)

¹⁵⁶ See, for instance: I. Zamfir, "Refugee and asylum policy in Australia: Between resettlement and deterrence", briefing (European Parliament, Strasbourg, 2015); Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* (Australian Human Rights Commission, Sydney, 2014). Available from www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf

Concerns have been raised at the lack of open source data on migrant smuggling by sea. (See, for instance: "Statistics relating to Migrant Smuggling in Australia", University of Queensland website, TC Beirne School of Law: Research section. Available from www.law.uq.edu.au/migrantsmuggling-statistics; and A. Schloendhardt and C. Craig, "Turning back the boats: Australia's Interdiction of Irregular Migrants at Sea", pp. 567–570.)

that they would be taken to Australian territory, but instead towed them back to Indonesian waters. The engines of pushed-back vessels failed, resulting in migrants (including children) having to swim or wade to shore, and situations in which migrants tried to overpower Australian authorities during tow-backs while being subdued with pepper spray, not to mention acts of sabotage, incidents of self-harm, threats of suicide, passengers jumping overboard or being pointed back out to sea after being shown maps and receiving instructions on how to operate lifeboats, and deaths in remote jungles. There have also been allegations of arrest and torture upon re-arrival in the country of initial embarkation.¹⁵⁷ The lives and safety of Australian officers have also been jeopardized, for example, when they were required to rescue migrants in risky situations, or when migrants threatened to set alight vessels. Post-traumatic stress has also been reported among navy officers who carried out turn-back operations, owing to the use of force and coercive tactics, as well as exposure to situations of human misery.¹⁵⁸ Indonesia has also alleged that tow-backs into Indonesian waters violate its territorial sovereignty. In light of these considerations, questions have been raised about whether OSB complies with international law, including, among other instruments, the Migrant Smuggling Protocol.¹⁵⁹

¹⁵⁷ A. Schloendhardt and C. Craig, “Turning back the boats’: Australia’s Interdiction of Irregular Migrants at Sea”, pp. 550–558.

¹⁵⁸ *Ibid.*, pp. 566–567.

¹⁵⁹ R. Warner and M. McAdam, “Transnational criminal law in Australia”, in: D.R. Rothwell and E. Crawford (eds.), *International Law in Australia* (Third edition, Thomson Reuters, Pyrmont, 2016). See also: IOM Bangkok Regional Office, “Bay of Bengal and Andaman Sea Crisis Response”, situation report (IOM, Bangkok, 2016), available from www.iom.int/sites/default/files/situation_reports/file/IOM-Bay-of-Bengal-and-Andaman-Sea-Crisis-Response-August-2016.pdf, referred to in Part 3.2.

Do human rights laws apply extraterritorially?

It is increasingly accepted that where a State acts outside of its territorial waters (for instance, by intercepting a vessel and exercising “effective control” over those on board), it interferes with the human rights enjoyment of individuals outside its territory, and, therefore, has human rights obligations.¹⁶⁰ However, some human rights instruments contain clauses limiting extraterritorial jurisdiction, while others do not, leaving the scope of their application in some question.¹⁶¹

In navigating the confusion, States are guided by the human rights obligations to which they are committed, as well as the realities of their extraterritorial activities.¹⁶² There is a strong foundation for the extraterritorial application of human rights obligations in any

¹⁶⁰ Article 29 of the Vienna Convention on the Law of Treaties holds that “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” This provision is understood as not excluding the extraterritorial application of treaties. It is generally understood that human rights treaties concern only the relationship between a State and its nationals or persons in its territory. In the European context, it has been confirmed that the European Court of Human Rights (ECHR) has extraterritorial applicability. The case of *Xhavara and Others v. Italy and Albania* confirmed the extraterritorial application of human rights and the principle of non-refoulement in the maritime context. The ECHR held in that case that interception activities that extend to international waters fall within the jurisdiction of the intercepting State, which accordingly bear responsibilities for the treatment of persons on board, in accordance with the Refugee Convention and the ECHR. In the case of *Loizidou v. Turkey*, the ECHR found that there are three different scenarios in which jurisdiction may be established outside of the State’s territory: (a) when an extradition or expulsion order by a State party gives rise to a violation of the Article 3 prohibition on torture and other degrading treatment or punishment; (b) when acts by State actors give rise to results outside of the State territory; and (c) when the State exercises “effective control” through either lawful or unlawful military action of an extraterritorial nature. (See also: L.A. Nessel, “Externalised borders and the invisible refugees”, *Columbia Human Rights Law Review* 40(3):625–700.)

¹⁶¹ For instance, the International Covenant on Economic, Social and Cultural Rights (ICESCR), done 16 December 1996 and entered into force 3 January 1976, does not contain a jurisdiction clause and is generally accepted to have territorial scope. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), done 18 December 1979 and entered into force 3 September 1979, does not contain any reference to its scope of application. Article 5 of the Convention against Torture explicitly requires States to criminalize acts of torture committed aboard ships flying their flag. In some instruments, victims of human rights violations must be within the “jurisdiction” of the State in order for that State to have responsibility for those violations: Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) refers to the commitment of States parties to ensure rights “to all individuals within its territory and subject to its jurisdiction.” On this point, it has been noted that the provision is now understood to refer to all individuals within its territory or subject to its jurisdiction. (See, for instance: A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 252.)

Article 2 of the Convention on the Rights of the Child, done 20 November 1989 and entered into force 2 September 1990, requires that States must ensure certain rights “to each child within their jurisdiction.” The United Nations Committee on the Rights of the Child has noted that Convention rights apply to all children, regardless of status, within the territory of each State party, and these include children “who come under the State’s jurisdiction while attempting to enter the country’s territory.” (United Nations Committee on the Rights of the Child (CRC), General Comment No. 6 of 1 September 2005 (Treatment of unaccompanied and separated children outside their country of origin). Available from www2.ohchr.org/english/bodies/crc/docs/GC6.pdf)

General Comment No. 6 (2005), however, does not state that the Convention has extraterritorial application where the State exercises some measure of control over children. Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and their Families (ICRMW), done 18 December 1990 and entered into force 1 July 2003, requires States parties to respect and ensure the human rights of migrant workers and their families “within their territory or subject to their jurisdiction.” Case law assumes the extraterritorial application of human rights treaties that lack a clause clarifying the scope of jurisdiction. On this point, though, Khaliq (2015) considers that human rights tribunals and domestic courts consider the extraterritorial application of human rights obligations to be exceptional, noting that the application of human rights obligations to ships was not discussed during the drafting process of the ICCPR. However, he accedes that there are several strong arguments for why the United Nations Human Rights Committee (HRC) should extend State obligations to privately owned vessels: firstly, the ICCPR is a living instrument that should evolve; secondly, the ICCPR does not exist in a vacuum but is to be interpreted within the framework of the entire international legal system (including Article 94 of UNCLOS); thirdly, absolving a State party of human rights obligations would lead to a gap in protection on the high seas. (U. Khaliq, “Jurisdiction, ships and human rights treaties”, pp. 339–43.)

¹⁶² With this in mind, the contexts discussed below that may occur outside the jurisdiction of the State – maritime interception and search and rescue – would involve conduct that places persons within the power, control or authority of States, thereby triggering their human rights obligations in international law. (For further discussion on extraterritorial application of human rights, see, for instance: E. Papastavridis, “Rescuing migrants at sea: The responsibility of States under international law”, *SSRN Electronic Journal* (27 September 2011), available from <http://dx.doi.org/10.2139/ssrn.1934352>); and A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 250–264.)

interception measures carried out at sea. The United Nations Human Rights Committee's General Comment No. 31 promotes a wide scope of applications of the rights set out in the International Covenant on Civil and Political Rights (ICCPR) to assert a general rule that:

. . . a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. . . . the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, *regardless of the circumstances in which such power or effective control was obtained.* [emphasis added]¹⁶³

Similarly, although the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the "Convention against Torture") refers only to jurisdiction over territory, it has affirmed in its General Comment No. 2 that it recognizes "any territory" to include "all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law."¹⁶⁴ The Migrant Smuggling and Trafficking Protocols contain mandatory protection provisions, as well as a savings clause clarifying that any actions taken on the basis of either instrument cannot dilute or displace human rights obligations.¹⁶⁵

¹⁶³ United Nations Human Rights Committee (HRC), General Comment No. 31 of 26 May 2004 (Nature of the General Legal Obligation Imposed on States Parties to the Covenant). Available from www.refworld.org/docid/478b26ae2.html

¹⁶⁴ United Nations Committee Against Torture (CAT), General Comment No. 2 of 24 January 2008 (Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment - Implementation of Article 2 by States parties). Available from www.refworld.org/docid/47ac78ce2.html

The paragraph also states that "the Committee [against Torture] considers that the scope of "territory" under Article 2 must also include situations where a State Party exercises, directly or indirectly, de facto or de jure control over persons in detention." (See also: *J.H.A. v. Spain*, CAT/C/41/D/323/2007, United States Committee Against Torture, 21 November 2008.) The *J.H.A. v. Spain* case required the United Nations Committee Against Torture to consider whether the Convention against Torture applied to the 23 smuggled Indian migrants rescued by Spanish authorities in international waters who were subsequently disembarked and detained in Mauritania. In its admissibility determination, the Committee referred to the "effective control" test and affirmed that where States parties exercise – directly or indirectly – de facto or de jure control over persons in detention, they have human rights obligations to persons under that control, even where that detention takes place outside the territory of the State. Although the Committee did not decide on the merits of the case, Paragraph 2.6 offers insight into the conditions of detention that could amount to violations under Article 7 of the ICCPR and Article 3 of the Convention against Torture. The 23 alleged victims, who refused to sign voluntary repatriation agreements, remained in detention under Spanish control in Nouadhibou, Mauritania in a former fish-processing plant. The complainant states that the vessel on which the immigrants were detained lacked sufficient lighting and ventilation and that the detainees were not allowed out. He added that although the vessel was large, the detainees were obliged to remain confined to a restricted area and to sleep on the floor, on plastic and blankets. He reported that access to toilet and shower facilities was subject to the authorization of the guards supervising the detainees, and that the latter were occasionally forced to urinate in bottles.

¹⁶⁵ See, for instance: Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Article 14, available from www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx; and Migrant Smuggling Protocol, Article 19.

Case law has further affirmed that States cannot interpret their jurisdiction to perpetrate human rights violations in the territories of other States that they could not perpetrate in their own territory.¹⁶⁶ The principle that jurisdiction in interception triggers human rights obligations can be summarized as follows:

In itself, *de jure* jurisdiction over other vessels in interception measures on the high seas, albeit limited, provides evidence for a sufficient level of *de facto* control to trigger the application of human rights law . . . [Physical] control over intercepted persons would, under any of the criteria, trigger State jurisdiction; but even where the level of *de facto* control is limited, it is likely that all human rights bodies would consider that the intercepting State has established jurisdiction.¹⁶⁷

This principle has been affirmed and further elaborated on in jurisprudence of the European Court of Human Rights. In *Medvedyev and Others v. France* (2010), the European Court of Human Rights held that intercepting and arresting a vessel and the people on board constituted an exercise of jurisdiction in the sense of the European Convention. It furthermore stated that:

[The] special nature of the maritime environment...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."¹⁶⁸

In *Xhavara and Others v. Italy* (2001), the European Court of Human Rights found that Italy, as the flag State of a patrol boat, was responsible for the human rights violations caused by its vessel to persons not on board.¹⁶⁹ In this case, an Italian military vessel collided with the Albanian vessel *Kater i Rades*, which was carrying irregular migrants, resulting in the deaths of several people. The court affirmed that judicial authorities could exercise an assessment of actions of effective control over persons on board another vessel (in this case, the *Kater i Rades*) through interception in the context of a border control operation. In this case, the State actions taken concerned conduct in the exercise of jurisdiction at sea, impacting on the right to life. The question in this case concerned:

¹⁶⁶ R. Barnes, "The international law of the sea and migration control". See also: *Issa v. Turkey* (2004), which took a broader approach to jurisdiction than that offered in *Banković and Others v. Belgium and 16 Other States* and *Lopez Burgos v. Uruguay* (*Issa and Others v. Turkey* (Judgment), Application No. 31821/96, European Court of Human Rights, 16 November 2004; *Banković and Others v. Belgium and 16 Other States*, Application No. 52207/99 (Grand Chamber Decision), European Court of Human Rights, 12 December 2001; and *Lopez Burgos v. Uruguay* (Merits), Communication No. 52/1979, United Nations Committee on Human Rights, 29 July 1981).

¹⁶⁷ A. Klug and T. Howe, "The concept of State jurisdiction and the applicability of the non-refoulement principle to extraterritorial interception measures", p. 95.

¹⁶⁸ *Medvedyev and Others v. France* (Judgment), Application no. 3394/03, European Court of Human Rights, 29 March 2010.

¹⁶⁹ A. Klug and T. Howe, "The concept of State jurisdiction and the applicability of the non-refoulement principle to extraterritorial interception measures", p. 85.

. . . whether the alleged negligent conduct of the accused exposed the passengers of the *Kater i Rades* to disproportionate danger in relation to the legitimate goal of the protection of national security, and thus to determine whether the immigration control measures were applied in a manner incompatible with the obligation resting upon States to protect the right to life of every person.¹⁷⁰

It was also alleged that Italy's actions amounted to a violation of the right to leave a country.¹⁷¹ On this point, the European Court of Human Rights took the view that interception activities – which extended to international waters and to the territorial waters of Albania – were not aimed at preventing Albanians from leaving their country, but rather at preventing them from entering Italian territory. The Court found that the right to life could potentially be violated in interception operations when engaging vessels with migrants on board. Even though the right to be rescued does not exist (except where an obligation is created), the conduct of State authorities could be scrutinized to see whether they contributed or led to the deaths of people at sea. While the court found the case inadmissible on all grounds, it did clarify that any measures taken must protect the right to life.

In short, once jurisdiction over migrants at sea is established, States are responsible for protecting and respecting human rights and other obligations, either by virtue of the treaties they have ratified, or by virtue of international customary law.

Does the obligation of non-refoulement apply extraterritorially?

Whether the obligation of non-refoulement applies extraterritorially remains a subject of significant debate.¹⁷² The Refugee Convention does not contain any specific clause pertaining to the scope of its application, leaving it subject to different interpretations.¹⁷³ However, non-refoulement is not subject to any qualification as to the required link between the individual refugee and the territory of the State.¹⁷⁴ The current externalization of border control measures means that States are likely to encounter refugees extraterritorially, often well

¹⁷⁰ *Xhavara and Others v. Italy and Albania* (Judgment), Application No. 39473/98, European Court of Human Rights, 11 January 2001.

¹⁷¹ International human rights law protects an individual's right to leave a country, including his or her own. In practice, this right can be violated not only by the country a person seeks to leave, but also by countries a person seeks to enter. (United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 (International Covenant on Civil and Political Rights (ICCPR)), Article 12(2), available from www.ohchr.org/en/professionalinterest/pages/ccpr.aspx; United Nations General Assembly Resolution 45/158 of 18 December 1990 (International Convention on the Protection of the Rights of All Migrant Workers and their Families (ICRMW)), Article 8(1), available from www.un.org/documents/ga/res/45/a45r158.htm; United Nations General Assembly Resolution 2106 (XX) of 7 March 1966 (International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)), Article 5, available from www.refworld.org/docid/3ae6b3940.html; United Nations General Assembly Resolution 44/25 of 20 November 1989 Convention on the Rights of the Child, Article 10, available from www.un.org/documents/ga/res/44/a44r025.htm; United Nations General Assembly Resolution 217A of 10 December 1948 (Universal Declaration of Human Rights (UDHR)), Article 13(2), available from www.un.org/en/universal-declaration-human-rights; and United Nations Human Rights Committee (HRC), General Comment No. 27 of 2 November 1999 (Freedom of Movement), Article 12, available from www.refworld.org/docid/45139c394.html)

¹⁷² The principle of non-refoulement is captured in Article 33(1) of the Refugee Convention.

¹⁷³ For instance, Klug and Howe (2010) point to the complementarity between human rights law and refugee law, as speaking in favour of giving the same territorial scope to non-refoulement in both regimes. In contrast, Gallagher and David point to distinctions between human rights law and refugee law, concluding that extraterritorial application of the principle of non-refoulement remains unsettled. (A. Klug and T. Howe, "The concept of State jurisdiction and the applicability of the non-refoulement principle to extraterritorial interception measures", pp. 71–72; and A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 267.)

¹⁷⁴ M. den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing, Oxford, 2012), pp. 120–141.

before the refugees reach those States' frontiers but are in the territorial sea of a third State or even on the high seas. In these cases, where States push refugees back to where they came from, questions arise as to whether the principle of non-refoulement is violated.¹⁷⁵ State practice often reveals a narrow interpretation, locating the obligation only within the territory of the State, thereby creating significant gaps in refugee protection.¹⁷⁶ Some significant refugee-receiving States, including the United States¹⁷⁷ and Australia,¹⁷⁸ deny that the principle of non-refoulement has extraterritorial application. These States opt for a more restrictive understanding that does not extend the principle to asylum seekers who are not at their borders or physically within their territory. This position is perhaps understandable in light of the fact that the Refugee Convention was drafted in consideration of persons who are already in a State physically, and not actively approaching it to seek asylum. Drafters may also not have anticipated the State practice of offshore immigration control devised to limit the right to seek asylum¹⁷⁹ or mass migration situations.¹⁸⁰ However, relevant international treaties drafted since, including both the Trafficking and Migrant Smuggling Protocols, have reaffirmed the applicability of non-refoulement, stating, for example:

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights

¹⁷⁵ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 266.

¹⁷⁶ See, for instance: A. Fischer-Lescano, T. Löhr and T. Tohidipur, "Border controls at sea: Requirements under international human rights and refugee law", *International Journal of Refugee Law*, 21(2):256–296; R. Barnes, "The International Law of the Sea and Migration Control", pp. 115–117; E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, pp. 302–308; and E. Papastavridis, "Rescuing Migrants at Sea", pp. 31–33.

¹⁷⁷ In the 1993 case *Sale v. Haitian Centers Council, Inc.* (1993), the US Supreme Court found that national law and the Refugee Convention do not commit States parties to the granting of protection from refoulement on the high seas. Accordingly, the US Supreme Court found that intercepting and repatriating asylum seekers without giving them access to asylum procedures was consistent with obligations under domestic law and the Refugee Convention. The decision was widely criticized both within the United States and internationally, and notably by dissenting Justice Blackmun, for whom the notion that a country goes forth "to seize aliens who are not at its borders and return them to persecution" was untenable. (*Sale v. Haitian Centers Council, Inc.* (Judgment), Reference No. 509 US 155, United States Supreme Court, 21 January 1993.)

The main elements of the *Sale v. Haitian Centers Council, Inc.* decisions were subsequently rejected by the Inter-American Commission on Human Rights in *Haitian Centre for Human Rights et al. v. United States* (Judgment), Case No. 10.675, Report No. 51/96, Inter-American Commission on Human Rights, 13 March 1997. Further criticism of the *Sale v. Haitian Centers Council, Inc.* decision can be found, inter alia, in: L.A. Nessel, "Externalised borders and the invisible refugees", p. 640–641; N. Klein "A maritime security framework for the legal dimensions of irregular migration by sea" in: *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (V. Moreno-Lax and E. Papastavridis (eds.)) (Brill/Nijhoff, Leiden and Boston, 2016), pp. 49–50; A.G. Pizor, "Sale v. Haitian Centers Council: The return of Haitian refugees", *Fordham International Law Journal* 17(4):1062–1104; and H.H. Koh and M. Wishnie, "The story of *Sale v. Haitian Centers Council: Guantánamo and Refoulement*", in: *Human Rights Advocacy Stories* (D. Hurwitz and M.L. Satterthwaite (eds.)) (Thomson Foundation Press, New York, 2009), p. 424, which describes the decision of the US Supreme Court as "bad law-making."

¹⁷⁸ *CPCF v. Minister for Immigration and Border Protection* (2015) also decided that the non-refoulement principle does not apply outside the territorial sea. This decision has been criticized as being in contravention of international refugee law. (*CPCF v. Minister for Immigration and Border Protection* (Judgment), Case No. S169/2014, High Court of Australia, 28 January 2015.)

For a critical assessment of the Australian jurisprudence, see, for instance: N. Klein, "Assessing Australia's Push Back the Boats Policy under international law: Legality and accountability for maritime interceptions of irregular migrants", pp. 17–18, which maintains that "the weight of legal authority cuts against Australia's position that it is not bound by an obligation of non-refoulement on the high seas."

¹⁷⁹ The text of the Refugee Convention consequently remains subject to interpretation. For a critique of Australia's offshore processing, see, for instance: C. Higgins, "The (Un-)sustainability of Australia's offshore processing and settlement policy", in: *Boat Refugees and Migrants at Sea* (V. Moreno-Lax and E. Papastavridis (eds.)), pp. 303–326.

¹⁸⁰ M. den Heijer, "Europe beyond its borders: Refugee and human rights protection in extraterritorial immigration control", in: *Extraterritorial Immigration Control: Legal Challenges* (B. Ryan and V. Mitseligas) (Martinus Nijhoff Publishers, Leiden, 2010), p. 186.

law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.¹⁸¹

Ultimately, the challenges associated with applying the principle do not give rise to the conclusion that the principle does not apply. Certainly, non-refoulement (at least in the European context) has been recognized as a clear limit on State sovereignty in relation to migration controls at sea.¹⁸² The 2012 landmark decision on non-refoulement in *Hirsi Jamaa and Others v. Italy* confirmed the application of the principle on the high seas.

Hirsi Jamaa and Others v. Italy

In May 2009, Hirsi Sadik Jamaa (a Somali national) and others were among a group of almost 200 migrants on board three vessels leaving the Libyan coast for Lampedusa, Italy. They were intercepted on the high seas by Italian Coast Guard and Italian Police vessels, transferred onto Italian military ships and returned to Libya. In returning them, no process of screening for refugee status was carried out. Subsequent to these facts, 24 people among those returned brought claims against Italy to the European Court of Human Rights, arguing that Italy had breached their rights. The Court held that Italy had violated the rights of the migrants through interdiction and by pushing back; Italy had established jurisdiction by exercising control over the migrants, even though they did so on the high seas. In specific relation to non-refoulement, the Court held that Italy should have known that there was significant risk of arbitrary return owing to the lack of asylum procedures in Libya, and accordingly found Italy in violation of the principle of non-refoulement under the Refugee Convention.¹⁸³

While international jurisprudence has not been so decisive about the extraterritorial application of non-refoulement as European case law has been, there is clear momentum towards that same approach.¹⁸⁴ UNHCR is adamant that the prohibition on refoulement applies wherever a State operates, including on the high seas or in the territory of another State, stating its position definitively thus:

[A]n interpretation which would restrict the scope of application of Article 33(1) of the 1951 Convention to conduct within the territory of a State party to the 1951 Convention would not only be contrary

¹⁸¹ Trafficking Protocol, Article 14; and Migrant Smuggling Protocol, Article 19.

The phrase “where applicable” could be taken to refer to jurisdictional applicability; a good faith interpretation of the savings clauses would rather suggest the phrase refers to those situations in which a person is at risk of refoulement.

¹⁸² S. Kim, “Non-refoulement and extraterritorial jurisdiction”.

¹⁸³ *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, European Court of Human Rights, 23 February 2012. See also: *Xhavara and Others v. Italy and Albania* (2001).

For a detailed analysis of *Hirsi Jamaa and Others v. Italy* (2012) in the context of non-refoulement in push-back operations, see: M. Tondini, “The legality of intercepting boat people under search and rescue and border control operations, with reference to recent Italian interventions in the Mediterranean Sea and the ECtHR decision in the *Hirsi* case”, *Journal of International Maritime Law*, 18(1):59–74.

¹⁸⁴ S. Kim, “Non-refoulement and extraterritorial jurisdiction”, p. 70.

to the terms of the provision, as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with relevant rules of international human rights law. It is UNHCR's position, therefore, that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction.¹⁸⁵

According to this interpretation, the non-refoulement obligation is triggered whenever a person is under the "effective control" and, hence, the jurisdiction of a State, whether as part of port State control, a search and rescue operation or a maritime interception. As the extraterritorial application of human rights obligations slowly but surely gains acceptance (at least in critical areas such as the right to life and the prohibition against torture), and noting the non-derogable nature of the refoulement prohibitions in ICCPR Article 7¹⁸⁶ and Article 3 of the Convention against Torture,¹⁸⁷ it seems reasonable to expect an increasing acceptance of the extraterritorial application of the non-refoulement principle.¹⁸⁸

¹⁸⁵ 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," (UNHCR Geneva, 2007). Available from www.refworld.org/docid/45f17a1a4.html (See also: UNHCR Executive Committee, "Interception of asylum seekers and refugees: The international framework and recommendations for a comprehensive approach", paper presented at the eighteenth meeting (UNHCR, Geneva, 2000), Paragraph 23; and P. Mallia, *Migrant Smuggling by Sea*, pp. 88–90.)

Goodwin-Gill shares the view that non-refoulement applies wherever State action takes place, including outside its territory. However, he does note that while intercepting and forcibly returning refugees on the high seas amounts to refoulement, the denial of entry to seek asylum does not. (G.S. Goodwin-Gill, *The Refugee in International Law* (Oxford University Press, New York, 1996), pp. 143 and 252.)

¹⁸⁶ Article 7 of the ICCPR states that "no one shall be subjected to torture or to cruel, inhuman[e] or degrading treatment or punishment." This provision has been interpreted as a non-refoulement obligation by the United Nations Human Rights Committee (HCR): "In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman[e] or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement." (United Nations Human Rights Committee (HRC), General Comment No. 31 of 26 May 2004 (Nature of the general legal obligation imposed on States parties to the Covenant), Paragraph 9. Available from www.refworld.org/docid/478b26ae2.html.) This right is not only relevant for non-refoulement, but also for assessing conditions under which migrants are held under jurisdiction.

¹⁸⁷ Article 3 of the 1984 Convention against Torture states that "no State party shall expel, return (French: "*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." At least at the level of European law, the European Court of Human Rights has determined that the refoulement of migrants to frontiers of territories where a person could be exposed to torture or inhumane or degrading treatment may amount to a violation because of the extraterritorial effect of Article 3 of the Convention against Torture. (See, for example: *Soering v. the United Kingdom*, Application No. 37201/06, European Court of Human Rights, 28 February 2008, Paragraph 127; and *Hirsi Jamaa and Others v. Italy* (2012), in which the court decided that Article 3 rights could be violated by returning a person to a country where they risked torture, and by returning them to a country that would repatriate them to a country where they were at risk of being tortured.)

¹⁸⁸ On this point, Gallagher and David (2014) note that "the reality of extraterritorial migration control will eventually render untenable the wholesale rejection of the extraterritorial application of the obligation of non-refoulement. Specifically, the arguments that have been advanced for expanding the scope of applicability of human rights obligations (i.e. that control and authority over individuals or territory, not mere geography, is ultimately what really matters) will become increasingly difficult to reject in the context of refugee protection." (A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 473.)

Table 4: Types of jurisdiction exercised in the maritime context

| Type of jurisdiction | Description |
|---|---|
| Prescriptive jurisdiction (French: <i>compétence législative</i>) | A State's capacity to prescribe acts as criminal under its own laws ¹⁹⁰ In the maritime context, this refers to a State's power, in conformity with international law, to apply its laws to the sea and to persons and things at sea. ¹⁹¹ A State may assert prescriptive jurisdiction: <ul style="list-style-type: none"> • On the basis of the principle of territoriality, given that the crime was committed in the territory of the State; • Over a crime committed outside its territory when the crime is committed by or against one of its nationals (nationality principle); • Extraterritorially, on the basis that a particular crime affects their vital interests (protective jurisdiction).¹⁹² |
| Enforcement jurisdiction (French: <i>compétence exécutive</i>) | A State's capacity to apply law to specific facts and to enforce those laws ¹⁹³ In the maritime context, enforcement jurisdiction is a State's power, in conformity with international law, to enforce compliance and punish non-compliance with its laws, through executive measures such as boarding, searching or arrest, or by judicial measures such as court-imposed fines or imprisonment. ¹⁹⁴ Bilateral or multilateral treaties may be entered into that can give States enforcement jurisdiction outside their territory. ¹⁹⁵ |
| Adjudicative jurisdiction (French: <i>compétence juridictionnelle</i>) | The power of a court to decide in a matter of legal dispute or controversy |
| Functional jurisdiction (French: <i>compétence fonctionnelle</i>) ¹⁹⁶ | Limited jurisdiction of coastal States over their own legitimate interests within their maritime zones (territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf) and, exceptionally, also common concerns on the high seas ¹⁹⁷ |

¹⁸⁹ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 212.

¹⁹⁰ D. Nelson, "Maritime jurisdiction", in: *Max Planck Encyclopedia of Public International Law*.

¹⁹¹ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 273.

¹⁹² *Ibid.*, p. 222.

¹⁹³ D. Nelson, "Maritime jurisdiction", in: *Max Planck Encyclopedia of Public International Law*.

¹⁹⁴ Article 17 of the Migrant Smuggling Protocol invites States parties to consider bilateral or regional agreements or arrangements to prevent and combat smuggling. Article 15(1) requires States to establish jurisdiction over migrant smuggling and related offences where the offence is committed in the territory of the State party or on board one of its ships or aircraft. According to Article 15(2), States may (but are not required to) establish jurisdiction when the offence is committed against one of its nationals, by one of its nationals (or a stateless person who is resident in its territory) or where the offence is by activities outside the territory but committed with a view to a commission of a crime within its territory. By virtue of Article 15(4), States must treat Protocol offences as extraditable under relevant treaties and laws, and may also establish jurisdiction over offences when the alleged offender is present in its territory and the State does not extradite him.

¹⁹⁵ The term *compétence fonctionnelle* is not commonly used, but appears in Bulletin No. 88 of the United Nations Division for Ocean Affairs and the Law of the Sea: "... Le Protocole de 2002 ne s'applique donc ni au plateau continental, ni à la zone économique exclusive, ni encore à tout autre zone de compétence fonctionnelle (telle la zone écologique et de pêche protégée de la Croatie)." (p. 23) (Translation: The [Athens Convention] Protocol of 2002 does not therefore apply to either the continental shelf, exclusive economic zone, or any other zone under functional jurisdiction (such as the ecological and fisheries protection zone of Croatia.)

¹⁹⁶ Functional jurisdiction involves both prescriptive and enforcement jurisdiction components. (C. Rynjaert, "The concept of jurisdiction in international law", in: A. Orakhelashvili, *Research Handbook on Jurisdiction and Immunities in International Law*, pp. 59–60.)

Continuing Questions and Controversies

- To what extent can protection obligations extend to situations where States exercise migration control outside their territorial seas?
- What is the extraterritorial scope of application of a human rights treaty that does not contain an explicit clause on scope of application?
- What is the precise meaning of “effective control” in the context of triggering jurisdiction?
- What extraterritorial human rights obligations, if any, are owed to persons who are not intercepted or rescued at sea, and are accordingly not brought within the State’s jurisdiction?
- Under what circumstances, if any, is the non-refoulement obligation applicable extraterritorially?
- How are protection obligations allocated and shared between States where States exercise extraterritorial jurisdiction in the jurisdiction of a third State?

2.1. HIGH SEAS AND EXCLUSIVE ECONOMIC ZONE

The freedom of the high seas means, *prima facie*, that this region falls outside of any State’s jurisdiction. However, interception offers a significant exception to the principle of freedom on the high seas.¹⁹⁷ Interception is a means of enforcing domestic laws and regulations extraterritorially.¹⁹⁸ While State interception measures are generally aimed at persons once they have arrived at or are in its territorial waters, measures such as interdiction are increasingly used extraterritorially, whether on the high seas (or EEZ) or in the territorial waters of third States.¹⁹⁹ Given that ships in the EEZ are entitled to high seas freedoms, the same considerations that apply to the high seas are relevant to this maritime zone as well.

For a State to exercise jurisdiction over a foreign vessel on the high seas, a legal exception to the general rule of exclusive jurisdiction *vis-à-vis* foreign vessels must be found.²⁰⁰ Exceptions, in the forms of “the right of visit” and “the right of hot pursuit,” can be exercised in certain situations, including where there are reasonable grounds to believe that the vessel concerned is engaged in piracy or slavery. Irregular migration is not one of the grounds specified as an exception. However, States can intercept a vessel where there are reasonable grounds to believe it is engaged in migrant smuggling.²⁰¹ Indeed, incidents of maritime interception on the high seas have reportedly risen in recent years as States work to counter criminal

¹⁹⁷ E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, p. 309.

¹⁹⁸ D. Nelson, “Maritime jurisdiction”, in: *Max Planck Encyclopedia of Public International Law*.

¹⁹⁹ A. Klug and T. Howe, “The concept of State jurisdiction and the applicability of the non-refoulement principle to extraterritorial interception measures”, pp. 69–71.

²⁰⁰ Including the rights of visit and of hot pursuit exceptions provided for in Articles 110 and 105 of UNCLOS.

²⁰¹ United Nations General Assembly, “Conclusion on protection safeguards in interception measures” (United Nations, New York, 2003). Available from www.unhcr.org/excom/exconc/3f93b2894/conclusion-protection-safeguards-interception-measures.html

phenomenon at sea.²⁰² In noting the challenge of establishing jurisdiction on the high seas in relation to migrant smuggling, the Working Group on Smuggling of Migrants recommends that:

States should consider establishing jurisdiction, consistent with applicable international law, over incidents of migrant smuggling on the high seas involving unflagged vessels, including incidents in which the transportation of the migrants to shore by rescuers is the result of the deliberate conduct of the smugglers aimed at provoking the rescue of the migrants, and States may wish to consider the full implementation of Article 15 of the [Smuggling] Convention.²⁰³

In short, then, whether criminal jurisdiction is established over smuggling outside the territory of the State depends on the link between smuggling and domestic laws.²⁰⁴

Glauco I and II investigations: Italy establishes jurisdiction on the high seas

The capsizing of a smuggling vessel on 3 October 2013 resulted in the deaths of at least 366 people. What followed was a complex investigation by Italian authorities resulting in several convictions and the dismantling of a network of migrant smugglers operating across Eritrea, Ethiopia and Libya, as well as many European countries, that was responsible for smuggling at least 5,377 people. The investigation initially required the Italian Public Prosecutor to determine precautionary detention over several suspects. In order for Italy to lawfully exercise jurisdiction on the high seas, the action constituting the criminal conduct must take place, in whole or in part, on Italian territory (according to Article 6 of the Italian Criminal Code), or the results of the conduct must occur on Italian territory. Where criminal conspiracy is involved, the jurisdiction of the State extends to all co-perpetrators, even if they are abroad, as long as any act of participation in the shared criminal place by any of the associates, occurs in Italy. If this can be established, it is irrelevant that the participatory act itself is not illegal. Therefore, Italian jurisdiction was triggered in this case, giving effect to Article 5 of UNTOC (criminalization of participating in an organized criminal group) and thereby closing an area of impunity.²⁰⁵

²⁰² E. Papastavridis, *The Interception of Vessels on the High Seas*, p. 2. Also note: United Nations Security Council Resolution 2312 (2016). Available from <http://unscr.com/en/resolutions/doc/2312>

²⁰³ Report on the meeting of the Working Group on Smuggling of Migrants held in Vienna from 18 to 20 November 2015, Recommendation 5, Section A, available from www.unodc.org/unodc/en/treaties/CTOC/working-group-on-the-smuggling-of-migrants-2015.html

²⁰⁴ M. den Heijer, *Europe and Extraterritorial Asylum*, pp. 227–228. See also: United Nations Office on Drugs and Crime (UNODC), *Model Law against the Smuggling of Migrants* (UNODC, Vienna, 2010), pp. 23–25. The same considerations would apply, mutatis mutandis, to the extraterritorial application of the Trafficking Protocol.

²⁰⁵ See, for instance: Sharing Electronic Resources on Laws and Crime (SHERLOC), “Case n. 10341/15 R.N. G.I.P. – Glauco I” (United Nations Office on Drugs and Crime (UNODC), Vienna, n.d.), available from www.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2014/case_n_1034115_r.n._g.i.p._-glauco_i.html?lng=en&tmpl=sherloc; and SHERLOC, “Case n. 7472/15. R.N. G.I.P. – Glauco II” (UNODC, Vienna, n.d.), available from www.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2015/case_n_747215_r.n._g.i.p._-glauco_ii.html?lng=en&tmpl=sherloc

Another position maintains that a form of universal jurisdiction can be exercised over flagless vessels along the lines of the model applicable to piracy and unauthorized broadcasting, to allow States to intercept vessels engaged in migrant smuggling or human trafficking.²⁰⁶ The essence of universal jurisdiction is that certain crimes are so abhorrent that every State is considered to have an interest in their prosecution. In such cases, no link (whether by virtue of territoriality, nationality, interests or otherwise) needs to be established between the State and the person subjected to jurisdiction.²⁰⁷ Rather, the principle of universal jurisdiction provides jurisdiction over crimes committed by aliens outside the territory of the State that exercises jurisdiction, because the crime is considered to be “of concern to the international community as a whole.”²⁰⁸ There are few crimes to which universal jurisdiction applies; torture, genocide, war crimes and crimes against humanity are generally considered to be of the requisite seriousness for universal jurisdiction to apply.²⁰⁹

There have been some suggestions that slavery should be considered a crime of universal jurisdiction, and as such should fall within the purview of all States, irrespective of whether they have a nexus to a vessel at sea engaged in slavery. The notion of “crimes against humanity” is relevant here.²¹⁰ Some forms of human trafficking have been considered “crimes against humanity” primarily when they relate to slavery.²¹¹ Nuanced readings of exploitation could bring some situations within the purview of “crimes against humanity,” such that, at least in theory, slavery at sea could be found to constitute situations of “enslavement” within the understanding of a crime against humanity. However, the complex and case-by-case reading required to reach this conclusion cannot lead to a general conclusion that slavery per se is automatically a crime of universal jurisdiction. Similarly, suggestions that universal jurisdiction should apply to flagless vessels have gained little traction.

Piracy – the crime that contributed to the emergence of the universal jurisdiction concept in the eighteenth century – has also been suggested as providing grounds for States to exercise jurisdiction to protect migrants at sea. Piracy was once defined broadly to include “every unauthorized act of violence by a private vessel on the open sea with the intent to plunder,” a definition that could have captured several acts perpetrated against migrants at sea within its

²⁰⁶ M. den Heijer, “Europe and extraterritorial asylum”, Doctoral dissertation, Faculty of Law, University of Leiden (Leiden, 2011), p. 240, citing: Commission of the European Communities, “Study on the international law instruments in relation to illegal immigration by sea”, working document (CEC, Brussels, 2007), Annex Paragraph 4.3.2.4.

²⁰⁷ A. Orakhelashvili, “State jurisdiction in international law”, p. 39.

²⁰⁸ Rome Statute of the International Criminal Court of 17 July 1998, Article 5. Available from www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

²⁰⁹ J.P. Grant and J.C. Barker, “Universal jurisdiction”, in: *Parry & Grant Encyclopaedic Dictionary of International Law*, pp. 645–646; and A. Orakhelashvili, *Research Handbook on Jurisdiction and Immunities in International Law*, pp. 39–42.

²¹⁰ Article 7(1) of the Rome Statute defines a “crime against humanity” as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

²¹¹ See, for instance: *Prosecutor v. Kunarac* (brought before the International Tribunal for the former Yugoslavia (ICTY)), in which charges of “enslavement as a crime against humanity” are laid. (*Prosecutor v. Kunarac, Kovac and Vukovic*, Case Nos. IT-96-23-T and IT-96-23/1-T, ICTY Appeals Chamber, 12 June 2002, Paragraph 539.)

reach. However, UNCLOS narrowed the definition significantly, such that piracy must consist of:

- (a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).²¹²

Defined thus, piracy could be suggested to capture situations of exploitation of fishers and seafarers on the high seas, given that acts of violence and detention are committed “for private ends” against persons. It could be considered where some of the conditions in which migrants are smuggled at sea could also fall within this definition, effectively giving States universal jurisdiction to arrest and seize involved vessels outside the territorial or internal waters of the coastal State, and to prosecute crimes and subject perpetrators to penalties imposed by its laws.²¹³ This possibility has yet to be tested in practice. Attempts to expand the notion of piracy to include situations of human trafficking and migrant smuggling must be considered from the perspective of the advantage that would be gained in doing so. While Article 105 of UNCLOS comes into play, allowing for the arrest, seizure and prosecution for acts committed on the high seas, existing efforts to implement that article in respect of more commonly understood forms of “piracy” (typically observed off the coast of Somalia), at the same time, show the very significant operational challenges of applying this regime in practice.²¹⁴ The low number of piracy prosecutions points to significant barriers, including lack of resources and political will, which are also encountered in attempts to approach acts of violence against migrants at sea as “piracy.” Additionally, these ongoing efforts may suffer if resources were to be diverted towards the broadened framework to capture trafficking and smuggling. Furthermore, if smuggling vessels were to be approached for “piracy,” the risk could arise of migrants themselves being prosecuted as “pirates,” where, for instance, prosecution for migrant smuggling offences were to fail.²¹⁵ Rather than being identified and protected as migrants who may have protection needs, the risk arises that they instead be labelled as

²¹² UNCLOS, Article 101.

²¹³ UNCLOS, Article 105.

For this reason, the crime of “armed robbery against ships” allows for actions against acts of piracy acts within internal waters. (See, for instance: E. Papastavridis, “Combating transnational organized crime at sea”, issue paper (UNODC, Vienna, 2013), pp. 7–8.)

²¹⁴ See, for instance: E. Papastavridis, “Combating transnational organized crime at sea”, pp. 9–11.

In addition to low capacity, Papastavridis also points to human rights concerns and evidentiary challenges.

²¹⁵ The prosecutorial risk for smuggled migrants is borne of the fact that migrants who pilot smuggling vessels are often prosecuted as smugglers, notwithstanding the fact that the Migrant Smuggling Protocol targets only those who smuggle others for financial or other material benefit. For more on this issue, see: A. Gallagher and M. McAdam, “The concept of “financial or other material benefit” in the Smuggling of Migrants Protocol”, issue paper (UNODC, Vienna, 2017). Available from www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/UNODC_Issue_Paper_The_Profit_Element_in_the_Smuggling_of_Migrants_Protocol.pdf

pirates. In short, any benefit to be gained from expanding notions of “piracy” to capture crimes that were not envisaged by the drafters of UNCLOS must be carefully scrutinized against these and other risks.

In practice, reasonable suspicion that a vessel is without nationality (including small vessels or dinghies transporting migrants that do not fly a flag), is a justification for interception commonly relied on.²¹⁶ Indeed, this is the legal basis of European Union Member States exercising jurisdictional authority to intercept such vessels on the high seas.²¹⁷ In practical terms, irrespective of the strength of the grounds for interception, it is anyway unlikely that a State would have an interest in mounting a challenge to the exercise of jurisdiction over a stateless vessel.²¹⁸

Security Council Resolution 2312 of 2016

In October 2016, the United Nations Security Council adopted Resolution 2312 in response to the thousands of deaths in the Mediterranean Sea, often resulting from activities of transnational crime. The resolution extended the authorization initially established by Resolution 2240 (2015) allowing Member States to inspect a vessel on the high seas should they have reasonable grounds to suspect it of being used for migrant smuggling or human trafficking from Libya and seize those confirmed to be engaged in those activities.²¹⁹

2.1.1. What is the “right of visit” exception?

Article 110 of the 1982 UNCLOS regulates the “right of visit.” While consent of the flag State is not required to exercise this right, the powers that it gives are limited to verifying the vessel’s right to fly the flag of the State and to investigate suspicions that the vessel is engaged in one of the activities set out in Article 110(1). Once that has happened, the boarding party must depart or obtain the consent of the vessel’s master to stay on board, or if suspicions about criminal activity are confirmed, consult the operating commander for guidance.²²⁰ Some of the grounds listed may be relevant in the migration context, being where the ship is:

- (a) engaged in piracy;
- (b) engaged in the slave trade;
- (c) engaged in unauthorized broadcasting;

²¹⁶ UNCLOS Article 110(1)(d) gives warships and other duly authorized vessels of the State the right to exercise the right to visit vessels without nationality. For more on absence of nationality as grounds for interception, see: E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, pp. 264–266.

²¹⁷ See, for instance: A.D. Tejera, “The interception and rescue at sea of asylum seekers, refugees and irregular migrants”, report (Council of Europe Parliamentary Assembly, Strasbourg, 2011). Available from www.refworld.org/pdfid/4ee0d4ac2.pdf

²¹⁸ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 423, respectively referring to R. Churchill and V. Lowe, *The Law of the Sea* (Third edition, Manchester University Press, Manchester, 1999), p. 172; and R. Jennings and A. Watts (eds.), “Peace”, in: *Oppenheim’s International Law: Volume 1*, (Ninth edition, Longman, Burnt Mill, 1992), p. 546.

²¹⁹ United Nations Security Council Resolution 2312 of 6 October 2016 (On renewal for 12 months of the authorizations as set out in paragraphs 7, 8, 9 and 10 of Resolution 2240 (2015) concerning migrant smuggling and human trafficking into, through and from the Libyan territory and off the coast of Libya). Available from www.un.org/press/en/2016/sc12543.doc.htm

²²⁰ P. Mallia, *Migrant Smuggling by Sea*, p. 19.

- (d) without nationality or;
- (e) flying a foreign flag, but in reality is the same nationality as the ship seeking to exercise the right to visit.²²¹

The provision relating to the slave trade²²² may be important for migrants who are victims of trafficking. Although defined differently within international law, slavery and trafficking in persons are intertwined, not only in practice, but also within certain legal instruments, particularly given that slavery is specified as an exploitative purpose for which trafficking in persons can be perpetrated.²²³ Accordingly, questions arise as to whether the right of visit can be exercised in situations of human trafficking. While the definition of “slavery” in the Slavery Convention does not accord with the definition of “trafficking,” there is some basis to suggest that trafficking situations can trigger this exception. Indeed, from a protection point of view, it can be argued that the interpretation of this provision of UNCLOS should be reinvigorated to allow its application to the present-day protection needs of people in slavery or slave-like conditions at sea.²²⁴

Relying on Article 110(1)(b) as a basis for exercising the right of visit also requires a complementary interpretation of the meaning of “slave trade.” On this point, Papastavridis is of the view that the meaning of slavery and the slave trade can be reasonably inferred from contemporary law, and not only the law that was applicable at the time when UNCLOS was drafted. Accordingly, the full gamut of international law relevant to slavery is applicable and may provide the requisite legal basis for the right to visit a vessel on the high seas that is reasonably suspected of transporting slaves in the contemporary meaning of the term.²²⁵ This interpretation may have broad impact; it could provide States with grounds for visiting not only vessels at sea where it is reasonably believed that slavery is occurring (for instance, where migrants are enslaved to work as fishers or seafarers), but also situations where it is reasonably believed that migrants are being transported towards a situation of slavery on land. However, the practical challenges of “visiting” on this basis are acute, requiring concrete intelligence that people on board are in a situation of exploitation, or will be exploited in modern forms of slavery in destination countries.²²⁶ How much intelligence is required to justify visiting is unclear, so that while Article 110(b) could arguably be evoked in theory to visit a vessel reasonably suspected of transporting migrants towards contemporary forms of slavery, practical challenges mean that it is yet to be used in this way in practice.²²⁷ Whether

²²¹ Papastavridis (2014) considers both piracy and unauthorized broadcasting as completely irrelevant grounds vis-à-vis migrants at sea, while “slavery” offers potential grounds for interception in cases of human trafficking. (E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, p. 263.)

²²² UNCLOS, Article 110(1)(b).

²²³ Trafficking Protocol, Article 3(a); and N. Oral et al., “The role for maritime zones in promoting effective governance for protection of the Mediterranean marine environment”, report of the Expert Group on Governance of the Mediterranean Sea (European Commission – Directorate-General for Maritime Affairs and Fisheries, Brussels, 2009), p. 24.

²²⁴ E. Papastavridis, “‘Fortress Europe’ and FRONTEX: Within or without international law?”, *Nordic Journal of International Law*, 79(1):75–111; and E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, pp. 267–275.

²²⁵ E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, pp. 275–278.

²²⁶ *Ibid.*, p. 278.

Papastavridis (2014) gives the example of persons who may victims of human trafficking, who may end up facing conditions of slavery, such as domestic servitude.

²²⁷ In the sense of Article 31(3)(b) and (c) of the 1969 Vienna Convention on the Law of Treaties. (See also: E. Papastavridis, “Combating transnational organized crime at sea”, p. 21.)

the exception of “slave trading” specified in UNCLOS may be relevant in situations of migrant smuggling is also the subject of some discussion.²²⁸

Use of force in maritime interception

International law does not provide concrete answers on the permissibility of the use of force in maritime interceptions.²²⁹ In the case of *MV Saiga No. 2*, the International Tribunal for the Law of the Sea confirmed that force should be avoided as far as possible and, where it is inevitable, must not exceed what is reasonable and necessary in the circumstances.²³⁰ However, what constitutes “reasonable” force is subjectively determined.²³¹

In addition to those listed grounds, Article 110 also provides for an open-ended exception to the exclusivity of flag State jurisdiction, by allowing for the conclusion of bilateral or multilateral treaties that confer the right of visit on States parties to them, which many States have done in relation to irregular migration at sea.²³² Among examples of bilateral agreements are those agreements permitting interdictions of irregular migrants on the high seas.²³³ Controversial examples include the Italy–Libya bilateral agreement of 2008 authorizing Italy to turn boats back to Libyan territorial waters; the Cuba–United States joint communiqué on migration of 1994; the Australia–Malaysia arrangement of 2011 to transfer irregular maritime arrivals to Malaysia; and Australia’s various arrangements with other countries under the Pacific Solution. These various arrangements have been widely criticized owing to their negative human rights consequences, calling their standing in international law into question. Where the right-to-visit exception is invoked, States are required to protect persons from collective expulsion and ensure that needs assessments are carried out through individualized examinations.²³⁴

²²⁸ There is nothing in either UNCLOS or the Migrant Smuggling Protocol to prevent such a reading, and there is no incompatibility between the two. Gallagher and David (2014) note that “whereas slave trading involves individuals being transported and trade for purposes of exploitation, and migrant smuggling involves illegal cross-border movement for profit, each can involve elements of the other. In other words, provided they are being moved across a border without authorization, all slaves transported by sea are, by definition, also being smuggled. Conversely, persons who are being smuggled could potentially be victims of the slave trade.” They go on to note that while the broadening of the notion of “modern slavery” to capture a range of exploitative practices has impacted advocacy and public awareness, it has had less impact on legislation. (A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*.)

²²⁹ Papastavridis (2010) offers the view that force can be used in principle, but in extreme moderation and in strict accordance with requirements of necessity and proportionality. However, he also acknowledges that a more restrictive interpretation can be made to assume that force should be prohibited, in light of the high risks posed to humans on board vessels. (E. Papastavridis, “Fortress Europe’ and FRONTEX”, pp. 100–102; E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, pp. 301–302.)

²³⁰ *The M/V “Saiga” (No. 2) Case (St Vincent and the Grenadines v. Guinea)* (Judgment), Case No. 2, International Tribunal for the Law of the Sea, 1 July 1999, Paragraph 156.

²³¹ J. Coppens, “Interception of migrant boats at sea”, in: *Boat Refugees’ and Migrants at Sea: A Comprehensive Approach* (V. Moreno-Lax and E. Papastavridis (eds.)) (Brill/Nijhoff, Leiden and Boston, 2016), pp. 216–218. Coppens refers to the Australian Government’s deployment of armed personnel to take control of the *MV Tampa* scenario that she describes as measures that were “definitely not reasonable.”

²³² E. Papastavridis, “Fortress Europe’ and FRONTEX”, pp. 98–100. For an analysis of relevant “bilateral treaties” particularly in the European FRONTEX context, see: E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, pp. 281–291. On these agreements (some of which were repealed following the European Court of Human Rights *Hirsi Jamaa and Others v. Italy* decision), Papastavridis notes that many are oriented towards combating irregular migration rather than the crime of migrant smuggling as such.

²³³ For a brief overview, see: N. Klein, “Assessing Australia’s Push Back the Boats Policy under international law”, p. 11. These interdictions can be qualified as interceptions and, henceforth, as a form of exercising State jurisdiction over a vessel. Bilateral agreements cannot justify the interception on the high seas of ships either flying no flag, or flying the flag of a third State.

²³⁴ For more information on how “push-backs” can amount to “collective expulsions”, see: N. Sitaropoulos, “Migrant ‘push backs’ at sea are prohibited ‘collective expulsions’”, 8 February 2014, Oxford Human Rights Hub website, Blog section, available from <http://ohrh.law.ox.ac.uk/migrant-push-backs-at-sea-are-prohibited-collective-expulsions>

CASE STUDY 6

Bilateral agreement-based interception on the high seas

The European Court of Human Rights case of *Medvedyev and Others v. France* (2010) involved France intercepting a vessel on the high seas that was suspected of drug trafficking. The vessel concerned, *The Winner*, was flying the flag of Cambodia, which gave its consent, via a diplomatic note, for France to intercept. The Court considered that a bilateral cooperation to combat drug trafficking was possible outside the framework of UNCLOS,²³⁵ but subject to a very strict test relating to the notion of “legality,” when assessing the right not to be unlawfully deprived of one’s liberty.²³⁶ Two criteria can be derived from the European Court’s jurisprudence, namely:

- (a) The bilateral agreement must clearly determine the scope of the authorization, namely, whether it allows for detention or only interception.²³⁷
- (b) The bilateral agreement must be foreseeable in the sense that it is part of long-standing practice between the two States in combatting the illegal activity concerned.²³⁸

A factor that also played an important role in the Court’s negative assessment of the foreseeability criterion was that Cambodia had not ratified the relevant international conventions related to drug trafficking.²³⁹

There is ongoing debate as to whether informal agreements and working arrangements between States can constitute international agreements of this type, but in general are considered to fall short of binding treaties of the type anticipated by Article 110 of UNCLOS. Accordingly, Papastavridis (2010) is of the view that several agreements entered into by States are on “unstable legal ground.” Examples he refers to here are European operations in the territorial waters of North African States and some interceptions on the high seas, as well as the diversion of vessels from the high seas to the contiguous zone or territorial waters of a State where jurisdiction can be exercised, that all lack a clear mandate and are not premised on the Migrant Smuggling Protocol or other agreements.²⁴⁰

²³⁵ UNCLOS provides an explicit legal ground in this regard in Article 108(2).

²³⁶ Cf. European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Article 5. Available from www.echr.coe.int/Documents/Convention_ENG.pdf

²³⁷ *Medvedyev and Others v. France* (2010), Paragraphs 98–99.

²³⁸ *Medvedyev and Others v. France* (2010), Paragraph 100.

The agreement between two States must be foreseeable to the master of the vessel; if it is not it is possible that the legislation in question would be open to suggestions that it is retroactive.

²³⁹ The *Medvedyev* judgment was criticized not only in the literature (see, for instance: D. Guilfoyle, “ECHR rights at sea: *Medvedyev and Others vs. France*”, EJIL: Talk! (Blog of the European Journal of International Law), 19 April 2010, available from www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france), but also by judges of the European Court of Human Rights itself (“Joint partly dissenting opinions of Judges Costa, Casadevall, Birsan, Garlicki, Hajiyev, Sikuta and Nicolaou”, in: *Medvedyev and Others v. France* (2010), pp. 42–44).

²⁴⁰ E. Papastavridis, “‘Fortress Europe’ and FRONTEX”, pp. 87 and 98–100.

Good practices to ensure interception complies with international law

Where enforcement jurisdiction is shared, so too is responsibility for any unlawful acts resulting from it. Bilateral and multilateral agreements cannot absolve a State responsibility for human rights violations.²⁴¹ Accordingly, some good practices with respect to establishing a clear legal framework for cooperation in interception in the context of migrant protection can be propounded.

- (a) States should ratify relevant treaties and protocols related to human trafficking, migrant smuggling, slavery, forced labour, labour exploitation and others.
- (b) States should establish agreements that govern their cooperation in combatting illegal activities that may raise protection concerns for migrants at sea.
- (c) Bilateral arrangements and diplomatic notes that serve as the basis for authorizing interception should specifically describe the powers of the intercepting State (stopping, searching, detaining, etc.).

The Migrant Smuggling Protocol is the only example of a multilateral treaty relevant to the context of the protection of migrants at sea.²⁴² The Protocol offers States parties grounds to visit smuggling vessels and seize vessels and arrest crew members on the high seas.²⁴³ The right to visit a foreign-flagged vessel is stipulated in Article 8(2), effectively allowing States to transfer jurisdictional power to one another.²⁴⁴ Where any action is taken under this provision, it must be based on express flag State authorization; neither tacit consent nor consent of the master of the vessel is sufficient.²⁴⁵ An exception to the need to seek consent concerns any action necessary to relieve imminent danger to life, or actions deriving from relevant bilateral or multilateral agreements.²⁴⁶ Where the vessel has no nationality, Article 8(7) of the Migrant Smuggling Protocol establishes that:

A State party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search

²⁴¹ Note, for instance, the decision in *Hirsi Jamaa and Others v. Italy* (2012) concerning a bilateral agreement between Italy and Libya.

²⁴² The Trafficking Protocol does not contain a similar section on measures to combat trafficking by sea. The Migrant Smuggling Protocol does not constitute a new framework for interception, but restates what is already possible under the international law of the sea for the specific context of migrant smuggling at sea.

²⁴³ E. Papastavridis, "'Fortress Europe' and FRONTEX", pp. 92–93; and E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, p. 280.

Also of note here is another multilateral treaty, namely, the 2008 CARICOM Agreement that includes within its scope "illicit traffic in persons" and "illegal migration", which may be interpreted to refer to human trafficking and migrant smuggling, respectively. The interception measures it provides for include operations on the high seas.

²⁴⁴ Migrant Smuggling Protocol, Article 8(2).

The cooperation provisions established by Articles 7 and 8 of the Migrant Smuggling Protocol apply primarily to the high seas, given that existing principles would apply elsewhere. (See, for instance: Interpretative Note, UN Document CTOC/COP/2006/7 (23 August 2006), Paragraph 14.)

²⁴⁵ E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, p. 280.

²⁴⁶ Migrant Smuggling Protocol, Article 8(5).

the vessel. If evidence confirming the suspicion is found, that State party shall take appropriate measures in accordance with relevant domestic and international law.

This provision may be particularly relevant in situations where a larger smuggling vessel transfers migrants onto smaller boats to complete their journey; in such cases, the larger vessel is ideally intercepted. Notably, only the right of visit is specified; other measures, including arrest and prosecution of smugglers, fall within flag State jurisdiction.²⁴⁷ However, while on the one hand Article 8(7) can be seen as a mere restatement of Article 110 of UNCLOS, its language (“shall take appropriate measures in accordance with relevant domestic and international law”) is broader, effectively extending the right of visit to include situations where a State party has reasonable grounds to suspect that a vessel engaged in smuggling is without nationality, which goes beyond the mere right of visit provided for in UNCLOS.²⁴⁸ While it remains unclear what precisely is meant by “appropriate measures,” interpretations have looked to the UN drug control treaty framework for interpretative guidance and suggest that in the right to seize the vessel, arrest the crew and prosecute would be captured.²⁴⁹ Further, it is clear that upon taking such measures, the intercepting State must promptly inform the flag State of the results of the operation.²⁵⁰ The flag State has an obligation to respond expeditiously to the request to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so, and to a request for authorization for the above-mentioned measures.²⁵¹ When replying to requests, a flag State may make its authorization subject to conditions relating to responsibility and the extent of effective measures to be taken.²⁵² An operational example of this could be a situation where consent is given to the coast guard of a given State to board a vessel, but not to prosecute smugglers found on board it.²⁵³

In practice, it may be difficult to determine whether protection measures are necessary unless the vessel can be boarded and examined. Here, human rights principles may support an argument to permit States to board a vessel to make such a determination.²⁵⁴ The primacy of the safety of migrants is evident in Article 8(5) of the Migrant Smuggling Protocol, which prohibits States parties from taking additional measures without the express authorization of the flag State, “except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.” This requirement constitutes an exception to the principle that States have jurisdiction over vessels flying their

²⁴⁷ E. Papastavridis, “‘Fortress Europe’ and FRONTEX”, p. 93.

²⁴⁸ The Migrant Smuggling Protocol is silent on what action is to be taken in the event that no such suspicion is found, making no mention, for instance, of compensation. The Protocol further provides that the State concerned may then request the assistance of other States parties in suppressing the use of the vessel for smuggling. The States that have been addressed in turn must render assistance to the extent possible within their means (Article 8(1)).

²⁴⁹ The Migrant Smuggling Protocol provides no further insight into the meaning of “appropriate measures.” Gallagher and David (2014) consider that the failure of drafters to include more specific provisions (for instance, by borrowing from provisions in the UN drugs control treaties) suggests that States were not prepared at the time to extend criminal jurisdiction in the same way to smuggling situations. (A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 245.)

²⁵⁰ Migrant Smuggling Protocol, Article 8(3).

²⁵¹ Migrant Smuggling Protocol, Article 8(4).

²⁵² States have to appoint authorities competent for handling these procedures. (Migrant Smuggling Protocol, Article 8(6).)

²⁵³ J. Coppens, “Interception of migrant boats at sea”.

²⁵⁴ T. Obokata, “The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air,” in: B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control*, pp. 159–160.

flag on the high seas reflected in UNCLOS and affirmed by Article 15(1) of UNTOC. The Migrant Smuggling Protocol requires States parties to ensure the safe and humane treatment of persons on board during cooperative law enforcement activities at sea, both in respect of the physical safety of all persons on board intercepted vessels and in protecting persons from harm (for instance, from smugglers), including those who express a wish to seek international protection under human rights or humanitarian law.²⁵⁵

Non-criminalization and migrant smuggling

Transporting migrants at sea is not a crime per se under the Migrant Smuggling Protocol. The crime of migrant smuggling involves the facilitation of an illegal border crossing for the purpose of financial or material benefit. The Protocol cannot be used as a basis for criminalizing the transport of migrants for other purposes, nor of migrants themselves for the fact of merely being objects of smuggling.²⁵⁶ However, nothing in the Migrant Smuggling Protocol limits the existing right of States parties to take action against those whose conduct constitutes an offence under their national laws.²⁵⁷

IUU fishing and interception

The occurrence of illegal, unreported and unregulated (IUU) fishing serves as grounds for the interception of foreign vessels on the high seas.²⁵⁸ Globally, between 11 and 26 million tons of fish (at least 15% of the world's catch) are reportedly caught illegally every year. IUU has been recognized as a threat to marine conservation and biodiversity. There is also a strong link between IUU and human trafficking and other forms of exploitation. Where fishing occurs illicitly and without adequate oversight, trafficking can flourish. Where vessels suspected of being engaged in IUU are intercepted, it is possible that some will also reveal human trafficking and/or forced labour, raising protection obligations for intercepting States.

²⁵⁵ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 438.

²⁵⁶ "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of [migrant smuggling]" Migrant Smuggling Protocol, Article 5. For more on this, see also: *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, New York, 2004), p. 340, available from www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf; and A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 358–359.

²⁵⁷ Migrant Smuggling Protocol, Article 6(4).

A good practice is not to subject mere migrants to penal measures but to determine their nationality and status. (See, for instance: E. Papastavridis, "'Fortress Europe' and FRONTEX", p. 265.)

²⁵⁸ The UN Fish Stocks Agreement is a relevant international instrument on IUU fishing.

2.1.2. What is the “right of hot pursuit” exception?

A second exception to exclusive jurisdiction of the flag State on the high seas is “the right of hot pursuit” provided in Article 111(2) of UNCLOS.²⁵⁹ Unlike the right to visit, which is relevant only on the high seas, the right of hot pursuit allows States to take enforcement actions that commence within the territorial sea, contiguous zone or EEZ, but continue onto the high seas.²⁶⁰ The pursuit must start when the foreign vessel is “within the internal waters, the archipelagic waters, the territorial waters or the contiguous zone of the pursuing State.”²⁶¹ Only warships, military aircraft or other ships or aircraft clearly marked as governmental can exercise the right of hot pursuit. When the authorities of a coastal State have good reason to believe that a foreign vessel has violated its laws and regulations, it may pursue this ship into the high seas for arrest and escort it to one of its ports. A State may thus act in response to violations that occur in its own waters, including its EEZ.

Hot pursuit may not be interrupted; it must be continuous, and a visual or auditory order to stop must be properly given to the pursued ship.²⁶² The same applies, *mutatis mutandis*, for violations committed in the EEZ.²⁶³ The pursuit, however, must come to an end when the foreign ship enters the territorial sea of its own State or of a third State, unless it allows the pursuit to continue through its territorial waters.²⁶⁴ The pursuing State must compensate a vessel for any loss or damage caused in situations where hot pursuit was not justified.²⁶⁵

CASE STUDY 7

MV Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea) (1999)

A case concerning compensation for hot pursuit was the *MV Saiga (No. 2)*, which involved an oil and gas tanker being attacked by a Guinean patrol boat on suspicion of illegally importing gas. The International Tribunal for the Law of the Sea had to rule on the lawfulness of hot pursuit by Guinean authorities of a vessel flagged to St Vincent and the Grenadines. The Tribunal held that the conditions for exercising the right of hot pursuit were cumulative and that, in this case, some were not fulfilled, making the hot pursuit unlawful. In this case, the authorities could not have had more than a suspicion that the tanker had violated Guinean laws in the EEZ; no signs were given to stop and the pursuit was interrupted. The pursued vessel claimed compensation under Article 111(8) and general international law. The Tribunal relied more heavily on the latter in awarding compensation (i.e. of more than USD 2 million).²⁶⁶

²⁵⁹ UNCLOS, Article 111; and High Seas Convention, Article 23.

²⁶⁰ D. Rothwell and T. Stephens, *The International Law of the Sea*, p. 176.

²⁶¹ UNCLOS, Article 111(1).

²⁶² UNCLOS, Article 111(1) and (4); and High Seas Convention, Article 23(3). The order must be given at a distance close enough to be seen or heard by the foreign ship.

²⁶³ UNCLOS, Article 111(2).

²⁶⁴ UNCLOS, Article 111(3).

²⁶⁵ UNCLOS, Article 111(8); and High Seas Convention, Article 23(7).

These articles have been interpreted to suggest that compensation is not owed where the suspicion is justified.

²⁶⁶ *The M/V Saiga (No. 2) Case (1999)*, Paragraphs 146–147 and 175.

Six conditions for exercising the right of hot pursuit set out in UNCLOS Article 111

1. The pursuit must be undertaken by warships clearly marked and identifiable as being on government service. (Article 111(5))
2. The pursuit may be undertaken where there is good reason to believe the ship has violated laws and regulations of the State. If the foreign ship is within the contiguous zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established. (Article 111(1))
3. The pursuit must be commenced when the foreign ship or boat is within the internal waters, territorial sea or contiguous zone of the pursuing State. (Articles 111(1) and (4))
4. The pursuit may only commence after a signal to stop has been given. (Article 111(4))
5. The pursuit must be hot and continuous, with no breaks between ships or aircraft taking over from others. (Article 111(6)(b))²⁶⁷

The right of hot pursuit ceases as soon as the pursued ship enters the territorial sea of its own or another State. (Article 111(3))²⁶⁸

The International Tribunal for the Law of the Sea in *MV Saiga (No. 2)* affirmed that each of the conditions set out above by Article 111 of UNCLOS are cumulative, which means that each has to be satisfied for the pursuit to be considered legitimate.²⁶⁹

Continuing Questions and Controversies

- Under what circumstances, if any, can human trafficking and/or migrant smuggling be considered crimes of universal jurisdiction?
- Under what circumstances, if any, can human trafficking and/or migrant smuggling be considered crimes of piracy?
- From a protection point of view, what would the advantages and disadvantages be in classifying human trafficking and/or migrant smuggling as crimes of “piracy”?

²⁶⁷ Pursuit may be commenced by a vessel or aircraft and transferred to another vessel or aircraft, but where the pursuit is broken, it is deemed “interrupted.” Hot pursuit ceases when the pursuing vessel loses sight of the pursued vessel, or when it enters the territorial sea of its flag State or any other State. (See, for instance: A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 427.)

²⁶⁸ Y. Tanaka, “Jurisdiction of states and the law of the sea”, pp. 142–143.

²⁶⁹ *The MV Saiga (No. 2) Case (1999)*, Paragraph 146.

2.2. CONTIGUOUS ZONE

No enforcement jurisdiction is permissible in respect of vessels merely transiting through the contiguous zone without the intention to enter the territorial sea.²⁷⁰

Article 33(1) of UNCLOS allows States to exercise the control necessary to prevent and punish infringements of laws and regulations, but it is not entirely clear what “control necessary” means. It can be assumed that coastal State jurisdiction to address infringements of municipal laws in its contiguous zone includes the right of the coastal State to undertake the “hot pursuit” of foreign ships within the contiguous zone, and to stop, arrest and escort ships to port in accordance with Article 111 of UNCLOS.²⁷¹ However, it has been asserted that the power to “prevent” does not extend to powers of arrest but only to carrying out inspections and issuing warnings.²⁷²

The case of *MV Saiga (No. 2)* brought to the International Tribunal for the Law of the Sea, discussed above, confirms the narrow scope of jurisdiction in the contiguous zone. In the said case, Judge Laing stated that “the power of the coastal State to punish infringements of the stated laws (committed outside the territorial areas or within the contiguous zone) is not generally permissible in relation to vessels merely located in the contiguous zone and not proven to have some relevant connection with territorial areas.”²⁷³ Accordingly, international law does not provide any basis for coastal States to exercise enforcement jurisdiction over a vessel carrying migrants in its contiguous zone who are intended for disembarkation in another coastal State, even where such disembarkation would violate that other State’s laws. For the coastal State to have jurisdiction, some other connection is required to permit interception.²⁷⁴

Where such a connection can be established, the State’s competence is limited to “inspection and warnings”; it cannot board a vessel, make an arrest, forcibly take the vessel into port, or otherwise exercise control over the vessel.²⁷⁵ Detaining the vessel and/or the people on board, or towing it into port, are illegal in the context of prevention under international law. Some argue, however, that towing or directing the vessel concerned to the outer edge of the contiguous zone is permitted under circumstances of prevention.²⁷⁶ Similarly, while such measures, including “push-backs,” may be carried out to remove vessels from territorial

²⁷⁰ An exception is found in the doctrine of “constructive presence,” which relates to situations where a mother ship hovers and from which smaller vessels are dispatched to enter the territorial sea. Constructive presence can offer a means of exercising jurisdiction over vessels entering ports, as well as mother ships in the high seas, whereby vessels are treated as if within national jurisdiction while actually being outside of it. This concept allows a coastal State to exercise jurisdiction over a so-called “mother vessel” beyond the maritime zone over which it has jurisdiction because of the presence of smaller delinquent vessels (vessels that form an operational whole with the mother ship) within its territorial or internal waters. (See, for instance: A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 248, 416 and 427; and N.M. Poulantzas, “Chapter VI: The Doctrine of Constructive Presence,” in: *The Right of Hot Pursuit in International Law* (Second edition, Martinus Nijhoff, The Hague, 2002), pp. 243–251.)

²⁷¹ UNCLOS, Articles 111(1), (6), (7) and (8); and Y. Tanaka, “Jurisdiction of states and the law of the sea”, pp. 127–128. The right of hot pursuit is discussed in Part 2.1.

²⁷² A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 240–241.

²⁷³ The *MV Saiga (No. 2)* Case, Paragraph 15 referred to in: A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 417.

²⁷⁴ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 417.

²⁷⁵ Y. Tanaka, *The International Law of the Sea*, p. 123; D. Nelson, “Maritime jurisdiction”, in: *Max Planck Encyclopedia of Public International Law*; Shearer, “Problems of jurisdiction and law enforcement against delinquent vessels”, *The International and Comparative Law Quarterly*, 35(2):320–343; and A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 417.

²⁷⁶ D. Rothwell and T. Stephens, *The International Law of the Sea* (First edition, Hart Publishing, Oxford, 2010), p. 80.

waters, it is unlikely that actions to push vessels back to the high seas can be exercised lawfully in the contiguous zone; coastal States may not take enforcement action beyond prevention measures within the contiguous zone, and may not do so until the vessel has entered its territorial waters.²⁷⁷ Where States do take such action – notwithstanding the lack of legal basis for doing so – their actions will be limited by other considerations, such as the principle of non-refoulement, which may prohibit the redirecting of the vessel.²⁷⁸

At any rate, a coastal State may be able to lawfully intercept an outbound vessel – for instance, one that has disembarked migrants in the territory of the coastal State and is departing through the contiguous zone.²⁷⁹

2.3. TERRITORIAL SEA

Push-backs from territorial waters in contravention of international law

On 21 May 2015, the Special Rapporteurs on the human rights of migrants; on extrajudicial, summary or arbitrary executions; on torture and other cruel, inhumane or degrading treatment or punishment; and on trafficking in persons jointly issued letters of urgent appeal to the governments of Indonesia, Malaysia and Thailand in response to information they had received about “push-backs” at sea.²⁸⁰ The Special Rapporteurs noted that the allegations, if accurate, would contravene Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 6(1) of the International Covenant on Civil and Political Rights concerning the right to life; Article 3 of the Convention against Torture; and Article 14 of the UDHR and the Convention on the Rights of the Child (UNCRC) concerning asylum, as well as Articles 6 and 9 of the Trafficking Protocol and Principle 2 of the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking.²⁸¹ While the urgent appeal did not mention the Migrant Smuggling Protocol, the allegations would also be in violation of its Article 16. The letter to Thailand referred to an incident of a boat carrying 300 irregular migrants from Myanmar and Bangladesh being towed out of Thailand’s territorial waters by Thai Government border officials after fixing it and providing the

²⁷⁷ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 417.

Gallagher and David note that State practice has conflicted with this, pointing to the lack of distinction drawn between the territorial sea and the contiguous zone with respect to interceptions carried out by Frontex.

²⁷⁸ Non-State stakeholders have pointed out in a joint briefing that actions such as directing the course of a vessel away from the territorial sea and contiguous zone “would de facto mean that individuals wishing to lodge an application for international protection could be physically prevented from doing so and, therefore, from accessing the safeguards laid down in the EU asylum acquis to ensure a full and fair examination of their application.” (Amnesty International (AI), European Council on Refugees and Exiles (ECRE), and International Court of Justice (ICJ), “Joint briefing on the European Commission Proposal for a regulation of the European Parliament and of the Council 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 Members States of the European Union” (AI, ECRE and ICJ, 2013), p. 12. Available from www.ecre.org/wp-content/uploads/2016/07/ECRE-Amnesty-ICJ-Joint-Briefing-on-the-European-Border-and-Coast-Guard-Regulation-April-2016.pdf)

²⁷⁹ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 418.

²⁸⁰ Urgent Appeal UA IDN 5/2015 of 21 May 2015 (OHCHR, Geneva); Urgent Appeal JUA MYS 2/2015 of 21 May 2015 (OHCHR, Geneva); and Urgent Appeal UA THA 3/2015 of 21 May 2015 (OHCHR, Geneva).

²⁸¹ Urgent Appeal UA THA 3/2015 of 21 May 2015 (OHCHR, Geneva).

migrants with food. According to the information received, Government officials offered disembarkation to the migrants; however, the offer was only communicated to the smugglers, who did not convey it to the migrants, on whose behalf the smugglers refused the offer. The Royal Thai Government responded to this allegation that the persons on board communicated that they did not wish to be disembarked in Thailand, having been pushed by sea currents into Thai territorial waters, and so were provided with food, drinking water and fuel.²⁸² The Governments of Malaysia and Indonesia did not respond to the letters of urgent appeal they received.

The principle of territorial sovereignty implies that a coastal State can exercise enforcement jurisdiction in its territorial sea; specifically, it can act upon situations in which passage is rendered non-innocent (non-exhaustively understood to be prejudicial to the peace, good order or security of the coastal State).²⁸³ In doing so, coastal States are entitled to “take necessary steps” in its territorial sea to prevent passage that is not considered innocent under Article 25(1) of UNCLOS. This provision does not specify what those necessary steps may be – or, indeed, what may exceed them – but it is generally agreed that they may include requesting a ship to desist from certain conduct or to leave the territorial waters; boarding the ship and excluding it from the territorial sea; and escorting it to the high seas.²⁸⁴ That “necessary steps” can be broadly construed is in line with the understanding that a vessel engaged in non-innocent passage becomes subject to the full jurisdiction of the State in whose territorial waters the vessels is.²⁸⁵ However, any step taken must be in line with principles of international law, that is, it must be necessary and proportionate to achieve a legitimate purpose. Where the vessel in question is proceeding towards the State’s internal waters (for instance, intending to disembark smuggled migrants) the State may take necessary steps to prevent any breach of conditions for the vessel’s admission to its internal waters, and may take action to enforce criminal and immigration laws.²⁸⁶

²⁸² Response from the Royal Thai Government to Urgent Appeal UA THA 3/2015 of 21 May 2015 (No. 52101/339, 22 May B.E. 2558 (2015)).

²⁸³ UNCLOS, Article 19(1). See also: Y. Tanaka, *The International Law of the Sea*, p. 86; and S. Wolf, “Territorial sea”, in: *Max Planck Encyclopedia of Public International Law*. Cf. D. Nelson, “Maritime jurisdiction”, in: *Max Planck Encyclopedia of Public International Law*.

²⁸⁴ UNCLOS, Article 22(2). Furthermore, by virtue of Article 22(3) “the coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.” (See also: Y. Tanaka, “Jurisdiction of states and the law of the sea”, pp. 120–121, referring to D. Rothwell and T. Stephens, *The International Law of the Sea* (First edition, Hart Publishing, Oxford, 2010), p. 218.)

²⁸⁵ J. Coppens, “Interception of migrant boats at sea”. Coppens further notes that the right of removal of the non-innocent vessel is part of international law.

²⁸⁶ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 413.

Indonesian legal framework for intercepting migrant smuggling²⁸⁷

Indonesia has adopted a legal framework for the interception of migrant smuggling in its territorial sea. Article 24 of its Law No. 6 of 1996 states that “if an offence or crime is committed using either a national vessel or a foreign vessel within Indonesian waters, enforcement shall be carried out under the international convention and prevailing laws and regulations.” Indonesia also extends “the right of innocent passage”²⁸⁸ to foreign vessels passing through Indonesian waters while respecting the sovereignty and the laws and regulations of the coastal State. The right does not apply if a foreign vessel is considered to be endangering the peace, good order or security of Indonesia and, if within the territorial sea and or archipelagic waters, engages in one of the activities prohibited by UNCLOS and/or by other international laws (Article 12 of Law No. 6 of 1996).²⁸⁹ Repressive efforts, including arrest, are to be taken by intercepting and inspecting vessels engaged in the smuggling of migrants on the basis that migrant smuggling constitutes a transnational crime that Indonesia considers a disturbance to the peace and good order of the territorial sea.

There are also means by which States can intercept vessels in the territorial seas of other States. A coastal State may simply give its consent to another State to intercept a vessel in its territorial waters, for instance, where migrant smuggling is suspected. Under the Migrant Smuggling Protocol, where a State is requested to assist in the suppression of a vessel involved in migrant smuggling, it is required to render such assistance “to the extent possible,” which could, for instance, extend to intercepting and returning the vessel to the coastal State for the disembarkation of persons on board.²⁹⁰ States may also reach agreements by which a coastal State allows other States to exercise enforcement jurisdiction within its territorial sea.

²⁸⁷ IOM, *Manual for the Coordinated handling of People Smuggling: Interceptions, Investigations and Prosecutions in Indonesia* (IOM, Jakarta, 2012), pp. 18–20.

²⁸⁸ As discussed above, the right of innocent passage is captured in Article 19(1) of UNCLOS and Article 11(1) of Law No. 6 of 1996 on Indonesia Waters. (See also: *Manual for the Coordinated Handling of People Smuggling: Interceptions, Investigations and Prosecutions in Indonesia* (IOM, Geneva, 2012).)

²⁸⁹ In carrying out enforcement against a foreign vessel engaging in crime, law enforcement officers are to be guided by provisions of law in conformity with international law, in accordance with UNCLOS, Article 27(1).

²⁹⁰ Migrant Smuggling Protocol Article 8(1). A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 441, pointing to agreements between European and North African countries.

European Union framework for the interception of migrant smuggling

Article 6 of European Union Regulation No. 656/2014 is an example of legislation that permits the coastal State in whose territorial sea a smuggling vessel is situated to give authorization to other States to take measures against the vessel. Based on the suspicion that a vessel is carrying persons intending to circumvent checks at border crossing points or is engaged in the smuggling of migrants, the coastal State may authorize third States to request information on that vessel and, if needed, to stop, board and search the vessel within that maritime zone.²⁹¹ If the evidence supports this suspicion, the coastal State may authorize third States to seize the vessel, as well as the persons on board, or to order the vessel to alter its course.²⁹²

By virtue of joint patrol arrangements, patrol ships may comprise of crew members from different countries involved in surveillance and search and rescue operations and interceptions. Important to keep in mind in this respect, is that all countries that take part in a joint patrol remain independently responsible for the conduct of their officers on board. In practice, this means that where two States are jointly carrying out a patrol, both can be held independently responsible for any wrongful act that is committed.²⁹³ Joint patrols should adhere to international law – including obligations under humanitarian and human rights law – and ensure that cooperation to fulfill rescue obligations is not conflated or confused with cooperation in respect of migration control.²⁹⁴

²⁹¹ Regulation (EU) 656/2014 of the European Parliament and of the Council of 15 May 2014 (establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union), Article 6(1). Available from <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=PCggm3TeA5LVKEV50EfqqAFzDuMzX8w9-Kaa8mKmxcfKVGdGBN Z3!2096757176?docId=1801130&cardId=1801129>

²⁹² EU Regulation 656/2014, Article 6(2).

When such a situation takes place on the high seas, authorization to intercept should not come from the coastal State of the territorial sea concerned, but from the flag State of the vessel subjected to interception.

²⁹³ M. den Heijer, "Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control", pp. 191–192.

²⁹⁴ E. Papastavridis, "'Fortress Europe' and FRONTEX", p. 107; A. Fischer-Lescano et al., "Border controls at sea", p. 278; and R. Weinzierl and U. Lisson, *Border Management and Human Rights: A Study of EU Law and Law of the Sea* (German Institute for Human Rights, Berlin, 2007), pp. 78–79.

CASE STUDY 8

European Border and Coast Guard Agency (Frontex)

Frontex, the European Agency that “plans, coordinates, implements and evaluates joint operations conducted using Member States’ staff and equipment at the external borders (sea, land and air),” was established by European Council Regulation No. 2007/2004 to “facilitate the application of existing and future [European] Community measures relating to the management of external borders by ensuring the coordination of Member States’ actions in the implementation of those measures.”²⁹⁵ EU Regulation 656/2014 was introduced in response to the challenges of protecting migrants at sea in the context of Frontex cooperation, and sets out rules for intercepting vessels during joint operations²⁹⁶ and for resolving confusions surrounding international provisions on maritime surveillance.²⁹⁷ In its Fundamental Human Rights Strategy, Frontex recognizes that “respect and promotion of fundamental rights are unconditional and integral components of effective integrated border management” and that joint operations are to take account of “the particular situation of persons seeking international protection and the particular circumstances of vulnerable individuals or groups in need of protection or special care (e.g. separated and unaccompanied children, women, victims of trafficking, and persons with medical needs).”²⁹⁸

²⁹⁵ European Council Regulation No. 2007/2004 of 26 October 2004 (establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union), Preamble Paragraph 4. Available from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/borders-and-visas/schengen/docs/frontex_regulation_consolidated_2011_en.pdf

Council Regulation (EC) No. 2007/2004 established Frontex, whose sea-based joint operations have included the following: Operation Hera in the Canary Islands; Operations Indalo and Minerva in the south coast of Spain; Operation Hermes in the central Mediterranean; Operation Aeneas in South Italy and the Adriatic Sea, and Operation Poseidon in the Aegean Sea; Operation Mare Nostrum in the Mediterranean; and Operation Triton in the Mediterranean, launched in 2014 and scaled up in 2015 to patrol the sea border between Libya and Italy and provide frontline support to Italy. Frontex’s operational capabilities were enhanced by Regulation (EU) No. 1168/2011 of the European Parliament and of the Council, amending Council Regulation (EC) No. 2007/2004.

²⁹⁶ EU Regulation 656/2014.

²⁹⁷ If, in a Frontex joint operation, there is reason to believe that a vessel or person on board is in an emergency situation, the responsible RCC must be contacted. Whoever conveys information to them must then follow its instruction to assist with rescue and disembarkation in a place of safety. (Report of the Special Rapporteur on the human rights of migrants, François Crépeau on 8 May 2015 (Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants), pp. 7–8).

²⁹⁸ Frontex Fundamental Rights Strategy of 31 March 2011, Preamble and Paragraph 14. Available from www.statewatch.org/observatories_files/frontex_observatory/2011-03-31-frontex-fundamental-rights-strategy.pdf

In the context of joint maritime operations coordinated by Frontex, EU Regulation 656/2014 ensures respect for the principle of non-refoulement.

Shiprider agreements have been described as “a means of bringing together the State with an interest in preventing smuggling (and generally superior resources to do so) with the State that has the necessary enforcement jurisdiction, in a manner that seeks to preserve the latter’s position as decision maker and responsible agent.”²⁹⁹ Shiprider agreements typically involve an official of a State of embarkation being placed on board a ship of the State – usually the State of destination – seeking to intercept a migrant smuggling vessel within the territorial waters of the State of embarkation. The presence of the official from the State of embarkation can authorize interception within its territorial waters and enforce the laws of that State. Such agreements can also be used to enable the State seeking to intercept the vessel (which may be in any maritime zone, including the high seas) to take enforcement action against vessels flagged to the State of the official on board.³⁰⁰

United States shiprider agreements

Niels Frenzen notes that the United States is party to bilateral shiprider agreements with at least six states (Bahamas, Cook Islands, Dominican Republic, Federated States of Micronesia, Marshall Islands and Palau), allowing US military ships to intercept vessels suspected of migrant smuggling within the territorial waters of other States or on the high seas when flagged with another State’s flag. Under such arrangements, US vessels regularly transport migrants intercepted or rescued at sea to remote areas of States with which they have agreements for their immigration processing. While some of these agreements reflect commitments to not return a migrant to a place where he/she is likely to be tortured, the United Nations High Commissioner for Refugees has expressed concern that such provisions are not always respected and that not all parties to such agreements have ratified the Refugee Protocol nor the Convention against Torture.³⁰¹

The prohibition on arbitrary detention is a relevant human rights consideration in the context of interception.³⁰² Detention of intercepted persons is not arbitrary where States are lawfully exercising enforcement jurisdiction and where it is necessary and proportionate to achieve a legitimate aim.³⁰³ In a case where a migrant is charged with offences for illegally entering the territory of a coastal State, he/she must be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to have a trial within a reasonable time, or to be released.³⁰⁴ Anyone detained has the right to take proceedings before a court in order to have that court adjudicate – without delay – on the lawfulness

²⁹⁹ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 440.

³⁰⁰ *Ibid.*

³⁰¹ N. Frenzen, “Responses to ‘boat migration’: A global perspective – US practices”, in: *Boat Refugees and Migrants at Sea* (V. Moreno-Lax and E. Papastavridis (eds.)), pp. 289–292 and 296–297.

³⁰² Article 9(1) of the ICCPR formulates the prohibition of arbitrary detention thus: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” This principle is repeated in several regional human rights treaties, including Article 16 of the ICRMV, Article 5 of the European Convention on Human Rights, and, specifically for children, in Article 37 of the CRC.

³⁰³ For more on this point, see: A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 475–476.

³⁰⁴ ICCPR, Article 9(3).

of the detention and to order release in case of unlawful detention.³⁰⁵ The United Nations Working Group on Arbitrary Detention has set out procedural guarantees for migrants in detention, non-implementation of which may result in the Working Group concluding that such detention is arbitrary.³⁰⁶

CASE STUDY 9

Unlawful detention of migrants who arrive by sea

The European Court of Human Rights case, *Khlaifia and Others v. Italy* (2016), involved the detention of three Tunisian nationals in a reception centre on Lampedusa and, subsequently, on ships moored in Palermo harbour during the Arab Spring of 2011. The Grand Chamber found a violation of Article 3 of the European Convention on Human Rights, with respect to the conditions at the detention centre but not on the ships (the *Vincent and Audace*). It further found the detention to be arbitrary (under Article 5), as there was no legal basis for it, making it unlawful. Other violations were found in the failure to promptly inform the applicants were of reasons for their deprivation of liberty (Article 5(2)), and their right to a speedy decision by a Court as to the lawfulness of their detention (Article 5(4)).³⁰⁷

³⁰⁵ ICCPR, Article 9(4).

³⁰⁶ Procedural guarantees – among others – include notification about the grounds for any detention; the right to a remedy to a judicial authority; and the right to challenge the detention before a court. (See, for instance: United Nations Human Rights Council (UNHRC), “Report of the Working Group on Arbitrary Detention: A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court” (United Nations, New York, 2014), Paragraphs 37–45, available from <http://undocs.org/en/A/HRC/27/47>; UNHRC, “Report of the Working Group on Arbitrary Detention: Civil and political rights, including questions of torture and detention” (United Nations, New York, 1999), Annex II, available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/165/70/PDF/G9916570.pdf?OpenElement>; United Nations Commission on Human Rights (UNHCR), “Report on the Fifty-fifth Session (22 March – 10 April 1999), Supplement No. 3” (United Nations, New York, 1999), Paragraph 69, available from www.un.org/documents/ecosoc/docs/1999/e1999-23.pdf; UNHRC, “Report of the Working Group on Arbitrary Detention at the Thirteenth Session of the Human Rights Council” (United Nations, New York, 2010), Paragraph 61, available from <https://undocs.org/A/HRC/13/30>; UNHRC, “Report of the Working Group on Arbitrary Detention at the Thirteenth Session of the Human Rights Council, Addendum 2: Mission to Malta (19 to 23 January 2003)” (United Nations, New York, 2010), available from www.un.org/ga/search/view_doc.asp?symbol=A/HRC/13/30/Add.2; and UNHRC, “Report of the Working Group on Arbitrary Detention: Basic principles and guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court” (United Nations, New York, 2015), Principle 21 and Guideline 21, available from www.ohchr.org/Documents/Issues/Detention/DraftPrinciplesAndGuidelinesRightCourtReview.pdf), which include specific principles for non-nationals, including migrants, regardless of their migration status.

³⁰⁷ *Khlaifia and Others v. Italy*, Application No. 16483/12, European Court of Human Rights, 15 December 2016.

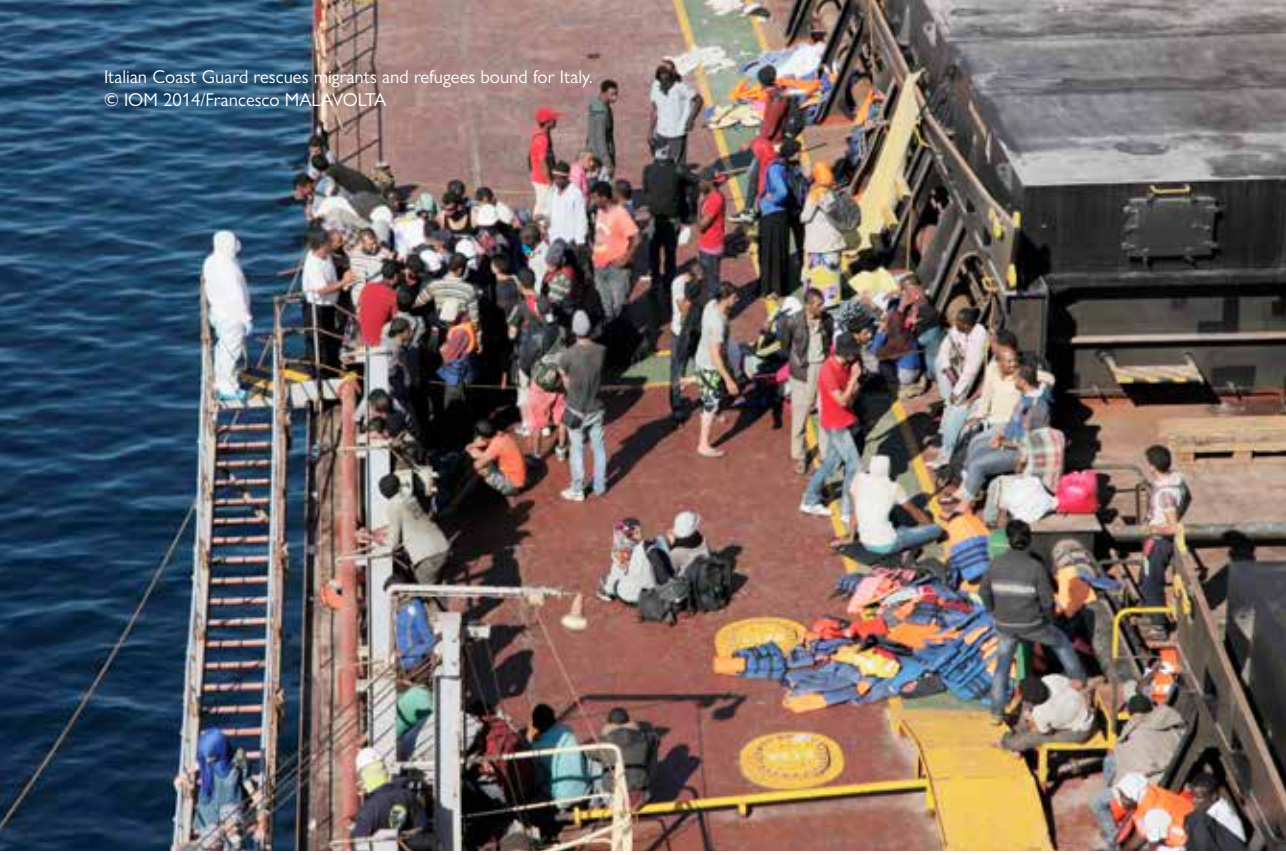
Continuing Questions and Controversies

- Do informal agreements and arrangements between States concerning irregular migration at sea constitute an exception to exclusive jurisdiction in the absence of a basis in international law? On what basis would they or would they not?
- How can the right to visit, contained in Article 110(1) of UNCLOS be better interpreted to apply to the protection needs of people in slave-like conditions at sea?
- Can the right to visit contained in Article 110(1) of UNCLOS be interpreted and applied to protect the needs of migrants being smuggled at sea?
- How much intelligence or evidence is needed to ground a suspicion that a vessel is engaged in the slavery trade, in order to justify exercising the right to visit?
- Can enforcement jurisdiction be exercised to intercept a stateless vessel on the high seas? On what basis?
- What steps can constitute “necessary steps” to prevent non-innocent passage under Article 25(1) of UNCLOS? What steps would exceed that power?

PART

3

Italian Coast Guard rescues migrants and refugees bound for Italy.
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SEARCH AND RESCUE



*As the boat moved off, we began singing gospel music to keep our spirits up. It helped us not to think about the danger. After many hours, lots of us, including me, were vomiting. One girl who had been seriously vomiting died. I can't say what happened to her body. I try never to think about it . . . Moments after they picked us all up, our boat broke in two. If we had not been rescued, we would certainly have died at sea. The other two boats disappeared. To this day I don't know what happened to them . . .*³⁰⁸

—“Morgan,” migrant

Regional response to the Bay of Bengal and the Andaman Sea Crisis

The discovery of mass graves in Thailand in 2015 uncovered smuggling and trafficking rings taking advantage of people forced to migrate from Bangladesh and Myanmar by sea towards Malaysia. Some 62,000 people are believed to have travelled by boat in the Bay of Bengal and the Andaman Sea in 2014 alone, with thousands more following in 2015. Among them are mixed groups consisting of refugees, stateless people and economic migrants. Criminal networks operated many of the boats, perpetrating violence and often murder at sea or on shore. With no State initially willing to allow ships access to their territories due to concerns that a precedent would be set, an estimated 5,000 people were left stranded at sea. The crisis revealed the remaining uncertainty of States with regard to their duty to assist.

The duty of States to rescue and render assistance to migrants in distress at sea is a well-established principle of customary law. That duty is not negated or diminished on the basis of the irregular situation of persons who need to be rescued.

Article 98(1) of UNCLOS³⁰⁹ requires both State authority vessels and private ships to:

- (a) Render assistance to any person found at sea in danger of being lost;
- (b) Proceed with all possible speed to rescue persons in distress as far as one can reasonably expect;
- (c) After a collision, render assistance to the other ship, its crew and its passengers and, where possible, inform the other ship of the name of his own ship, its port of registry, and the nearest port at which it will call.³¹⁰

³⁰⁸ “A migrant’s journey to Europe”, BBC News, 12 September 2006. Available from http://news.bbc.co.uk/2/hi/talking_point/5331608.stm

³⁰⁹ See also: UNCLOS, Article 98(2); IMO Resolution MSC.153(78) of 1974 (Safety of Life at Sea (SOLAS) Convention), as amended, Chapter V, Regulations 7 and 33; and SAR Convention, as amended. Although the article is in the section of UNCLOS concerning the high seas, it is well-accepted that the principle is applicable in all maritime zones. See, for instance: D. Guilfoyle and E. Papastavridis, “Mapping disembarkation options: Towards strengthening cooperation in managing irregular movements by sea”, background paper (UNHCR/Bali Process Regional Support Office, Bangkok, 2014), p. 5, available from www.refworld.org/pdfid/5346438f4.pdf; and E. Papastavridis, “Combating transnational organized crime at sea”, p. 19.

³¹⁰ The International Convention on Salvage of 1989 (hereinafter the “Salvage Convention”) repeats the legal duty of the master of a ship to render assistance to any person in danger of being lost at sea (Article 10). The SOLAS Convention contains similar legal provisions as the Salvage Convention – for example, Chapter V Regulation 10 maintains that the master of a ship at sea – on receiving a signal of distress – is bound to proceed with all speed as to assist persons in distress.

Article 98 requires rescue of “any person,” making clear that no distinction may be drawn between persons at sea in need of rescue, including distinctions related to legal status or reason for being at sea.³¹¹

Disrupting the rescue of migrants on the Mediterranean Sea

In May 2017, the Italian Coast Guard was forced to intervene to prevent a vessel belonging to a far right political group from allegedly disrupting a rescue vessel off the coast of Sicily.³¹² A month later, reports emerged that efforts had been made to crowd-source funds to purchase vessels to interfere with attempts to rescue migrants at sea. Individuals who have engaged in such conduct are criminally liable for acts they perpetrate against both migrant vessels and rescue vessels, and flag States are responsible for curtailing these illegal activities.

As with other areas of law of the sea, Article 98 was not drafted with the current situation of migration, or the obligations of the 1951 Refugee Convention that emerged later, in mind. At the time that Article 98 was drafted, only a relatively small number of boats and individuals were in need of rescue, and it was an uncomplicated proposition to return rescued persons after bringing them to the nearest place of safety. While Article 98 remains the applicable framework for rescue at sea, rescues in an era of large-scale migration create heavy burdens for those who are responsible for carrying them out. Rescuers may incur significant financial losses when effecting a rescue, particularly where States refuse to allow disembarkation. Shipmasters and crew members may even be forced or threatened by the people they rescue to transport them to a particular destination, and may even risk prosecution for facilitating irregular migration.³¹³ In light of these very real concerns, some private actors who have been in a position to carry out rescues have sometimes been reluctant to do so.³¹⁴

³¹¹ The IMO and Executive Committee of the UNHCR emphasized this obligation in 1985. In 2004, the IMO issued its Guidelines on the Treatment of Persons Rescued at Sea to clarify obligations under UNCLOS, the SOLAS Convention and other international laws that are referred to in the succeeding paragraphs.

³¹² See, for instance: *The Guardian (International edition)*, “Far right raises £50,000 to target boats on refugee rescue missions in Med”, 4 June 2017, available from www.theguardian.com/world/2017/jun/03/far-right-raises-50000-target-refugee-rescue-boats-med and *Independent*, “Activist raises £50k in hours to stop far-right group’s plans to ‘chase down vessels’ rescuing refugees”, 4 June 2017, available from www.independent.co.uk/news/uk/home-news/activist-anti-refugee-gofundme-fundraising-far-right-rescue-boat-mission-a7772421.html

³¹³ P. Mallia, *Migrant Smuggling by Sea*, p. 97.

³¹⁴ Note the incident in 2011 in which a rubber boat with 22 passengers left Libya, bound for Italy, and drifted back some two weeks later with only nine survivors, despite several encounters with both State and private ships who could have rendered assistance. See, for instance: A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 8.

Non-criminalization of rescuers of migrants at sea

A Centre for European Policy Studies report found that some non-State actors fear being sanctioned for rescuing migrants and taking them to a place of safety. While it notes that, where correctly applied, rescue-at-sea regimes protect persons from prosecution, fear of prosecution has nonetheless deterred shipmasters from rescuing migrants at sea, including those on fishing trawlers in distress in the Mediterranean Sea. Prosecutions of rescuers acting for humanitarian purposes are rare, but are not unheard of.³¹⁵ It is clear that the Migrant Smuggling Protocol cannot serve as a basis for prosecuting the transport of migrants following a rescue, in the absence of an intention to profit financially or materially.³¹⁶ Furthermore, the IMO Guidelines on Treatment of Persons Rescued at Sea confirm that a rescue operation does not end until rescued persons are delivered to a “place of safety,”³¹⁷ which means that any transport of rescued persons should be treated as a rescue operation and not an act in violation of immigration or other laws.³¹⁸

Search and rescue situations differ both practically and legally from situations of interception. States must engage vessels in distress, whereas they are only allowed (or sometimes obliged) to engage States in situations of interception.³¹⁹ Furthermore, State action in search and rescue operations relies on different legal relationships with the vessel and the persons on board. Rescue involves actions to locate, retrieve, assist and disembark persons in distress at sea to a place of safety. Such measures are clearly intended to rescue, “rather than such rescue being only the incidental by-product of an immigration control operation, or a subterfuge calculated to mask such an immigration operation.”³²⁰ In practice, States may inappropriately label an interception as a “search and rescue operation” to secure support for actions it would otherwise have no legal competence to take and to avoid specific obligations, or because of the practical reality that one situation may morph into another.³²¹

³¹⁵ See, for instance: M. Collyer, “Cross-border cottage industries and fragmented migration”, in: S. Carrera and E. Guild (eds.), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Centre for European Policy Studies, Brussels, 2016), pp. 17–18 and 45–47, available from www.ceps.eu/system/files/Irregular%20Migration,%20Trafficking%20and%20SmugglingwithCovers.pdf; J. Allsop and M.G. Manieri, “The EU Anti-Smuggling Framework: Direct and indirect effects on the provision of humanitarian assistance to irregular migrants” in: S. Carrera and E. Guild (eds.), *Irregular Migration, Trafficking and Smuggling of Human Beings*, pp. 88–89; Directorate-General for Internal Policies, “Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants”, study (European Parliament, Brussels, 2016), available from [www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU\(2016\)536490_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf); and M. Gkliati, “Proud to aid and abet refugees: The criminalization of ‘flight helpers’ in Greece”, University of Oxford website, Blog section, available from www.law.ox.ac.uk/research-subjectgroups/centre-criminology/centrebordercriminologies/blog/2016/05/proud-aid-and

³¹⁶ Migrant Smuggling Protocol, Article 3(a).

³¹⁷ For more on the concept of “place of safety”, see Part 3.3: Duty to disembark to a “place of safety” of this document.

³¹⁸ IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea), Annex 34, Paragraph 6.12.

³¹⁹ For instance, to combat crimes such as trafficking in persons. (See, for instance: Office of the United Nations High Commissioner for Refugees (UNHCR), “Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV) – 2003” (UNHCR, 2009:155). Available from www.refworld.org/docid/3f93b2894.html)

³²⁰ *Hirsi Jamaa and Others v. Italy* (Intervener brief filed on Behalf of the United Nations High Commissioner for Human Rights (filed pursuant to leave granted by the Court on 4 May 2011)), Application No. 27765/09, European Court of Human Rights, Paragraph 32.

³²¹ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 406 and 444. Also note *Hirsi Jamaa and Others v. Italy* (2012) in this context.

CASE STUDY 10

*Hirsi Jamaa and Others v. Italy (2009)*³²²

In May 2009, Hirsi Sadik Jamaa, a Somali national, and others were among a group of around 200 migrants on board three vessels that left the Libyan coast for Lampedusa, Italy. They were engaged on the high seas by the Italian Revenue Police and the Italian Coast Guard, transferred onto Italian military ships and returned to Tripoli, Libya.³²³ At issue was whether the situation was one of interception, which would trigger Italy's human rights obligations, or one of rescue at sea. Technically, the vessels were engaged within the Maltese search and rescue region (SRR),³²⁴ and yet it was Italy that invoked a distress situation. Italy argued that it had "intercepted in the context of the rescue on the high seas of persons in distress [...] and could, in no circumstance, be described as a maritime police operation."³²⁵ Italy argued that the obligation to save lives at sea did not create a link between the State and the persons concerned to establish jurisdiction. The European Court of Human Rights determined that Italy exercised de jure and de facto effective control between the boarding of the migrants onto the Italian military ships and the handover to Libyan officials, as the ships were flagged to Italy and crewed by Italian military personnel. Accordingly, Italian authority was sufficiently exercised to trigger human rights obligations.³²⁶

Italy's submissions to the Court as to why the case was one of "rescue" could equally feature in interception: Italy noted that "the authorities had provided the parties concerned with the necessary humanitarian and medical assistance and had, in no circumstance, used violence; they had not boarded the boats and had not used weapons."³²⁷ The Court left undetermined whether the case was one of rescue or interception, merely noting that a State cannot circumvent its jurisdiction by describing the event as a rescue operation.³²⁸

"Intercepting to rescue" is a legal *contradictio in terminis*. Calling a rescue what in reality is an interception may falsely imply that the State is merely providing assistance and not exercising any effective control or jurisdiction (which Italy was trying to evade in the case of *Hirsi Jamaa and Others v. Italy*), making the scope of legal obligations less extensive than is the case where it exercises actual jurisdiction over a ship. However, exercise of effective control (and, thereby, jurisdiction) is not limited to situations in which States actually take migrants on board a State vessel. Other situations that can amount to effective control include engaging vessels to repair their engines, dropping food packages and providing medical aid, to then directing them to a

³²² *Hirsi Jamaa and Others v. Italy* (2012).

³²³ *Ibid.*, Paragraphs 9–11.

³²⁴ *Ibid.*, Paragraphs 9–10.

³²⁵ *Ibid.*, Paragraphs 64–65.

³²⁶ *Ibid.*, Paragraphs 81–82.

³²⁷ *Ibid.*, Paragraph 66.

³²⁸ *Ibid.*, Paragraph 79.

certain course at sea or pushing them back.³²⁹ Some have argued that “effective control can result when State vessels use their physical presence and strength in order to make smaller, more vulnerable or less maneuverable vessels move back or return to ports in the country of origin or transit country by threatening or exerting physical force.”³³⁰ These examples concern a de facto limit to the freedom of navigation that involve exercise of power and effective control over a vessel.

3.1. DUTY TO COORDINATE AND COOPERATE

“Left to die” on the Mediterranean Sea

While attempting to cross the Mediterranean Sea to Italy in March 2011, a 10-metre boat with several migrants on board ran into trouble. Using a satellite phone, persons on board contacted a person in Rome, who then alerted the Italian Coast Guard and the NATO Headquarters in Naples. However, the boat never received any help. A military vessel and a military helicopter that had direct contact with the vessel did not respond to distress calls. It appeared that because the vessel was in the Libyan search and rescue region (SRR), neither Italy nor Malta – although aware of the distress situation – came to rescue. The vessel drifted for two weeks, until it was pushed by tides back to Libya. The incident resulted in 63 deaths at sea, which included 41 men, 20 women and two babies; another two people died later in a Libyan jail.³³¹ A subsequent investigation by the Parliamentary Assembly of the Council of Europe referred to a “catalogue of failures” in this incident, including the failures of Italy, Malta, NATO and two commercial fishing vessels to respond to distress signals, as well as Libya’s failure to maintain responsibility for its search and rescue region and its action of forcing people to board unseaworthy vessels and undertake dangerous sea journeys.³³²

Coordination and cooperation between States of origin, transit and destination and other actors is necessary to identify and prosecute those who criminally profit from cross-border irregular maritime flows and the exploitation of migrants at sea. It is also critical to identify migrants at sea who are in need of protection, and to ensure that their protection needs are met. Where cooperation does not happen, criminal profits increase and rights are undermined.

³²⁹ As an example, such actions occur in the context of Australia’s Operation Sovereign Borders (see Case Study 5).

³³⁰ A. Fischer-Lescano et al., “Border Controls at Sea: Requirements under International Human Rights and Refugee Law”, pp. 275–276.

³³¹ J. Sunderland, “Hidden emergency: Migrant deaths in the Mediterranean”, *Human Rights in Europe* – August (Human Rights Watch, Washington, D.C., 2012), pp. 6–7, available from www.hrw.org/sites/default/files/related_material/2012_EU_Hidden%20Emergency.pdf; and C. Heller and L. Pezzani, “Forensic oceanography: Report on the “left-to-die boat”, (Forensic Architecture, London, n.d.).

³³² Parliamentary Assembly – Council of Europe (PACE) Committee on Migration, Refugees and Displaced Persons, “Lives lost in the Mediterranean Sea: Who is responsible?” (PACE, Strasbourg, 2012). Available from https://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf

Article 98(2) of UNCLOS obliges coastal States to maintain search and rescue services and cooperate with other States.³³³ In order to determine the geographical scope for search and rescue, States have established search and rescue regions (SRRs)³³⁴ and rescue coordination centres (RCCs) responsible for search and rescue operations in each.³³⁵ Where the rescue takes place determines which RCC is responsible. Unlike maritime zones that are determined by law, SRRs are established by agreement between parties that are not related to the delimitation of other State boundaries.³³⁶ It has been argued that persons within the SRR of a coastal State are to be treated as though they are within the jurisdiction of the relevant State for purposes of international human rights law.³³⁷ However, this is not the same as assuming that a State's jurisdiction extends to the geographical scope of an entire SRR. Such an assumption would place unreasonable burdens on coastal States, contradict the overall scheme of maritime zones in the law of the sea, and undermine the principle that State jurisdiction is essentially territorial, with some exceptions allowing jurisdiction to be exercised extraterritorially.³³⁸ States parties to the International Convention on Maritime Search and Rescue (hereinafter the "SAR Convention") are also obliged to coordinate their search and rescue organizations and should, whenever necessary, coordinate operations with those of neighbouring States.³³⁹ The Annex to the SAR Convention outlines obligations to coordinate in establishing and organization search and rescue facilities.³⁴⁰

³³³ Many commentators express the view that although Article 98 appears in the UNCLOS section concerning the high seas, the duty applies to all maritime zones. See, for instance: E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, p. 295; and A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 44.

³³⁴ SAR Convention, Paragraph 2.1.4.

³³⁵ SAR Convention (as amended by MSC 70(69)), Chapters 3 and 4.

³³⁶ International Convention on Maritime Search and Rescue (SAR), adopted 20 May 2004, Chapters 2.1.4 and 2.1.7. Available from <https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf>

³³⁷ S. Trevisanut, "Law of the Sea Symposium: Search and rescue operations at sea – Who is in charge? Who is responsible?", *Opinio Juris*, 28 May 2013. Available from <http://opiniojuris.org/2013/05/28/law-of-the-sea-symposium-search-and-rescue-operations-at-sea-who-is-in-charge-who-is-responsible/>

³³⁸ Cf. *Banković and Others v. Belgium et al.*, in which "jurisdiction" is defined narrowly, recognizing only limited exceptions to territorial jurisdiction. The Court finds that a State's mere infringement upon rights in another country does not constitute an exceptional circumstance to warrant extraterritorial application of the European Convention obligations, emphasizing its essentially territorial nature (pp. 71–72). The *Banković* decision was widely criticized, notably for equating jurisdiction with legality to act, implying that a State could profit and avoid responsibility for rights abuses stemming from illegal acts. As a result, subsequent cases at the European Court of Human Rights have departed from *Banković*. (See, for instance: *Issa and Others v. Turkey* (Judgment), Application No. 31821/96, European Court of Human Rights, 30 March 2005; *Al-Skeini and Others v. United Kingdom* (2011); *Medvedyev and Others v. France* (2010); *Xhavana and Others v. Italy and Albania* (2001); and *Hirsi Jamaa and Others v. Italy* (2012).

³³⁹ SAR Convention (as amended in 1998), Article 3.1.1. See also: IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea), Annex 34, Paragraphs 6.4 and 6.5.

³⁴⁰ SAR Convention (as amended in 1998), Articles 2.2.1, 2.2.2, 2.5.1, 2.5.2, 2.3.1, 2.4, 4.2 and 4.6.

Figure 2: Indian Ocean and South-West Pacific search and rescue regions



Source: “Image of map showing Australia’s search and rescue region” (© Australian Maritime Safety Authority 2018), “Safety & navigation: Search and rescue” section. Available from www.amsa.gov.au/file/364

Note: This map is for illustration purposes only. The boundaries and names shown and the designations used on this map do not imply official endorsement or acceptance by IOM.

While many States have entered into agreements on SRRs, complications arise in operations to rescue and protect migrants at sea because of confusion about the allocation of responsibilities between the State responsible for the SRR and States with the operational capacity to rescue, as well as the flag State of any private vessel that has come to rescue. A significant operational impediment is the fact that not all States are able to discharge their search and rescue (SAR) obligations with comparable diligence.³⁴¹ Some States may be unable or unwilling to call for or to carry out search and rescue,³⁴² conflicting political priorities may even mean that States simply do not respond to information about persons in distress in their SRR.³⁴³ Questions arise as to which State should carry out search and rescue when the responsible State fails to do so.

³⁴¹ In addition, such regions may not have a system of human rights accountability under which victims and their families can pursue redress. (T. Stephens, “Law of the Sea Symposium: A comment on Seline Trevisanut’s post”, *Opinio Juris*, 28 May 2013. Available from <http://opiniojuris.org/2013/05/28/law-of-the-sea-symposium-a-comment-on-seline-trevisanuts-post>)

³⁴² This is a ground for State responsibility for a violation of an international legal obligation. (See, for instance: E. Papastavridis, “Rescuing Migrants at Sea: The Responsibility of States Under International Law” (27 September 2011), pp. 19–22. Available from SSRN: <https://ssrn.com/abstract=1934352> or <http://dx.doi.org/10.2139/ssrn.1934352>)

³⁴³ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 426.

Search and rescue operations may raise human rights concerns

While building a State's capacity to carry out search and rescue within its search and rescue region (SRR) and to disembark persons in its territory would, prima facie, seem to serve protection ends, this may not be so in practice. The European Commission's 2017 proposal to review the EU Action Plan on Return includes concrete financial, material and capacity-building support to the Libyan Coast Guard, to enable Libyan authorities to perform search and rescue operations and disembark intercepted migrants on the Libyan coast. A joint letter to the European Union from several Human Rights Council mandate-holders pointed out the many negative human rights implications of such measures, including potential violations of the principle of non-refoulement.³⁴⁴

CASE STUDY 11

On jurisdiction – the MV Tampa affair (2001)

In August 2001, the 20-metre fishing vessel, the KM *Palapa 1*, was stranded in international waters between Indonesia and Christmas Island, an Australian "external territory." The KM *Palapa 1* had 433 passengers, including asylum seekers and refugees, on board.³⁴⁵ The Australian regional coordinating centre (RCC) that received word about the KM *Palapa 1* requested ships in the area to assist. A Norwegian vessel, the MV *Tampa*, was closest to the site and proceeded towards the location. The Australian RCC attempted to contact Indonesian authorities and asked for the vessel to be towed to the Indonesian coast, informing the MV *Tampa* that Indonesian authorities would further coordinate the rescue operation. Indonesian authorities only responded after a one-day delay. After collecting the stranded migrants, the MV *Tampa* proceeded towards the Indonesian port of Merak, until migrants on board pressured the shipmaster of the MV *Tampa* to redirect the ship towards Christmas Island, some by entering the ship's bridge and threatening misbehaviour, others by threatening suicide. The Australian Government refused to grant the MV *Tampa* permission for its entry into Australian territorial waters, arguing that the incident fell within the search and rescue region (SRR) of Indonesia. A standoff ensued. The issue of who had jurisdiction over the migrants was further complicated by the MV *Tampa* flying the flag

³⁴⁴ Sent on 3 February 2017 by the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

The letter received a reply from the Permanent Delegation of the European Union to the United Nations on 10 April 2017 outlining rights attention that it was giving migration partnerships.

³⁴⁵ Some sources report this number as 438, for instance: "Refugee shares Tampa memories", SBS News, 26 August 2013, available from www.sbs.com.au/news/refugee-shares-tampa-memories; and "Stranded refugees start hunger strike", *The Guardian* (International edition), 29 August 2001, available from www.theguardian.com/world/2001/aug/29/johnnaglionby.patrickbarkham

of a third country, Norway.³⁴⁶ Eventually, the rescued persons were transferred onto an Australian navy vessel and transported to Nauru.

The case highlights a conflict between three types of legal bases for taking responsibility: Australian coastal State jurisdiction, Indonesian SRR jurisdiction and Norwegian flag State jurisdiction. Norway's position, based on Article 98 of UNCLOS, customary international law and humanitarian standards, was that Australia was obliged to allow the MV *Tampa* to proceed to the nearest port, which happened to be Australian shores.³⁴⁷ Suggestions were made by Norway that Australia was in breach of international law by formally warning the captain of the MV *Tampa* that if he continued towards Australian soil in his search for assistance, he would be liable for violating Australian immigration law, and that it was also in breach of international law by boarding the vessel merely to take over control so as to send it back to international waters. Its first responsibility was to rescue and assist those on board the MV *Tampa* and to disembark them to a place of safety, regardless of the nationality or status of such persons or the circumstances in which those persons are found.

On the other hand, a State can exercise full sovereignty over its territorial waters. UNCLOS Article 19(2) allows a State to regulate non-innocent passage, including to prevent infringements of immigration law, and to take "necessary steps" in accordance with Article 25 in doing so. Article 31 of the Refugee Convention provides no clear answer on whether non-refoulement triggers rights of entry to access asylum procedures. Accordingly, higher principles must be looked to in resolving grey areas of the law, including principles of good faith, international cooperation (as opposed to unilateralism) and humanitarianism.³⁴⁸ In the wake of the MV *Tampa* incident, the Australian Government amended its migration legislation to introduce an offshore asylum processing system known as "the Pacific Solution."³⁴⁹ IMO also responded by issuing guidance on treatment of persons rescued at sea.³⁵⁰

In response to the MV *Tampa* incident described in Case Study 9, amendments were made to the SAR and SOLAS Conventions to clarify the nature and scope of relevant rights and obligations which entered into force in 2006. Additionally, the IMO issued its Guidelines on the Treatment of Persons Rescued at Sea, which offered important, albeit non-binding, guidance for interpreting the international law of the sea and for developing customary rules. In accordance with emerging international standards and practice, third States have a legal

³⁴⁶ It has been argued that when migrants embark on rescue ships they fall under jurisdiction flag State of that ship based on Article 94(1) of UNCLOS. (See, for instance: J. E. Tauman, "Rescued at sea, but nowhere to go: The cloudy legal waters of the Tampa Crisis", *Pacific Rim Law and Policy Journal* 11(2):461–496.)

³⁴⁷ G.S. Goodwin-Gill, "Refugees and responsibility in the twenty-first century: More lessons learned from the South Pacific", *Pacific Rim Law and Policy Journal* 12(1):23–48, p. 32.

³⁴⁸ G.S. Goodwin-Gill, "Refugees and responsibility in the twenty-first century", pp. 32–41.

³⁴⁹ For a brief overview on Australian refugee and asylum policy, see: I. Zamfir, "Refugee and asylum policy in Australia: Between resettlement and deterrence", briefing (European Parliamentary Research Service, Strasbourg, 2016). Available from [www.europarl.europa.eu/RegData/etudes/BRIE/2016/593517/EPRS_BRI\(2016\)593517_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593517/EPRS_BRI(2016)593517_EN.pdf)

³⁵⁰ IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea), Annex 34.

obligation to undertake search and rescue operations where the responsible State fails to do so. This is in line with the Guidelines, which state that:

. . . shipmasters should – in case where the RCC responsible for the area where the survivors are recovered cannot be contacted – attempt to contact another RCC, or if that is impractical, any other government authority that may be able to assist, while recognizing that responsibility still rests with the RCC of the area in which the survivors are recovered.³⁵¹

IMO Guidelines on the Treatment of Persons rescued at Sea

The guidelines refer to IMO Assembly Resolution A.920(22) (Review of safety measures and procedures for the treatment of persons rescued at sea), which ensure that persons rescued at sea, “regardless of nationality or status, including undocumented migrants, asylum seekers and refugees, and stowaways” are treated in accordance with international law. The guidelines also note that non-SAR-related issues – including where survivors are migrants or asylum seekers – are to be dealt with by the appropriate authorities (typically other than the RCC), once they have been delivered to a place of safety, and that an assisting ship should not be considered a place of safety. The Guidelines also point to the relevance of IMO Assembly Resolution A.867(20) (Combating unsafe practices associated with the trafficking or transport of migrants by sea) and the IMO Global SAR Plan, UNTOC and the Trafficking and Migrant Smuggling Protocols thereto, as well as the Refugee Convention, among other instruments.

Efforts to strengthen coordination in the wake of the Andaman Sea crisis

The Andaman Sea crisis of May 2015 left some 5,000 people stranded at sea and revealed the lack of a functioning coordination mechanism to respond to crises of this magnitude and complexity in Southeast Asia, notwithstanding the existence of regional cooperation networks mandated to address migration.³⁵² This humanitarian disaster highlighted the urgent need to implement a coordinated responsibility-sharing system to effectively protect persons in need and to prosecute those who profit from such crises. At its Special Meeting on Irregular Migration in the Indian Ocean, held in Bangkok, Thailand, on 29 May 2015, participating governments unanimously agreed to establish a mechanism to administer and ensure necessary support to stranded persons – as well as resources and resettlement and repatriation options

³⁵¹ Ibid., Paragraph 5.1.4.

³⁵² Including the Jakarta Declaration on Addressing Irregular Movement of Persons of 20 August 2013; the 1975 Agreement for the Facilitation of Search of Ships in Distress and Rescue of Survivors; and the Bali Process Regional Cooperation Framework.

to irregular migrants. IOM recommended that the task force be a formal entity with clear channels of communication and procedures for cooperation.³⁵³ At the Eleventh Meeting of the Bali Process Ad Hoc Group Senior Officials held in Colombo, Sri Lanka on 16 November 2016, the Co-Chairs presented a report on the region's response, acknowledging that the crisis was in "large part predictable" and that "although there was knowledge of maritime movements, it was the media reporting to the world on the ships stranded at sea, the discovery of graves and, more profoundly, the lack of coordination and agreement in the region that prompted action," concluding that "this should not happen again." The Co-Chairs of the Bali Process were requested to take action to implement the report's recommendations, including by establishing a voluntary, non-binding Task Force on Planning and Preparedness to develop protocols and harmonize detection, search and rescue, disembarkation and shelter practices.³⁵⁴

The Annex to the SAR Convention, as amended in 1998, asks that States authorize immediate entry into or over its their territorial seas of the rescue units of other States for the purpose of searching for maritime casualties and rescuing survivors. Such search and rescue must be carried out in coordination with the State that has authorized the entry, or with an authority that the said State has designated.³⁵⁵ The RCC (or sub-centre) has to notify the consular or diplomatic authorities of concerned third States and, when the incident involves a refugee or displaced person, the centre has to notify the office of the competent international organization.³⁵⁶ However, consideration must be given to the security of migrants who may wish to apply for asylum. The IMO Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea provide that "when communicating this information [on the migrant], it should, therefore, not be shared with his/her country of origin or any other country in which he/she may face threats."³⁵⁷

³⁵³ See: Kingdom of Thailand Ministry of Foreign Affairs, "Summary: Special Meeting on Irregular Migration in the Indian Ocean", press release (Royal Thai Government, Bangkok, 2015), available from mfa.go.th/main/en/media-center/14/56880-Summary-Special-Meeting-on-Irregular-Migration-in.html; and W.L. Swing, Director General of the International Organization for Migration, "Challenges and opportunities of migration management in Asia Pacific", statement to the International Conference on Irregular Migration in the Indian Ocean, Thailand, 4 December 2015, available from www.iom.int/speeches-and-talks/statement-international-conference-irregular-migration-indian-ocean-challenges

The agreement mirrors commitments made in the Jakarta Declaration on Addressing Irregular Movement of Persons of 20 August 2013. Participating States include Afghanistan, Australia, Bangladesh, Cambodia, Indonesia, Malaysia, Myanmar, New Zealand, Pakistan, Papua New Guidance, the Philippines, Sri Lanka and Thailand.

³⁵⁴ See, for instance: "Review of Region's response to Andaman Sea situation of May 2015", report (UNHCR/Bali Process Regional Support Office, Bangkok, 2015). Available from www.baliprocess.net/UserFiles/baliprocess/File/Review%20of%20Andaman%20Sea_Final_Bali%20Process%20AHG%20SOM_16%20Nov%202016.pdf

³⁵⁵ SAR Convention (as amended in 1998), Annex, Article 3.1.2.

³⁵⁶ SAR Convention (as amended in 1998), Article 5.3.3.8.

³⁵⁷ International Maritime Organization (IMO), "Principles relating to administrative procedures for disembarking persons rescued at sea", circular (IMO, London, 2009), Paragraph 2.2. Available from www.refworld.org/pdfid/524be8244.pdf

The 1963 Vienna Convention on Consular Relations

Article 36 of the Vienna Convention on Consular Relations governs the communication and contact between individuals and their consular services abroad. The two key limitations to the utility of this mechanism to protect migrants at sea are, firstly, that migrants may not have access to their consular or diplomatic representatives because they are at sea and lack the means of communicating with them; and, secondly, that even where migrants have means of contacting their consulates or embassies, they may not wish to do so if they are fleeing from their government. This latter concern is one that State actors encountering migrants at sea must bear in mind. In the case of smuggled migrants who are detained, Article 16(5) of the Migrant Smuggling Protocol obliges States parties to comply with its obligations under the Vienna Convention, including that of “informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.” Human rights considerations and the principle of non-refoulement further require States parties to consider the wishes of any persons intercepted or rescued for their consular representatives not to be contacted. The SAR Convention may also come into play; it provides that upon the declaration of a phase of distress, a State’s RCC has “to notify the consular or diplomatic authorities concerned, or if the incident involves a refugee or displaced person, the office of the competent international organization.”³⁵⁸

For both coordination and cooperation,³⁵⁹ customary international law may expose States to scrutiny; with respect to the duty to cooperate, States can be held liable for breaches of the SAR Convention under the customary law on State responsibility.³⁶⁰ However, the lack of enforcement provisions in the SAR and SOLAS Conventions essentially leaves States parties to address failures to fulfil obligations, which has not resulted in significant jurisprudence to date.

³⁵⁸ SAR Convention, Article 5.3.3.8.

³⁵⁹ The legal difference between coordination and cooperation is that the former concerns a legal obligation of the State responsible for an SRR for which the State concerned is the primary responsible actor. A duty to cooperate exists regardless of the status of a State responsible for an SRR and pertains to any possible situation in which State authorities have the ability and/or proximity to render assistance, to communicate and to rescue.

³⁶⁰ This was hypothetically the case in the *MV Pinar* case. Malta was responsible for the SRR but failed to effectively coordinate, while Italy failed to cooperate de bona fide. (See, for instance: E. Papastavridis, “Rescuing Migrants at Sea: The Responsibility of States Under International Law” (27 September 2011), pp. 21–22. Available from SSRN: <https://ssrn.com/abstract=1934352> or <http://dx.doi.org/10.2139/ssrn.1934352>). The fact that the obligation to coordinate is one of “effort” and not “result” does not mean it goes unchecked. When a State manifestly fails to coordinate a search and rescue operation – in accordance with the requirements of the detailed regulation SAR Convention and guidelines – it is liable to the customary international law on State responsibility.

Best practices for cooperation and coordination with respect to migrants at sea

In an era of mass migration at sea, search and rescue obligations place heavy burdens on coastal States responsible for a large search and rescue region (SRR). The following good practices are offered in the spirit of cooperation and on the basis of the evolving nature of international law:

- (a) Regularly update agreements between national search and rescue (SAR) agencies;
- (b) Put in place a diplomatic clearance exemption clause in bilateral SAR service agreements, so as not to require normal diplomatic clearance processes for a State's aircraft or vessels to enter territorial waters to respond to search and rescue incidents;
- (c) Put in place regional and bilateral liaison arrangements for information-sharing (including a communication system that is manned 24/7) to discuss and settle operational difficulties and avoid disputes and standoffs;
- (d) Put in place regional financial and logistical burden-sharing arrangements and mechanisms to allocate resources and facilities of third States to reduce the burden on coastal States responsible for a large SRR.

Continuing Questions and Controversies

- How should search and rescue responsibilities be allocated in overlapping search and rescue region (SRR) zones?
- Who should be responsible for carrying out rescues where a search and rescue (SAR) authority does not take responsibility for its SRR zone?
- How can accountability for failure to carry out rescues in SRR zones be strengthened? By which body or institution?
- Under what circumstances should rescuing authorities notify (or not notify) diplomatic or consular representatives in the event of a rescue?
- Under what circumstances, if any, are international human rights and humanitarian law relevant to addressing the enforcement vacuum left by maritime law?

3.2. DUTY TO RESPOND TO SITUATIONS OF “DISTRESS”

We brought on five corpses recovered from the sea, but no lives.

– Proactiva Open Arms³⁶¹

CASE STUDY 12

*Jark v. Minister for Immigration and Border Protection*³⁶²

In June 2014, a vessel with 153 people on board, left a Sri Lankan Tamil refugee camp in Pondicherry, India. The Australian Government intercepted the vessel in its contiguous zone. Unlike in the case of *Hirsi Jamaa and Others v. Italy* (discussed in Case Study 8) in which the Italian Navy invoked distress so as to return the boat to Libya, Australia did not interpret this situation as one of distress, but boarded the vessel on the basis of interception, transferring passengers onto a military ship and disembarking them in Papua New Guinea. The migrants sought a High Court injunction, claiming Australia was in breach of its non-refoulement obligation. One of the questions before the Court was whether Australia had a duty to rescue. According to news reports, the vessel “had sprung an oil leak, and those on board felt they would run out of oil before making land. Their main fear [was] that the boat [would] stop, [making them] vulnerable to the elements.”³⁶³ The plaintiffs argued “that the boat was in some sort of distress, and [had] notified the Australian authorities and [that] the Navy then moved to assist the boat.” However, the Australian Minister for Immigration and Border Protection said “the vessel was in no stage in distress” and that “all aboard were safe.” There have been suggestions by some critics that the denial by Australian authorities that there was a situation of distress was an attempt to avoid obligations to rescue by instead asserting the right to intercept and detain.³⁶⁴

Article 98 of UNCLOS requires States to respond to situations of distress. Some key points of relevance to the general duty to respond to situations of distress are:

- (a) Once safety of life has been addressed, coastal States may determine how to deal with requests for assistance from vessels in distress, having regard to their own interests.
- (b) The right to assistance is not considered to extend to allowing entry to a particular port or into particular waters.

³⁶¹ Proactiva Open Arms, a Spanish aid organization, quoted in “More than 200 migrants feared drowned in Mediterranean”, *BBC News*, 24 March 2017.

³⁶² *Jark v. Minister for Immigration and Border Protection* (Transcript of proceedings), HCA Trans 150, High Court of Australia, 18 July 2014.

³⁶³ See, for instance: A. Coopes, “Lost at sea: Australia’s refugees”, *Al Jazeera Online* (English), 11 July 2014. Available from www.aljazeera.com/indepth/features/2014/07/lost-at-sea-australia-refugees-201471183541382898.html

³⁶⁴ *Jark v. Minister for Immigration and Border Protection* (Transcript of Proceedings), HCA Trans 148, Australian High Court, 7 July 2014; and “Fact file: why the fate of 153 asylum seekers is in the hands of the High Court”, *ABC News*, 13 August 2014, available from www.abc.net.au/news/2014-07-14/fact-file-asylum-seekers-fate-in-high-court/5581926

- (c) The basic rule applies to physical distress, but does not apply to cases in which vessels are seeking entry into ports purely to disembark persons rescued at sea;³⁶⁵
- (d) The burden of proving situations in distress falls on the master of the afflicted vessel.³⁶⁶

However, determining what constitutes a situation of distress is challenging. Situations of “distress” and “danger of being lost” trigger the legal obligation to assist.³⁶⁷ The Annex to the SAR Convention defines a “distress phase” as “a situation wherein there is reasonable certainty that a person, a vessel, or other craft is threatened by grave and imminent danger and requires immediate instance.”³⁶⁸ However, the concepts of “distress” and “danger of being lost,” which trigger the legal obligation to assist are not further defined in international law, leaving them subject to State interception and discretion as to whether to rescue or not.³⁶⁹ In practice, it is the relevant RCC that determines whether the phase of emergency is one of “uncertainty,” “alert” or “distress,” and when a rescue operation comes to an end.

Table 5: Phases of an emergency and respective legal obligations

| Emergency phase | Description of phase | Legal Obligation of RCC |
|-------------------|--|--|
| Uncertainty phase | There is uncertainty as to the safety of a person, a vessel or other craft. | <ul style="list-style-type: none"> • Initiate inquiries. • Declare the alert phase. |
| Alert phase | There is apprehension as to the safety of a person, a vessel or other craft. | <ul style="list-style-type: none"> • Extend inquiries. • Alert appropriate search and rescue services. • Initiate necessary action. |
| Distress phase | There is reasonable certainty that a person, vessel or other craft is threatened by grave and imminent danger and requires immediate assistance. | <ul style="list-style-type: none"> • Proceed to organize and coordinate rescue and assistance. |

Some literature has posited that distress involves “[a] necessity [that] must be urgent, and proceed from such a state of things as may be supposed to produce on the mind of a skillful mariner, a well-grounded apprehension of the loss of vessel and cargo, or the lives of the crew.”³⁷⁰ Judicial decisions and legal doctrine are subsidiary sources of guidance as to what constitutes “distress,” albeit ones that may yield only limited insight; case law has held, for example, that a vessel does need not to “dash against the rocks” in order for it to be deemed in distress.³⁷¹

³⁶⁵ As in the case of the MV Tampa.

³⁶⁶ R. Barnes, “The International Law of the Sea and Migration Control”, in: B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control*, pp. 135–136.

³⁶⁷ SOLAS Convention, Chapter V, Regulation 33. See also: IMO International Convention on Salvage of 1989 (ICS), Article 10. Available from www.jus.uio.no/lm/imo.salvage.convention.1989/doc.html

³⁶⁸ SAR Convention, Annex 3, Article 1.3.13.

³⁶⁹ SOLAS Convention, Chapter V, Regulation 33. See also: ICS, Article 10.

³⁷⁰ J.E. Noyes, “Distress”, in: *Max Planck Encyclopedia of Public International Law*.

³⁷¹ General Claims Commission US and Mexico, “Kate A. Hoff v. the United Mexican States”, *American Journal of International Law*, 23(4):860–865.

CASE STUDY 13***United States v. Hilario-Hilario (2008)***

The case of *United States v. Hilario-Hilario* concerned a wooden yawl carrying 92 nationals from the Dominican Republic. After the vessel capsized, rescue was carried out by the US Coast Guard and authorities in the territory of Puerto Rico. Seven people did not survive. The vessel was determined to be unseaworthy due to overcrowding, unsanitary conditions, the rudimentary construction of the yawl, and its lack of bathrooms, lights, seats, radio and appropriate safety and navigational equipment.³⁷² Although “unseaworthiness” on its own did not constitute distress, it played an important role in the capsizing of the vessel and, hence, the circumstance of distress.

CASE STUDY 14***MV Tampa (2001) – distress***

In the *MV Tampa* case discussed previously, there was little dispute that *KM Palapa 1* was in a situation of distress. The Australian authorities called the *MV Tampa* to carry out a rescue operation because the *KM Palapa 1* was sinking with 433 additional individuals on board (far beyond its 50-person capacity), putting them all at risk of drowning.³⁷³ However, there was some dispute as to whether the *MV Tampa* was in a situation of distress after having embarked the migrants on its own deck. The *MV Tampa* was at least in a phase of alert, but there were arguably some material indicators to suggest it was in a state of distress, by virtue of its need to provide immediate assistance³⁷⁴ and its impaired operating efficiency.³⁷⁵ Having hundreds of extra people on board a cargo vessel not built for that purpose arguably created a risk to safety. Among those saved and embarked, several were sick and injured, therefore posing a risk to the health and lives of those rescued and of the crew as well.³⁷⁶ Also among the people rescued were individuals that exercised pressure, intimidation and threats to crew risking security.³⁷⁷ Furthermore, because Captain Arne Rinnan was concerned about the security and medical situation on board *MV Tampa*, he issued an explicit distress signal and proceeded to the nearest shore, that is, Australia’s Christmas Island.³⁷⁸ The violation of safety standards led Captain Rinnan and the vessel owner to declare the ship unseaworthy under Norwegian law.³⁷⁹ However, Australia

³⁷² *United States v. Hilario-Hilario*, 529 F.3d 65, US Court of Appeals (First Circuit), 20 June 2008, p. 6.

³⁷³ J.E. Tauman, “Rescued at sea, but nowhere to go”.

³⁷⁴ SAR Convention, Article 4.4.3[1].

³⁷⁵ SAR Convention, Article 4.4.3[3].

³⁷⁶ Cf. J.E. Tauman, “Rescued at sea, but nowhere to go”, p. 478: “Many of those rescued passengers were suffering from severe dehydration, dysentery, scabies, and other illnesses that put the crew at risk.”

³⁷⁷ Communicating a situation of distress in itself constitutes an important indicator of distress.

³⁷⁸ J.E. Tauman “Rescued at sea, but nowhere to go”.

³⁷⁹ *Ibid.*, pp. 461, 462, 477 and 478.

did not treat the situation as one of distress warranting search and rescue, instead dispatching armed personnel to board and take control of MV *Tampa*, and demanding it leave Australian territorial waters.³⁸⁰ In the Federal Court case that subsequently arose, Australia defended its actions on the basis of national sovereignty and security:

SAS (Special Armed Services) officers boarded the ship because it contained unlawful non-citizens who did not hold visas to enter Australia. The officers included by (sic) SAS medical personnel whose purpose was to render medical and humanitarian assistance in response to a distress signal. Part of the purpose was to provide security for the crew. Another part of the purpose was to deal with any medical emergencies and thus remove the basis for the distress signal and facilitate the departure of the ship from Australian waters.³⁸¹

The SAR Convention outlines three situations wherein the presumption of distress should apply:

- (a) When positive information is received that a person, a vessel or other craft is in need of immediate assistance;
- (b) When the person, vessel or other craft is incommunicado following unsuccessful attempts to establish contact and more widespread unsuccessful inquiries;
- (c) When information is received which indicates that the operating efficiency of a vessel or other aircraft has been impaired to the extent that a distress situation is likely.³⁸²

A 2010 European Council Decision offers the following indicators:

- (a) Seaworthiness of the vessel;³⁸³
- (b) Number of persons on board (overcrowding);³⁸⁴
- (c) Availability of supplies such as fuel, water and food;
- (d) Absence of qualified crew on board;
- (e) Availability and capability of safety, navigation and communication equipment;

³⁸⁰ J.E. Tauman, "Rescued at sea, but nowhere to go", pp. 461 and 465.

³⁸¹ *Ruddock v. Vadarlis*, 110 ECR 491, Federal Court of Australia, 17 September 2001, Paragraph 11.

³⁸² The SAR Convention does not clarify what is meant by impairment to "operating capacity", but it is clear that a judgment about whether operating capacity has been impaired is to be made by "any authority or element of the search and rescue organization having reason to believe that a vessel is in a state of emergency" who provides any information to the rescue coordination centre (or sub-centre) that, immediately upon receiving such information, is responsible for evaluating it to determine the phase of emergency. See: SAR Convention 4.2.3 and 4.2.4. Aside from international treaty law, the European Union has adopted Regulation 656/2004, which establishes rules for the surveillance of the external sea borders in the context of the 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.

³⁸³ See, for instance: *United States v. Hilario-Hilario*.

³⁸⁴ What constitutes "overcrowding" is not defined in international law, but Provision 4.2.4 of the SAR Convention implies that it would be for the rescue coordination centre and sub-centres to make a determination on this question on the basis of the information they receive.

- (f) Presence of persons on board in urgent need of medical assistance;
- (g) Presence of vulnerable, injured or deceased persons on board;
- (h) Presence of pregnant women or children on board;
- (i) Prevailing weather and sea conditions.³⁸⁵

While the above list is not exhaustive or conclusive, the indicators are meant to be considered collectively and weighed against any mitigating circumstances on a case-to-case basis. Other situations that may indicate distress include security risks on board vessels, such as where persons on board become aggressive or violent – or threaten to become so, such as when they express intentions to kill themselves or harm others.

Where situations of distress are “self-induced” by migrants themselves

Migrants may travel in unseaworthy and/or overcrowded vessels, or “vessels” made up of little more than a wooden door and plastic bottles. In some situations, migrants may deliberately sabotage their vessels within plain sight of rescue authorities in a bid to force rescue. The fact that the situation of distress has been brought about by the persons in distress cannot bear on the determination of whether there exists, in the first place, a situation of distress or not.³⁸⁶ It would be paradoxical to conclude that a vessel is not in distress because a clearly existing situation of distress was caused by the persons navigating the vessel themselves. Put simply, people cannot be allowed to drown because they created a situation in which they could.

Ultimately, it is the responsibility of States to determine instances of distress and fulfil their obligations to rescue persons in distress at sea. Some areas of the sea and maritime straits are notoriously dangerous and are the sites of many casualties, despite awareness of the States responsible for those SRRs. It is good practice for States to identify “problem zones” and scenarios in which distress situations involving migrants occur in advance of such situations of distress arising, and prepare effective responses to them. The obligation to assist and rescue any person in danger of being lost or in distress is enhanced by human rights principles. The right to life and the prohibition on inhumane and degrading punishment is paramount in situations where smugglers place migrants in life-threatening situations or use force and violence against them, underlining States’ obligation to remove migrants from smuggling situations.³⁸⁷ In relation to migrants who are exploited at sea (e.g. as seafarers or fishers), questions may arise as to whether their circumstances amount to situations of “distress” that warrant rescue. The answer to that question will vary depending on the specific circumstances

³⁸⁵ EU Regulation 656/2014, Article 9(2)(f).

³⁸⁶ See, for instance: A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 463–464. Cf. Y. Tanaka, *The International Law of the Sea*, p. 82: Lord Stowell in the *Eleanor* case summed up four criteria, one of which is that “the distress may not be created by himself.”

³⁸⁷ This right is enshrined in Article 6(1) of the ICCPR and in Article 9 of the ICRMW and mirrored by an obligation of conduct on the part of the State authorities involved. In *Osman v. United Kingdom*, the European Court of Human Rights affirmed that there exists an obligation for States not only to refrain from the intentional and unlawful taking of lives, but also to take appropriate steps to safeguard the lives of those within their jurisdiction: *Osman v. the United Kingdom*, Application No. 871/1083, European Court of Human Rights, 28 October 1998, Paragraph 115.

and the extent to which lives are in imminent danger. Regardless of the situation in which migrants are encountered, preventing further harm and exploitation is an obligation of States, regardless of whether persons are smuggled or trafficked, or whether they are men, women, children, asylum seekers or refugees.

CASE STUDY 15

Ukrainian seafarers and fishers

A 2013 study of the exploitation of Ukrainian seafarers and fishers explored situations in which professional seafarers are recruited into human trafficking by formal agencies in the Republic of Korea, the Russian Federation and Turkey. In the cases captured by the study, those men who embarked in the Russian Federation on board vessels were engaged in illegal crabbing. Those seafarers who embarked in Turkey were involved in transporting cargo between ports along the Mediterranean coastline, covering the countries of Algeria, Cyprus, Lebanon, the Syrian Arab Republic and Turkey. One man, who was recruited in the Republic of Korea, was exploited at sea in seafood processing. In all cases, the situations in which the men lived and worked were inhumane, working 18 to 22 hours per day, seven days a week, in wet clothes and in the biting cold, often going without sleep for days at a time with inadequate food and no medical care to treat illnesses and injuries. Challenging questions persist as to which State or States are responsible for rescuing these victims of trafficking. When they are exploited in international waters, the “territory” in which they are exploited depends on the flag State of the vessel. In the case of the Ukrainian victims recruited in the Russian Federation, the vessel on which they were exploited was flagged to the Russian Federation; those recruited in Turkey were exploited on a vessel flagged to Panama. It is the flag State that has the responsibility to ensure that processes for registering vessels makes the commission of crime difficult, as well as rescuing and assisting victims of trafficking on board vessels that fly its flag.³⁸⁸

The humanitarian imperative to interpret “distress” broadly

The risk that persons may be left to die is a strong argument in favour of broadly interpreting the meaning of “distress.” In August of 2009, five Eritreans were rescued close to the Italian island of Lampedusa. They reported that 75 other passengers on board had died of dehydration and starvation, notwithstanding that at least ten ships had passed them by, and further alleged that they had been supplied with water and food by Maltese authorities, who had not taken steps to rescue them. Maltese authorities confirmed that they had encountered the vessel, but that it and its passengers were not determined to be in a situation of distress.³⁸⁹

³⁸⁸ R. Surtees, *Trafficked at Sea*, pp. 63, 69, 71–76.

³⁸⁹ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 459 at footnote 269.

International law does not detail the nature and scope of assistance to be provided in specific situations, but it has been stated that the obligation is to “render assistance” and not necessarily to “rescue,” unless it is both necessary and feasible to do so.

[On] receiving information that a person is in distress at sea in an area within which a State provides for the overall coordination of search and rescue operations, its responsible authorities must take urgent steps to provide the most appropriate assistance available.³⁹⁰

Assistance, for instance, could be rendered in a situation where a vessel is in need of fuel, provisions or engine repairs, but otherwise does not need rescuing per se. On this point, though, it is important to note that the “necessity” requirement means that it is not justifiable to only drop fuel or food to a situation of distress where rescue is “necessary.”³⁹¹ Indeed, doing so may amount to violations of human rights; several stakeholders have expressed concern about situations in which States merely provide minimal repair and assistance to address the most pressing causes of the distress and subsequently leave the vessel with migrants on board at sea or direct them on a certain navigational course.³⁹²

Safeguards in the Migrant Smuggling Protocol

The Migrant Smuggling Protocol includes several safeguards concerning the treatment of persons rescued. States parties taking action against a vessel under the Protocol must:

- (a) Ensure the safety and humane treatment of the persons on board (Article 9(1)(a));
- (b) Take due account of the need not to endanger the vessel or its cargo (Article 9(1)(b));³⁹³
- (c) Conduct a rescue in accordance with human rights and humanitarian law (Article 19(1)).

³⁹⁰ SAR Convention, Article 2.1.9.

These SAR duties should be carried out in accordance with the three volumes of the 2013 International Aeronautical and Maritime Search and Rescue Manual (IAMSAR). Volume I of the 2013 IAMSAR contains guidance on the organization and management of search and rescue operations. Volume II assists personnel who plan and coordinate SAR operations, and Volume III is aimed at performance of ongoing SAR operations. (See also: IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea), Annex 34, Paragraphs 6.1 and 6.2.)

³⁹¹ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 449.

³⁹² Examples from Australia’s Operation Sovereign Borders can be pointed to here. In the European context, a joint briefing on EU Regulation 656/2014 noted: “A rescue operation is not deemed over until the passengers on a vessel have reached a place of safety.” This reasoning accords with the definition of a place of safety, that is, as a place where rescue operations are considered to terminate. (*Joint briefing on the European Commission Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the 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 Members States of the European Union* (AI, ECRE and ICJ, 2013), p. 14.)

³⁹³ See also: Article 8bis(10)(a)(i) and (ii) of the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; and Article 17 (5) of the 1988 United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances.

Assistance must be provided to any person in distress at sea, regardless of the nationality or status of such person or the circumstances in which that person is found.³⁹⁴ This means that even though those in distress are irregular migrants – or fall into any other category of person towards which a State and its border and immigration policy have reservations – the State must nonetheless rescue them promptly. If a vessel with migrants on board is determined to be in distress, then the actors involved have an indisputable duty to rescue. How to further deal with those disembarked upon another vessel is a separate matter, but the safety of those in distress takes priority. However, if it is assessed that a vessel is not in distress, a State that wishes to engage it needs another legal basis for doing so, depending on the flag State and in which maritime zone the vessel is found.

Search and rescue operations involve certain discretionary powers for the States involved.³⁹⁵ It is up to the SRR State to decide whether a distress situation exists³⁹⁶ and whether a SAR operation should be suspended or terminated.³⁹⁷ However, these discretionary powers are not unlimited. While international law does seem to impose a legal obligation of conduct rather than of result, it requires States to use all means and apply all measures as reasonably practical to ensure the rescue of those in distress. Case law from the United States is useful in this regard: In *Thames Shipyard and Repair Co. v. the United States* (2004), the First Circuit of the US Court of Appeals confirmed that the US Coast Guard:

...[had] discretion to exercise its judgment in determining how to go about search and rescue operations, [that] the determination of a peril to endangered seamen had reached such level as to require forced evacuation involves a true policy choice, and [to decide] whether human life could reasonably have been deemed to be at serious risk.³⁹⁸

This “discretionary function exemption” (termed a “margin of appreciation” in the jurisprudence of the European Court of Human Rights), holds that when State conduct involves an element of judgment, a court can determine whether that judgment is of the kind that raises issues of public policy which – if reasonable and proportional – shield a State from liability.³⁹⁹ Given that international law specifically stipulates that rescue must be exercised regardless of the status of the persons involved, the fact that the persons on board are migrants may, in no way, affect this discretionary decision. This would constitute grounds for liability for negligence and breach of the international and domestic obligation to render assistance.

Besides the specific legal obligations arising from international law by virtue of flying the flag of a State that is bound by relevant treaties, private vessels have corporate responsibility to respect human rights: “They should avoid infringing on [the] human rights of others and should

³⁹⁴ SAR Convention, Article 2.1.10.

³⁹⁵ A legal obligation is of a non-discretionary nature if it proscribes a specified course of action.

³⁹⁶ SAR Convention, Article 4.2.4.

³⁹⁷ SAR Convention, Annex Section 4.8.

³⁹⁸ *Thames Shipyard and Repair Co. v. United States*, 350 F.3d 247, US Court of Appeals (First Circuit), 26 November 2003.

³⁹⁹ *Ibid.*, pp. 254–255, Paragraph 5–8.

address adverse human rights impacts in which they are involved.”⁴⁰⁰ Where private vessels render assistance, coastal States must relieve them from the burden as soon as practicable; if States do not take over from private vessels in a proper and efficient manner, commercial and other private ships will become reluctant to participate in search and rescue activities.⁴⁰¹ The IMO has enacted guidelines for States in this respect:

- (a) A ship should not be subject to undue delay, financial burden or other related difficulties after assisting persons at sea; therefore, coastal States should relieve the ship as soon as practicable.⁴⁰²
- (b) Governments and the RCC responsible should make every effort to minimize the time survivors remain aboard the assisting ship.⁴⁰³
- (c) Responsible State authorities should make every effort to expedite arrangements to disembark survivors from the ship; however, the shipmaster should understand that in some cases necessary coordination may result in unavoidable delays.⁴⁰⁴

Continuing Questions and Controversies

- What is a situation of “distress” in the context of migrant smuggling at sea?
- What is a situation of “distress” in the context of exploitation of migrants at sea? Under what conditions or circumstances could exploitation of fishermen or seafarers amount to a situation of distress requiring assistance?
- What is the scope and limit of a State’s obligation to assist?
- Does the obligation to assist imply a corresponding right to be assisted?
- Does the duty to assist convey a right to be rescued? On what legal basis?

⁴⁰⁰ *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (United Nations, New York, 2011), p. 13.

⁴⁰¹ The MV *Tampa* incident is an example in case: the Indonesian and Australian State authorities failed to properly coordinate and communicate their orders and assistance to the MV *Tampa* shipmaster.

⁴⁰² IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea).

⁴⁰³ *Ibid.*, Annex 34, Paragraph 6.8.

⁴⁰⁴ IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea), Annex 34, Paragraph 6.9. For further guidance on large-scale rescue operations at sea, see also: International Chamber of Shipping (ICS), *Large Scale Operations at Sea: Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons* (Second edition, ICS, London, 2015); UNHCR, IMO and ICS, *Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees* (ILO, Geneva, 2015); International Chamber of Shipping, *Recovery of Persons from the Water: Guidelines for the Development of Plans and Procedures* (ICS, London, 2014); IMO, “Guide to recovery techniques”, circular (IMO, London, 2014), available from www.ics-shipping.org/docs/default-source/refugee-migrant-rescue/imo-guide-to-recovery-techniques---msc-1-circ-1182-rev-1.pdf?sfvrsn=6; *Guidelines for Preparation of Plans and Procedures for Recovery of Persons from the Water*, circular (IMO, London, 2012), available from www.ics-shipping.org/docs/default-source/refugee-migrant-rescue/imo-guidelines-for-the-development-of-plans-and-procedures-for-the-recovery-of-persons-from-the-water---msc-1-circ-1447.pdf?sfvrsn=2; IMO, “Guide for cold water survival”, circular (IMO, London, 2012), available from www.ics-shipping.org/docs/default-source/refugee-migrant-rescue/imo-guide-for-cold-water-survival-msc-1-circ-1185-rev-1.pdf?sfvrsn=2; World Health Organization (WHO), IMO and ILO, *International Medical Guide for Ships: Including the Ship’s Medicine Chest* (WHO, Geneva, 2007); and IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea).

3.3. DUTY TO DISEMBARK TO A “PLACE OF SAFETY”

CASE STUDY 16

Ambiguity in the MV *Tampa* (2001) case

The MV *Tampa* case offers insight into the lack of clear rules surrounding international legal obligations to disembark. The captain of the vessel, Arne Rinnan, received many commendations for the manner in which he fulfilled his duties in rendering assistance to the 433 individuals rescued.⁴⁰⁵ The rescue took place in Indonesia's EEZ but it was Australia's regional coordinating centre (RCC) that became aware of the crisis and made the request to assist the vessel. The MV *Tampa* was denied entry into Australian territorial waters to disembark the rescued persons, despite issuing distress signals and communicating the dire and urgent situation of many people on board.⁴⁰⁶ This situation highlighted, in dramatic fashion, a significant ambiguity in international law allowing scope for political interpretation to prevail over humanitarian needs.

The duty to rescue is clear, but a major shortcoming of the treaty regime governing search and rescue is the lack of clarity on where to disembark people once they have been rescued.⁴⁰⁷ Rescue operations are not completed until the rescued persons are delivered to a place of safety.⁴⁰⁸ The fact that there is no clarity on disembarkation raises particular concerns in the current era of mass migration. States are reluctant to accept disembarkation given the obligations that may be triggered by disembarkation and the strain on resources that results from disembarking what sometimes amount to hundreds or even thousands of people.

The amendments made in 2004 to the SAR and SOLAS Conventions (which are legally binding under the latter convention) impose obligations on States parties, including to “cooperate and coordinate” to allow shipmasters to disembark rescued persons to a place of safety as soon as reasonably practicable, irrespective of nationality or status of those rescued, and

⁴⁰⁵ Captain Arne Rinnan was awarded, among other accolades, the UNHCR Nansen Refugee Award for rescue at sea; the A. Wilhelmsen Foundation Mariner's Prize; and the Shipmaster of the Year award at *Lloyd's List's* Maritime Excellence Awards 2001. He was knighted by the King of Norway in 2002. See, for instance: E. Cue, “Captain, crew and owner of “Tampa” win Nansen Award for rescue at sea”, 19 March 2002, UNHCR website, News section, available from www.unhcr.org/news/latest/2002/3/3c975a254/captain-crew-owner-tampa-win-nansen-award-rescue-sea.html; and S. Johanson and A. Holden, “Goodbye, Captain Courageous”, *The Age*, 28 April 2002, available from www.theage.com.au/articles/2002/04/27/1019441313792.html

⁴⁰⁶ A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, pp. 452–454, 462. Captain Rinnan was threatened by Australian authorities with prosecution.

⁴⁰⁷ Although the law of the sea regime does not provide this binding obligation to disembark rescued persons on their territory, a State can still be liable in the context of disembarkation on the basis of other legal regimes that may apply to the situation. Some argue that there exists a right of access for vessels to ports to seek refuge because of force majeure, an accepted principle of international law, referring to a “higher force” or a situation beyond human control. For instance, Article 18(2) of UNCLOS permits stopping and anchoring by a foreign vessel exercising the right of innocent passage through a State's territorial sea only, among others, insofar as these “are rendered necessary by force majeure.” However, as a customary rule, this is not clearly established, and neither are its parameters in cases involving migrants. (See, for instance: M. Crock, “In the wake of the Tampa: Conflicting visions of international refugee law in the management of refugee flows”, *Pacific Rim Law and Policy Journal*, 12(1):49–95, p. 55; and E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, p. 299.)

⁴⁰⁸ SAR Convention, Annex, Paragraph 1.3.2.

with minimum disruption to the ship's planned itinerary.⁴⁰⁹ There are two IMO instruments relevant to disembarkation that are not binding in themselves, but are important sources of guidance for interpreting obligations that are binding:

- (a) The 2009 IMO Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea (hereinafter the "2009 IMO Principles") stipulate that "international protection principles as set out in international instruments should be followed";⁴¹⁰
- (b) The 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea foresee that so-called "non-SAR considerations" can be resolved once rescued persons have been delivered to a place of safety and should not prejudice the provision of primary assistance with regard to the distress situation or unduly delay disembarkation of survivors.⁴¹¹

The genesis of these principles and guidelines – that is, in response to the MV *Tampa* crisis – offers significant insight into the challenges inherent in the disembarkation of persons rescued at sea. As treaty law stands, the State responsible for the SAR region is not obliged to disembark survivors in its own territory – even when it is not possible to disembark them elsewhere.⁴¹² However, it is encouraged to do so. The non-binding IMO Principles of 2009 urge the following:

... if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post-rescue support.⁴¹³

⁴⁰⁹ SAR Convention, Chapter 3.1.9; SOLAS Convention, Annex, Regulation 33, Paragraph 4; SOLAS Convention, Article 4.1–1.

⁴¹⁰ IMO, "Principles relating to administrative procedures for disembarking persons rescued at sea", Paragraph 2.5.

⁴¹¹ IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea), Annex 34, Paragraphs 6.19–6.20.

⁴¹² See: *Ruddock v. Vadarlis* (2001), Paragraph 126: "[Whilst] customary international law imposes an obligation upon a coastal state to provide humanitarian assistance to vessels in distress, international law imposes no obligation upon the coastal state to resettle those rescued in the coastal state's territory." (See also: E. Papastavridis, "Combating transnational organized crime at sea", pp. 22–23.)

⁴¹³ IMO, "Principles relating to administrative procedures for disembarking persons rescued at sea", Paragraph 2.3.

This point was further debated in 2010 at the Fourteenth Session of the IMO Sub-Committee on Radio Communications and Search and Rescue (COMSAR). Unfortunately, no consensus was reached on how to ensure rescued persons are disembarked to a place of safety within a reasonable time frame.⁴¹⁴

No duty to report the legal status of rescued persons

IMO Guidelines on the Treatment of Persons Rescued at Sea recommend that the RCC obtain information on survivors from the master of the assisting vessel, including their names, ages, health and medical conditions and any special medical needs.⁴¹⁵ However, even if requested by a RCC or other officials on shore, the shipmaster has no obligation to communicate information concerning the legal status of rescued persons or applications for asylum. The sole responsibility of the shipmasters and crew is to maintain safety and ensure human treatment of rescued people, and cooperate in their disembarkation to a place of safety.⁴¹⁶

Maritime zones are not relevant to disembarkation; flag State responsibility is the starting point (where rescue is carried out by a State vessel), and the primary responsibility for ensuring that survivors are disembarked from the rescuing vessel and delivered to a place of safety falls on the State responsible for search and rescue coordination. That State is responsible for coordinating disembarkation, but does not have an absolute duty to provide such a place of safety itself.⁴¹⁷ While it has been proposed that the coastal State in whose SAR zone the rescue operation takes place should have a residual obligation to allow rescued persons to enter its territory, there is no clear consensus in international or regional practice that such an obligation exists. The 2009 IMO Principles stipulate that the coastal States should ensure that SAR authorities coordinate disembarkation efforts and that all parties involved should cooperate to ensure that disembarkation occurs swiftly, taking into account the shipmaster's preferred arrangements for disembarkation and the immediate basic needs of those rescued.⁴¹⁸

The Party responsible for the search and rescue region in which [...] assistance is rendered shall exercise primary responsibility for ensuring [...] coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of

⁴¹⁴ D. Guilfoyle and E. Papastavridis, "Mapping disembarkation options", p. 176.

In the context of search and rescue operations carried out by Frontex, a 2010 EU Council decision gave priority to disembarkation in either the country from which the intercepted or rescued ship departed, or through whose territorial waters or search and rescue region it transited. If not possible, it was suggested that disembarkation could be in the Member State hosting the Frontex operation, unless another action is necessary to ensure the safety of the rescued persons. This solution resulted in criticisms from States hosting Frontex operations (e.g. Malta) and was accordingly annulled by the European Court of Justice on grounds of EU law. Subsequently, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs approved a draft Regulation on the subject, which, at the time of writing, was pending adoption by the European Parliament and Council. (See: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/141085.pdf)

⁴¹⁵ IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea), Annex 34, Paragraph 6.10.

⁴¹⁶ ICS, *Large Scale Operations at Sea*, p. 3.

⁴¹⁷ D. Guilfoyle and E. Papastavridis, "Mapping disembarkation options", p. 6.

⁴¹⁸ IMO, "Principles relating to administrative procedures for disembarking persons rescued at sea", Paragraph 2.3.

safety, taking into account the particular circumstances of the case and guidelines developed by the [International Maritime] Organization.⁴¹⁹

While most States, including Italy, have accepted this amendment, others have objected to it. For instance, Malta, given its geographical location, bears particularly onerous burdens from migration by sea:

Malta advocates the “next-port-of-call rule,” mandating disembarkation at the nearest safe port to the site of the rescue, which in the Maltese SAR area is often a port in Italy. Italy, on the other hand, reads the 2004 amendments as requiring the State in whose SAR area the rescue is effected to disembark the rescues on its territory.⁴²⁰

Disembarkation should precede resolution of SAR disputes

A disembarkation dispute between Malta and Italy in 2013 resulted in an allegation letter being sent to Malta by the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment. The letter referred to Malta’s refusal to disembark 102 migrants rescued from a vessel at sea on 4 August 2013. The Greek-operated MV *Salamis* rescued the migrants and continued towards Malta, being both the closest port and its originally intended destination. Maltese authorities allegedly communicated to the shipmaster that the MV *Salamis* should disembark the migrants to the nearest place of safety at the time of the rescue, namely, Libya, and threatened legal action if it continued on its course. The situation was resolved when Italy accepted the migrants on the 7 August at the Italian port of Syracuse. In its allegation letter, the Special Rapporteurs stated that:

We are aware that there remains some disagreement regarding where the search and rescue operation was carried out. Any dispute about the responsible search and rescue authority, including the involvement of the Italian and Libyan authorities, as well as the place of disembarkation at the time of search and rescue, should be clarified at a later stage. Between 4 and 7 August 2013, the ship was closest to Malta, which then became the closest port of safe disembarkation. In such situations, it is first and foremost important to quickly save the lives of the rescued persons by enabling their prompt disembarkation.⁴²¹

⁴¹⁹ Paragraph 3.1.9 was inserted into the SAR Convention, and a new Paragraph 1.1 was added to the SOLAS Convention.

⁴²⁰ P. Mallia, “The MV *Salamis* and the state of disembarkation at international law: The undefinable goal”, *American Society of International Law*, 18(11):1–6. Available from www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal

⁴²¹ UNHRC Special Procedure AL G/SO 214 (106-10) G/SO 214 (53-24) MLT 1/2013 of 12 August 2013 (Mandates of the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment). Available from [https://spdb.ohchr.org/hrdb/24th/public_-_AL_Malta_12.08.13_\(1.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_Malta_12.08.13_(1.2013).pdf) The Government of Malta responded to the letter on 14 October 2013 outlining the legitimacy of its actions and their compliance with international law.

Australia has also “made clear their rejection of any legal entitlement to disembark rescued persons at a particular port of a State without the consent of that State.”⁴²² However, in its 2005 (internal) Guidelines for Commercial Shipping Rescuing Persons at Sea in or Adjacent to the Australian Search and Rescue Region, Australia does recognize the need to give “expeditious consideration to the identification of suitable options for the disembarkation of rescued persons and to not unreasonably withhold consent to use its port or ports for disembarkation.”⁴²³

Disembarkation disputes

The lack of certainty as to where rescued persons are to be disembarked has manifested in very real ways that raise concerns about the protection of migrants. In 2015, more than 30,000 people took to the Andaman Sea, resulting in more than 5,000 of them being abandoned by smugglers at sea. States in the region were reluctant to rescue the migrants, owing to their lack of willingness to subsequently disembark them. At least 5,543 people who had departed from Myanmar and Bangladesh were eventually disembarked in Bangladesh, Indonesia, Malaysia, Myanmar and Thailand between May and July.⁴²⁴

In June 2004, the *Cap Anamur* – a rescue vessel operated by a German humanitarian group – rescued 37 migrants in international waters between Libya and Lampedusa and sailed for weeks searching for a State willing to allow disembarkation. After the rescued people threatened to throw themselves overboard, the *Cap Anamur* was finally allowed to disembark survivors in Italy. The migrants who had been rescued were detained, and the European crew who carried out the rescue were arrested and charged with promoting illegal migration.⁴²⁵ The ship’s captain and first officer were put on trial in Sicily, Italy in 2006 and acquitted in 2009.

In June 2006, the Maltese Government refused to disembark 51 migrants rescued by a Spanish fishing trawler (the *Francisco and Catalina*), stating that it was Libya’s responsibility to rescue them and that Spain had only become responsible when they were rescued by a Spanish vessel. Following an eight-day standoff, Andorra, Italy, Libya, Malta and Spain agreed to share the migrants between them.⁴²⁶

In May 2007, a tuna fishing vessel flying a Maltese flag encountered a group of 28 irregular migrants whose ship had sunk in the Mediterranean Sea. For financial and security reasons the shipmaster did not allow the migrants on board. As Italy, Libya and Malta wrangled over whose responsibility it was to disembark the migrants,

⁴²² A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 461.

⁴²³ *Ibid.*

⁴²⁴ IOM Bangkok Regional Office, “Bay of Bengal and Andaman Sea crisis response”, p. 1.

⁴²⁵ P. Mallia, *Migrant Smuggling by Sea*, p. 79.

⁴²⁶ M. den Heijer, *Europe and Extraterritorial Asylum*, p. 231. See also: L.A. Nessel, “Externalised borders and the invisible refugees”, pp. 625, 653 and 671.

who were forced to cling to tuna fishing nets for three days before being brought to Lampedusa, Italy.⁴²⁷

In April 2009, the regional coordination centre (RCC) of Malta coordinated the rescue of 154 persons from two small boats by the MV *Pinar E*, a Turkish-owned vessel registered in Panama. The rescue was carried out approximately 41 nautical miles from Lampedusa, Italy and 114 nautical miles from Malta. Italian authorities requested that the MV *Pinar E* proceed to Malta, given that the rescue occurred in its search and rescue (SAR) zone, while Malta asserted that the migrants should be disembarked at the nearest port, namely, Lampedusa in Italy. Italy denied the MV *Pinar E* permission to enter Italian seas after its shipmaster indicated his intention to proceed to Lampedusa. A four-day standoff between the two countries ensued until Italy agreed to admit the migrants on humanitarian grounds.

Because neither the SOLAS nor SAR Convention defines what constitutes a “place of safety,” its meaning is left subject to interpretation. In the absence of specific rules governing such decisions, there remain some ambiguities as to what constitutes a safe third country and the process that is required to determine whether a country is safe or not: For instance, on what basis can a reasonable assumption be made, or should a more thorough assessment of a country be made, and if so, by whom?⁴²⁸ The sum of interpretative guidance available points to the imperative to determine a “place of safety” as one where the protection needs of migrants can be met. The IMO Guidelines on the Treatment of Persons Rescued at Sea describe a place of safety as a location where the rescue operation is considered to terminate, and where:

- (a) The rescued persons’ safety of life is no longer threatened;
- (b) Their basic human needs (such as food, shelter and medical needs) can be met;
- (c) Transportation arrangements can be made for the persons’ next or final destination.⁴²⁹

⁴²⁷ M. den Heijer, *Europe and Extraterritorial Asylum*, pp. 230–231; and *CIR Report Regarding Recent Search and Rescue Operations in the Mediterranean* (Consiglio Italiano Per I Rifugiati, 2007). Available from www.europarl.europa.eu/hearings/20070703/libe/cir_report_en.pdf

⁴²⁸ M. Tondini, “The legality of intercepting boat people under search and rescue and border control operations, with reference to recent Italian interventions in the Mediterranean Sea and the ECtHR decision in the *Hirsi* case,” *The Journal of International Maritime Law*, 2012(18):59–74, pp. 59, 66–70.

Tondini points to relevant jurisprudence on the question of whether a third country provides adequate protections to be deemed “safe”, including: *MSS v. Belgium and Greece* (Judgment), Application No. 30696/09, European Court of Human Rights, 21 January 2011; *N.S. v. Secretary of State for the Home Department* (Judgment), Case C-411/10, and *ME et al v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform Case* (Judgment), Case C-493/10, Court of Justice of the European Union, 21 December 2011; *Plaintiff M70/2011 v. Minister for Immigration and Citizenship and Plaintiff M106/2011 v. Minister for Immigration and Citizenship*, Case Nos. M106/2011 and M70/2011, High Court of Australia, 31 August 2011; and *Hirsi Jamaa and Others v. Italy* (2012).

⁴²⁹ IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea), Annex 34, Paragraph 6.12.

Can a rescue ship be a “place of safety”?

The rescue ship itself may be a temporary place of safety, but alternatives should be arranged as soon as possible, in a way that does not amount to refoulement.⁴³⁰ The IMO 2004 Guidelines on the Treatment of Persons Rescued at Sea offer further guidance:

- (a) Guideline 6.13. An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for survivors. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made.
- (b) Guideline 6.14. A place of safety may be on land, or it may be on board a rescue unit or another suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked at their next destination.
- (c) Guideline 6.15. The conventions, as amended, indicate that delivery to a place of safety should take into account the particular circumstances of the case, including factors such as the situation on board the assisting ship, on-scene conditions, migrants’ medical needs and availability of transportation or other rescue units. Each case is unique, and selection of a place of safety may need to account for a variety of important factors.⁴³¹

Search and rescue services do not stop with merely locating and subsequently disembarking migrants from the vessel in distress. A place of safety is a place where the migrants concerned are under the de facto effective control of a State, which means that the moment a State asserts its jurisdiction over migrants, its obligations to protect their human rights are triggered.⁴³² Accordingly, it has been argued that a place of safety should not only refer to physical protection, but also entails respect for fundamental human rights in accordance with international law.⁴³³ A place can be considered “safe,” then, when there is no risk of human rights violations for persons brought there.⁴³⁴ The fact that disembarkation may trigger a right

⁴³⁰ M. Tondini, “The legality of intercepting boat people under search and rescue and border control operations, with reference to recent Italian interventions in the Mediterranean Sea and the ECtHR decision in the Hirsi case”, *The Journal of International Maritime Law* 18(1):59–74, p 63. (See also: A.T. Gallagher and F. David, *The International Law of Migrant Smuggling*, p. 457.)

⁴³¹ International Maritime Organization Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea), Annex 34.

⁴³² Their failure to do so means that migrants may submit applications or communications to human rights bodies, including UN committees or the European Court of Human Rights, depending on the treaty regime applicable. (E. Papastavridis, “Rescuing migrants at sea: The responsibility of States under international law”, 27 September 2011. Available from SSRN: <https://ssrn.com/abstract=1934352> or <http://dx.doi.org/10.2139/ssrn.1934352>

⁴³³ This definition is legally binding for EU Member States. (Regulation No. 656/2014 of the European Parliament and of the Council of 15 May 2014. Available from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0656&from=EN>)

⁴³⁴ M. Di Filippo, “Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea,” *Paix et Sécurité Internationales*, Vol. 1:53–79, p. 64.

to claim asylum makes some States reluctant to allow irregular migrants to disembark at their ports.⁴³⁵ A potential gap in asylum protection is thus revealed, highlighting the importance of State obligations to cooperate and coordinate rescue and disembarkation procedures to ensure that persons rescued can seek asylum and be protected from refoulement.

Can asylum procedures take place on board rescue ships?

Asylum procedures carried out on board maritime vessels have been rejected by UNHCHR on the basis that they cannot be conducted in a fair and efficient manner.⁴³⁶ A study conducted by IOM asserts that in order to comply with the principle of non-refoulement, migrants must be disembarked in a place of safety where it is possible to carry out individual assessments to identify specific needs and the right to protection. The report further states:

According to the United Nations High Commissioner for Refugees (UNHCR), a thorough assessment of each case cannot be carried out on board a vessel. While an initial screening on the ship is essential to evaluate the number and condition of the migrants rescued or intercepted, it is insufficient when it comes to processing claims for asylum or for other forms of international protection. Even basic information provided by migrants cannot be verified on the high seas, nor can adequate procedural safeguards and assistance be provided. Furthermore, effective determinations at sea are hindered by [the] lack of access to translators, privacy and legal counsel.⁴³⁷

There are significant practical challenges associated with ensuring that processing of protection claims of migrants at sea is fair and efficient, especially in cases involving large numbers of rescued people.⁴³⁸ As noted earlier, non-refoulement does not only apply to asylum or refugee status, but also to risk of torture, which means that for screening processes to be adequate, they must be conducted on the basis of the Convention against Torture, as well as the Refugee Convention. Some States have asserted that screening processes at sea can comply with international

⁴³⁵ IMO, Maritime Safety Committee, Resolution MSC. 167(78), Annex 34, Paragraph 6.12.

⁴³⁶ UNHCR *Protection Policy Paper: Maritime Interception Operations* [55–59]; P. Mallia, *Migrant Smuggling by Sea*, pp 91.

⁴³⁷ IOM, "International Standards on Interception Operations and Rescue at Sea," IOM International Migration Law Unit (unpublished).

⁴³⁸ On this point, Guilfoyle has noted that so far, more operational creativity has been brought to bear in attempting to ensure rights-compliance in addressing piracy than in migration contexts. Guilfoyle notes: "Ironically, Italy, the State which contended in *Hirsi* that providing access to a remedy at sea was impractical in the migrant interdiction context, has been a pioneer of video-conferencing judges on board warships to ensure the lawful detention of piracy suspects." (D. Guilfoyle, "Transnational crime and the rule of law at sea: Responses to maritime migration and piracy compared", in: *Boat Refugees and Migrants at Sea* (V. Moreno-Lax and E. Papastavridis (eds.)), p. 193.)

obligations.⁴³⁹ However, for the moment, until processing at sea can be done with full respect for human rights, it is considered best practice for asylum assessments to be processed on land, following disembarkation, even where disembarkation is only on a temporary basis for that purpose.⁴⁴⁰

Continuing Questions and Controversies

- Do coastal States, in whose search and rescue zone a vessel is rescued, have an obligation to disembark if no other solution can be found? If so, then on what basis?
- Where disembarkation is not possible at the nearest port, which State is responsible for disembarkation? On what basis?
- Where the State responsible for the search and rescue region (SRR) fails in its duty to coordinate the disembarkation of rescued migrants, which State assumes responsibility?
- Under what circumstances, if any, can a rescue vessel be considered a “place of safety”? For how long?
- Can a vessel be a “place of safety” if no State allows for disembarkation, or would this situation amount to indefinite detention? Which State should be held responsible for such detention? By what institution?
- Under what circumstances would a rescue vessel that takes survivors on board be considered a place of arbitrary detention?
- Under what circumstances, if any, would it be acceptable for States to carry out determinations of well-founded fears of persecution or risk of torture on board vessels at sea?

⁴³⁹ On 8 July 2014, an Urgent Appeal letter was sent to the Australian Government concerning the incommunicado detention and deportation of Sri Lankan migrants in contravention of non-refoulement obligations following an allegedly “dramatically abbreviated ‘screening’ process involving a single, four-question interview conducted on the high seas without any legal assistance.” (UA, AUS 2/2014, 8 July 2014). In response, Australia maintained that its on-water assessments were compliant with international obligations. In 2015 another allegation letter was sent to Australia concerning screenings of Vietnamese migrants, alleging that the “enhanced screening procedure” applied under Operation Sovereign Borders “are generally brief and not sufficiently detailed to ensure that all relevant protection claims are raised; legal advice is only provided upon specific request, and persons who are “screened out” are not given a written record of the reasons for the decision, nor do they have access to independent review of such a decisions”. (AL AUS 5/2015, 1 June 2015). Australia responded to the letter on 3 August 2015 strongly rejecting the allegations.

⁴⁴⁰ “Any screening process should ensure that each individual’s situation and reasons for entry are determined and that migrants who may be at particular risk at international borders are identified and appropriately referred” (OHCHR’s *Principles and Guidelines on Human Rights at International Borders*, p. 27.)



People rescued at sea await disembarkation, Sicily, Italy.

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CONCLUSION

International law evolves over time to adapt to changing circumstances. Today, the international community is called upon to effectively and cooperatively harness the available tools to respond to the challenges of complex, modern-day migration and exploitation at sea, and the protection of migrants in this context.

In interpreting and applying international law, States must strike a balance between their powers and interests on one hand, and their duties and responsibilities on the other.⁴⁴¹ Good-faith approaches to legal obligations under all relevant legal regimes support interpretations that prioritize the protection of people at sea. Customary international law also supports the conclusion that saving lives at sea takes precedence over border control and law enforcement measures.⁴⁴² There are many situations, however, where international law is not clear and where States disagree in their interpretation of their obligations, leaving gaps in the protection of migrants. Lack of certainty as to which States are responsible for persons rescued or intercepted at sea and where they are to be disembarked has left actors unsure of their responsibilities and reticent to fulfil their obligations. Deficient inter-State cooperation in fairly allocating responsibility plays into the hands of smugglers and traffickers who continue to generate enormous criminal profits with relative impunity. These crimes not only compromise the rights and safety of the migrants concerned, but they also diminish maritime safety, border control and migration management, and undermine State sovereignty. Efforts to combat them must draw together border control, law enforcement strategies, search and rescue services, and protection measures that address the specific needs of migrants.⁴⁴³

Ultimately, the success of these efforts depends on acknowledging and addressing the practical reality that migration and exploitation at sea not only affect coastal States, but that countries of origin, transit and destination contribute to their causes and partake of their consequences. Recognizing these realities of globalization is a call to more effectively and equitably share responsibilities between countries – not only coastal States, but also beyond – as well as to engage civil society actors, specialized agencies and international organizations that have crucial roles to play in ensuring that measures taken to address migration and exploitation also provide effective frameworks for protection.

⁴⁴¹ “Comprehensive approaches for addressing irregular movements of people by sea: international standards and best practices”. Suggested outline for future training, IOM/UNHCR Training Workshop, Bangkok, 19–22 January 2015, p. 5.

⁴⁴² Furthermore, maritime interceptions cannot be misrepresented as humanitarian rescue operations; conflation of these two concepts is legally untenable as it confuses Article 110 (interception) and Article 98 (rescue) of UNCLOS. (See, for instance: E. Papastavridis (ed.), *The Interception of Vessels on the High Seas*, p. 292; and E. Papastavridis, “Rescuing Migrants at Sea: The Responsibility of States Under International Law” (27 September 2011) 5, available from SSRN: <https://ssrn.com/abstract=1934352> or <http://dx.doi.org/10.2139/ssrn.1934352>)

⁴⁴³ “Comprehensive approaches for addressing irregular movements of people by sea: international standards and best practices”. Suggested outline for future training, IOM/UNHCR Training Workshop, Bangkok, 19–22 January 2015, p. 6.



GLOSSARY

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| archipelagic waters | The waters enclosed by baselines drawn by archipelagic States in conformity with the rules promulgated by the United Nations Convention on the Law of the Sea (UNCLOS), “regardless of their depth or distance from the coast,” but open to innocent passage of ships and aircraft through archipelagic sea lanes that might be established. See: UNCLOS, Articles 47, 49(1), 52(1) and 53. ⁴⁴⁴ |
| asylum seeker | An individual who is seeking international protection. In countries with individualized procedures, an asylum seeker is someone whose claim has not yet been finally decided on by the country in which he/she submitted it. Not every asylum seeker will ultimately be recognized as a refugee, but every recognized refugee is initially an asylum seeker. |
| baseline | The low-water line along the coast as marked on large-scale charts officially recognized by the coastal State. See: UNCLOS, Article 5. ⁴⁴⁵ |
| child | Every human being below the age of eighteen years, unless under the law applicable, majority is attained earlier. See: UNCRC, Article 1. ⁴⁴⁶ |
| collective expulsion | Any measure compelling non-nationals, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual of the group. Adapted from: <i>Vedran Andric v. Sweden</i> , Application No. 45917/99, European Court of Human Rights, 23 February 1999, Paragraph 1. Available from www.asylumlawdatabase.eu/en/content/ecthr-vedran-andric-v-sweden-application-no-4591799-23-february-1999-decision |
| contiguous zone | A maritime area contiguous to the territorial sea of a coastal State not extending beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. See: UNCLOS, Article 33(2). ⁴⁴⁷ According to Article 33 of UNCLOS, “in its contiguous zone, a State may exercise the necessary control to (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.” |
| exclusive economic zone (EEZ) | The area beyond and adjacent to the territorial sea, which does not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. See: UNCLOS, Articles 55 and 57. ⁴⁴⁸ |

⁴⁴⁴ United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982. Available from www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

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| fisher | <p>A person employed or engaged in any capacity or carrying out an occupation on board any fishing vessel, including persons working on board who are paid on the basis of a share of the catch, but excluding pilots, naval personnel, other persons in the permanent service of a government, shore-based persons carrying out work aboard a fishing vessel, and fisheries observers.</p> <p>See: ILO Resolution 188 of 14 June 2007 (Work in Fishing Convention), Article 1(e). Available from www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_208084.pdf</p> |
| fishing vessel | <p>Any vessel used commercially for catching fish, whales, seals, walrus or other living resources of the sea. Fishing vessels are not covered by the SOLAS Convention.</p> |
| flag State | <p>The flag State of a vessel is the State that registered or licensed the vessel. The flag State has the authority and responsibility to enforce regulations over vessels flying its flag, including under UNTOC and its Trafficking and Migrant Smuggling Protocols. Accordingly, where a flag State has ratified the Trafficking or Migrant Smuggling Protocol, laws that have been implemented would also likely apply to trafficking and smuggling that occurs on a vessel flying its flag, regardless of where in the world the vessel is.⁴⁴⁹</p> <p>Article 4 of the Geneva Convention on the High Seas (1958) provides that “every State, whether coastal or not, has the right to sail ships under its flag on the high seas.” Article 5 stipulates that: “Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”</p> <p>Article 98 of UNCLOS sets forth the duty to render assistance to persons in distress: “1. Every State shall require the master of a ship flying its flag, insofar 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, insofar as such action may reasonably be expected of him...”</p> |
| force majeure | <p>A “higher force” or an occurrence which is beyond human control. A principle widely accepted in international law (and expressed, for example, in Article 18(2) of UNCLOS) permits the stopping and anchoring by a foreign vessel exercising the right of innocent passage through a State’s territorial sea, insofar as these “are rendered necessary by force majeure.”⁴⁵⁰</p> |

⁴⁴⁹ R. Surtees, *Trafficked at Sea*, p. 87.

⁴⁵⁰ J.P. Grant and J.C. Barker (eds.), “Force majeure”, in: *Parry & Grant Encyclopaedic Dictionary of International Law*, p. 222.

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| forced labour | <p>All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. See: ILO Forced Labour Convention of 1 May 1932, Article 2(1). Available from www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C029 (Forced labour is explicitly recognized as a form of exploitation in the definition of trafficking in persons.)</p> <p>See: Trafficking in Persons Protocol, Article 3(a).⁴⁵¹</p> |
| high seas | <p>All parts of the sea not included in a State's internal waters, territorial sea, contiguous zone or exclusive economic zone.</p> <p>UNCLOS, Articles 1 and 86.⁴⁵²</p> <p>As stipulated in Article 87 of UNCLOS: "The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law." Article 98 of the Convention sets forth the provision of a duty to render assistance on the high seas, by stipulating that: "1. Every State shall require the master of a ship flying its flag, insofar 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...; (c) after a collision, to render assistance to the other ship, its crew and its passengers..."</p> |
| interception | <p>Any measure applied by a State, either at its land or sea borders, or on the high seas, territorial waters or borders of another State, to: (a) prevent embarkation of persons on an international journey; (b) prevent further onward international travel by persons who have commenced their journey; or (c) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law. In relation to the above, the person or persons do not have the required documentation or valid permission to enter.</p> <p>Adapted from: United Nations Office of the High Commissioner for Refugees (UNHCR), "Conclusion on protection safeguards in interception measures" (United Nations, Geneva, 2003). Available from www.unhcr.org/excom/exconc/3f93b2894/conclusion-protection-safeguards-interception-measures.html</p> |
| internal waters | <p>The waters lying landward of the baselines from which the territorial sea is measured.</p> <p>See: UNCLOS, Article 8(1).⁴⁵³</p> |
| jurisdiction | <p>A government's general power to exercise authority over all persons and things within its territory.</p> |

⁴⁵¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime of 15 November 2000, Article 3(a). Available from www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx

⁴⁵² United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982. Available from www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁴⁵³ Ibid.

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| jus cogens | <p>Rule of law that is peremptory in the sense that it is binding irrespective of the will of the individual parties.</p> <p>See: Vienna Convention on the Law of Treaties, Article 53⁴⁵⁴</p> <p>A peremptory norm of general international law (<i>jus cogens</i>) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Examples of <i>jus cogens</i> norms derived from human rights instruments that are relevant to migration include the prohibition of torture and inhumane and degrading treatments, on which the principle of non-refoulement is based, and, according to some authors and judicial bodies, the principle of non-discrimination. (See, for instance: <i>Juridical Condition and Rights of the Undocumented Migrants</i> (Advisory Opinion), Series A Case No. 18, Inter-American Court of Human Rights, 17 September 2003; and “Legal status and rights of undocumented workers”, <i>American Journal of International Law</i>, 90(2):460–465.)</p> |
| non-refoulement | <p>The principle of non-refoulement prohibits States from extraditing, deporting, expelling or otherwise returning a person to a country where his/her life or freedom would be threatened, or where there are substantial grounds for believing that he/she would risk being subjected to torture or other cruel, inhumane and degrading treatment or punishment, or would be in danger of being subjected to enforced disappearance, or of suffering another irreparable harm.</p> <p>The principle of non-refoulement is a fundamental principle of international law. It has its origins in international refugee law as found in Article 33 of the Convention Relating to the Status of Refugees (1951), which stipulates: “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.” This principle has been reiterated in human rights instruments.</p> |
| piracy | <p>Any illegal act of violence or detention, or any act of depredation committed on the high seas for private ends by the crew or passengers of a private ship and directed against another ship, aircraft, person or property in a place outside the jurisdiction of any State.</p> <p>See: UNCLOS, Article 101;⁴⁵⁵ and Geneva Convention on the High Seas, Articles 15 and 19.⁴⁵⁶</p> |

⁴⁵⁴ Vienna Convention on the Law of Treaties of 23 May 1969. Available from <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

⁴⁵⁵ Ibid.

⁴⁵⁶ Geneva Convention on the High Seas of 29 April 1958. Available from www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf

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| refugee | <p>A person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself/herself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it. See: Convention Relating to the Status of Refugees of 28 July 1951, Article 1. Available from www.unhcr.org/3b66c2aa10</p> |
| rescue at sea | <p>An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety. See: SAR Convention, Annex 1.3.1.</p> <p>The duty to rescue those in distress at sea is firmly established by both treaty and customary international law. Among others, Article 98.1 of UNCLOS stipulates that: “Every State shall require the master of a ship flying its flag, insofar 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, insofar as such action may reasonably be expected of him...” Coastal States are also required to promote the establishment, operation and maintenance of an adequate and effective search and rescue service and to cooperate with neighbouring States for this purpose (Article 98.2).</p> <p>The SAR Convention also specifies that “this assistance be provided to any person in distress at sea. [State parties] shall do so regardless of the nationality or status of such person or the circumstances in which that person is found.” (Annex 2.1.10)</p> |
| seafarer | <p>“A migrant worker employed on board a vessel registered in a State of which he or she is not a national” See: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 2(2)(c).</p> |
| servitude | <p>The state of a person deprived of liberty and subservient to another forced to live on the other’s property and with an impossibility of changing his status. See: <i>Siliadin v. France</i> (Judgment), Application No. 73316/01, European Court of Human Rights, 26 July 2005, Section 123. Available from https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/siliadin_v_france_en_4.pdf</p> |
| slavery | <p>The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. See: Convention to Suppress the Slave Trade and Slavery, Article 1.</p> |
| smuggling of migrants | <p>“...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 of which the person is not a national or a permanent resident.” See: Migrant Smuggling Protocol, Article 3(a).⁴⁵⁷</p> |

⁴⁵⁷ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC) of 15 November 2000. Available from www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf

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| sovereignty | <p>A concept of international law, sovereignty has three main expressions: external, internal and territorial.</p> <p>The external aspect of sovereignty is the right of the State to freely determine its relations with other States and other entities without the restraint or control of another State. This aspect of sovereignty is also known as independence.</p> <p>The internal aspect of sovereignty is the State's exclusive right or competence to determine the character of its own institutions, to enact laws of its own choice and ensure they are respected.</p> <p>The territorial aspect of sovereignty is the existence of a State's rights over its territory and the authority which that State exercises over all persons and things found on, under or above such territory.</p> <p>An aspect of territorial sovereignty relevant in the context of migration is the sovereign prerogative of a State to determine the admission and exclusion of non-nationals to and from its territory, within the limits imposed by international law.</p> <p>Note: In the context of migration, the prerogative of a State to determine the admission in and exclusion of non-nationals from its territory, which is based on its sovereignty, is subject to limitations imposed by international legal obligations derived from customary and treaty law, such as the principle of non-refoulement, human rights, and some other provisions contained in bilateral or regional agreements (e.g. free movement agreements).</p> |
| search and rescue region | <p>The region in which coastal States are required to make necessary arrangements for the provision of adequate search and rescue services for persons in distress.</p> <p>See: SAR Convention Annex, Chapter 2.1.1.⁴⁵⁸</p> <p>"An area of defined dimensions within which search and rescue services are provided."</p> <p>See: SAR Convention Annex, Chapter 1.3.1.⁴⁵⁹</p> |
| territorial sea | <p>The adjacent belt of sea of a coastal State that can be established up to 12 nautical miles measured from the baselines (i.e. the low-water line along the coast).</p> <p>See: UNCLOS, Articles 3 and 5.⁴⁶⁰</p> |

⁴⁵⁸ International Convention on Maritime Search and Rescue of 27 April 1979 (SAR Convention). Available from <https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf>

⁴⁵⁹ Ibid.

⁴⁶⁰ United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982. Available from www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

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| trafficking in persons | <p>“...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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”</p> <p>See: Trafficking in Persons Protocol, Article 3(a).⁴⁶¹</p> |
| vessel | <p>Any type of watercraft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on governmental non-commercial service.</p> <p>See: Migrant Smuggling Protocol, Article 3.</p> |
| worst forms of child labour | <p>Expression referring to “(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”</p> <p>See: ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999), Article 3.</p> |

⁴⁶¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime of 15 November 2000, Article 3. Available from www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx



BIBLIOGRAPHY

ABC News

- 2014 Fact file: Why the fate of 153 asylum seekers is in the hands of the High Court. *ABC News*, 13 August. Available from www.abc.net.au/news/2014-07-14/fact-file-asylum-seekers-fate-in-high-court/5581926

Allianz

- 2015 *Safety and Shipping Review 2015*. Allianz, Munich. Available from www.agcs.allianz.com/assets/PDFs/Reports/Shipping-Review-2015.pdf

Allsop, J. and M.G. Manieri

- 2016 The EU Anti-Smuggling Framework: Direct and indirect effects on the provision of humanitarian assistance to irregular migrants. In: *Irregular Migration, Trafficking and Smuggling of Human Beings* (S. Carrera and E. Guild, eds.). Centre for European Policy Studies, Brussels, pp. 88–89.

Andrew and Renata Kaldor Centre for International Refugee Law (The Kaldor Centre)

- 2017 Turning back boats. Fact sheet, The Kaldor Centre, Sydney, p. 3. Available from www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Turning_Back_Boats.pdf

Australia, Federal Court of

- 2001 *Ruddock v. Vadarlis*, 110 ECR 491, 17 September.

Australia, High Court of

- 2014 *Jark v. Minister for Immigration and Border Protection* (Transcript of proceedings), HCA Trans 150, 18 July.

Bang, H.S.

- 2009 Port State jurisdiction and Article 218 of the UN Convention on the Law of the Sea. *Journal of Maritime Law & Commerce*, 40(2):291–311.

Barnes, R.

- 2010 The international law of the sea and migration control. In: *Extraterritorial Immigration Control* (B. Ryan and V. Mitsilegas, eds.). Martinus Nijhoff, Leiden, p. 125.

BBC News

- 2006 A migrant's journey to Europe. *BBC News*, 12 September. Available from http://news.bbc.co.uk/2/hi/talking_point/5331608.stm

Biehler, G.

- 2008 Substantive international law before national fora. In: *Procedures in International Law*. Springer, New York, pp. 185–271.

Borelli, S. and B. Stanford

- 2014 Troubled waters in the *Mare Nostrum*: Interception and push-backs of migrants in the Mediterranean and the European Convention on Human Rights. In: *Uluslararası Hukuk ve Politika*, 10:29–69, p. 37.

Bruin, R.

- 2011 Border control: Not a transparent reality. In: *The Future of Asylum in the European Union* (F.A.N.J. Goudappel, and H.S. Raulus, eds.). T.M.C. Asser Press, The Hague, pp. 21–42.

Canada, Human Rights Committee

1993 *Ng v. Canada* (Views), Communication No. 469/1991, 5 November.

Churchill, R. and V. Lowe

1999 *The Law of the Sea*. Third edition, Manchester University Press, Manchester.

Cleaner Seas

2015 Flaws in port State control regime revealed by 'ghost ships'. News section, 10 January. Available from www.cleanerseas.com/flaws-port-state-control-regime-revealed-ghost-ships

Colangelo, A.J.

2014 What is extraterritorial jurisdiction? *Cornell Law Review*, 99(6):1303–1352.

Collyer, M.

2016 Cross-border cottage industries and fragmented migration. In: *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (S. Carrera and E. Guild, eds.). Centre for European Policy Studies, Brussels, pp. 17–18 and 45–47.

Coppens, J.

2016 Interception of migrant boats at sea. In: *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (V. Moreno-Lax and E. Papastavridis, eds.). Brill/Nijhoff, Leiden and Boston, pp. 216–218.

Council of Europe

1950 European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. Council of Europe, Strasbourg. Available from www.echr.coe.int/Documents/Convention_ENG.pdf

2012 Lives lost in the Mediterranean Sea: Who is responsible? Parliamentary Assembly – Council of Europe (PACE) Committee on Migration, Refugees and Displaced Persons, Strasbourg. Available from https://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf

2013 *Guide to Good Practice in Respect of Domestic Remedies (Adopted by the Committee of Ministers on 18 September 2013)*. Council of Europe, Strasbourg, p. 59.

Crawford, J.

2012 *Brownlie's Principles of Public International Law*. Oxford University Press, New York.

Crock, M.

2003 In the wake of the *Tampa*: Conflicting visions of international refugee law in the management of refugee flows. *Pacific Rim Law and Policy Journal*, 12(1):49–95.

Davies, M.E. et al.

2000 Appendix 4: Legal analysis: prescription, enforcement and observance. In: *Study on the Economic, Legal, Environmental and Practical Implications of a European Union System to Reduce Ship Emissions of SO₂ and No_x (Final Report)*. BMT Murray Fenton Edon Liddiard Vince Ltd and European Commission, Brussels.

Dearden, L.

2015 Abandoned migrant 'ghost ship' arrives in Italy carrying hundreds of Syrian refugees. *Independent*, 3 January. Available from www.independent.co.uk/news/world/abandoned-ghost-ship-carrying-hundreds-of-syrian-refugees-arrives-safely-in-italy-9955399.html

De Coning, E.

- 2011 *Transnational Organized Crime in the Fishing Industry – Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drug Trafficking*. United Nations Office on Drugs and Crime, Vienna.

den Heijer, M.

- 2012 *Europe and Extraterritorial Migration*. Hart Publishing, Oxford and Portland, Oregon.

Derks, A.

- 2010 Migrant labour and the politics of immobilisation: Cambodian fishermen in Thailand. *Asian Journal of Social Science*, 38(6):915–932.

Di Filippo, M.

- 2013 Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea. *Paix et Sécurité Internationales*, Vol. 1, pp. 53–76.

Dimitriadi, A.

- 2014 Managing the maritime borders of Europe: Protection through deterrence and prevention? Working paper, Hellenic Foundation for European and Foreign Policy, Athens.

European Commission – Director General for Migration and Home Affairs

- 2015 A study on smuggling of migrants: Characteristics, responses and cooperation with third countries. Final report, European Migration Network, Dublin. Available from www.emn.lv/wp-content/uploads/study_on_smuggling_of_migrants_final_report_master_091115_final_pdf.pdf

European Court of Human Rights

- 1998 *Osman v. the United Kingdom* (Judgment), Application No. 871/1083, 28 October.
- 2001a *Banković and Others v. Belgium and 16 Other States*, Application No. 52207/99 (Grand Chamber Decision), 12 December.
- 2001b *Khavara and Others v. Italy and Albania* (Judgment), Application No. 39473/98, 11 January.
- 2005 *Issa and Others v. Turkey* (Judgment), Application No. 31821/96, 30 March.
- 2008 *Soering v. the United Kingdom* (Judgment), Application No. 37201/06, 28 February.
- 2010 *Medvedyev and Others v. France* (Judgment), Application No. 3394/03, 29 March.
- 2011 *Al-Skeini et al. v. the United Kingdom* (Judgment), Application No. 55721/07, 7 July.
- 2012 *Hirsi Jamaa and Others v. Italy* (Judgment), Application No. 27765/09, 23 February.
- 2016 *Khlaifia and Others v. Italy* (Judgment), Application No. 16483/12, 15 December.

European Parliament Directorate-General for Internal Policies

- 2016 Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants. Study, European Parliament, Brussels. Available from [www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU\(2016\)536490_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf)

European Union

- 2004 European Council Regulation No. 2007/2004 of 26 October 2004 (establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union). Available from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/borders-and-visas/schengen/docs/frontex_regulation_consolidated_2011_en.pdf
- 2014 Regulation (EU) 656/2014 of the European Parliament and of the Council of 15 May 2014 (establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union). European Union, Brussels. Available from <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=PCggm3TeA5LVKEV50EfqqAFzDuMzX8w9-Kaa8mKmxcfKVGdGBNZ3!2096757176?docId=1801130&cardId=1801129>

Fischer-Lescano, A., T. Löhr and T. Tohidipur

- 2009 Border controls at sea: Requirements under international human rights and refugee law. *International Journal of Refugee Law*, 21(2):256–296.

Frenzen, N.

- 2016 Responses to 'boat migration': A global perspective – US practices. In: *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (V. Moreno-Lax and E. Papastavridis, eds.). Brill/Nijhoff, Leiden and Boston.

Frontex

- 2011 Frontex Fundamental Rights Strategy of 31 March 2011. Frontex, Warsaw. Available from www.statewatch.org/observatories_files/frontex_observatory/2011-03-31-frontex-fundamental-rights-strategy.pdf

Gallagher, A.T. and F. David

- 2014 *The International Law of Migrant Smuggling*. Cambridge University Press, New York.

Gallagher, A.T. and M. McAdam

- 2017 Financial and material benefit in the definition of smuggling of migrants. Issue paper, United Nations Office on Drugs and Crime, Vienna.

Gatto, A. and J. Carmona

- 2016 European Border and Coast Guard System. Briefing, European Parliament, Brussels. Available from [www.europarl.europa.eu/RegData/etudes/BRIE/2016/589845/EPRS_BRI\(2016\)589845_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/589845/EPRS_BRI(2016)589845_EN.pdf)

Gavouneli, M.

- 2007 *Functional Jurisdiction in the Law of the Sea*. Brill/Nijhoff, Leiden and Boston.

General Claims Commission – United States and Mexico

- 1929 Kate A. Hoff v. the United Mexican States (Docket No. 331) – Opinion rendered April 2, 1929. *American Journal of International Law*, 23(4):860–865.

Gkliati, M.

- 2016 Proud to aid and abet refugees: The criminalization of 'flight helpers' in Greece. University of Oxford website, Blog section. Available from www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and

Goodwin-Gill, G.S.

- 2003 Refugees and responsibility in the twenty-first century: More lessons learned from the South Pacific. *Pacific Rim Law and Policy Journal*, 12(1):23–48.
- 2016a The Mediterranean Papers: Athens, Naples and Istanbul. *International Journal of Refugee Law* 28(2):276–309.
- 2016b Setting the scene: Refugees, asylum seekers, and migrants at sea – the need for a long-term, protection-centred vision. In: *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (V. Moreno-Lax and E. Papastavridis, eds.). Brill/Nijhoff, Leiden and Boston.

Goodwin-Gill, G. and J. McAdam

- 2009 *The Refugee in International Law*. Third edition, Oxford University Press, New York.

Goudappel, F.A.N.J. and H.S. Raulus

- 2011 The future of asylum in the European Union: Proposals, problems and interaction with international human rights standards. In: *The Future of Asylum in the European Union*. T.M.C. Asser Press, The Hague, pp. 1–13.

Grant, J.P. and J.C. Barker

- 2009a Force majeure. In: *Parry & Grant Encyclopaedic Dictionary of International Law*. Third Edition, Oxford University Press, Oxford, p. 222.
- 2009b Universal jurisdiction. In: *Parry & Grant Encyclopaedic Dictionary of International Law*. Third Edition, Oxford University Press, Oxford, pp. 645–646.

Guilfoyle, D.

- 2009 Shipping interdiction and the law of the sea. In: *The International Law of Migrant Smuggling* (A.T. Gallagher and F. David, eds.), p. 405.
- 2010 ECHR rights at sea: *Medvedyev and Others vs. France*. EJIL: *Talk!* (Blog of the European Journal of International Law), 19 April. Available from www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france
- 2016 Transnational crime and the rule of law at sea: Responses to maritime migration and piracy compared. In: *Boat Refugees and Migrants at Sea* (V. Moreno-Lax and E. Papastavridis, eds.). Brill/Nijhoff, Leiden and Boston, p. 193.

Guilfoyle, D. and E. Papastavridis

- 2014 Mapping disembarkation options: Towards strengthening cooperation in managing irregular movements by sea. Background paper, UNHCR/Bali Process Regional Support Office, Bangkok. Available from www.refworld.org/pdfid/5346438f4.pdf

Hare, J.

- 1997 Port State control: Strong medicine to cure a sick industry. *Georgia Journal of International & Comparative Law*, 26(3):571–594.

Heller, C. and L. Pezzani

- n.d. Forensic oceanography: Report on the left-to-die boat. Forensic Architecture, London.

Higgins, C.

- 2016 The (Un-)sustainability of Australia's Offshore Processing and Settlement Policy. In: *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (V. Moreno-Lax and E. Papastavridis, eds.). Brill/Nijhoff, Leiden and Boston.

Honniball, A.N.

- 2016 The exclusive jurisdiction of flag States: A limitation on pro-active port States? *The International Journal of Marine and Coastal Law*, 31(3):499–530.

Hooper, J.

- 2015 Abandoned ship *Ezadeen* with 450 migrants on board being towed to Italy. *The Guardian (International edition)*, 2 January. Available from www.theguardian.com/world/2015/jan/02/abandoned-cargo-vessel-migrants-towed-italy-traffickers

Hooper, J., P. Kingsley and B. Quinn

- 2015 Smugglers abandon migrant ship off Italy in new tactic to force rescue. *The Guardian (International edition)*, 2 January. Available from www.theguardian.com/world/2015/jan/02/smugglers-abandon-migrant-ship-italy-ezadeen

International Commission of Jurists (ICJ), European Council on Refugees and Exiles (ECRE), and Amnesty International (AI)

- 2013 Joint briefing on the European Commission proposal for a regulation of the European Parliament and of the Council 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. ICJ, Geneva, p. 12. Available from www.ecre.org/wp-content/uploads/2016/07/ECRE-Amnesty-ICJ-Joint-Briefing-on-the-European-Border-and-Coast-Guard-Regulation_April-2016.pdf

Inter-American Commission on Human Rights

- 1997 *Haitian Centre for Human Rights et al. v. United States* (Judgment), Case No. 10.675, Report No. 51/96, 13 March.

International Court of Justice

- 1986 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment on Merits), General List No. 70, International Court of Justice, 27 June, Paragraph 213.

International Criminal Court

- 1998 Rome Statute of the International Criminal Court of 17 July 1998. Available from http://legal.un.org/icc/statute/99_corr/cstatute.htm

International Criminal Tribunal for the Former Yugoslavia (ICTY)

- 2002 *Prosecutor v. Kunarac, Kovac and Vukovic*, Cases IT-96-23-T and IT-96-23/1-T, 12 June.

International Labour Organization (ILO)

- 1949 ILO Convention 92 of 18 June 1949 (Accommodation of Crews Convention (Revised)). International Labour Office, Geneva. Available from www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C092
- 1970 ILO Convention 133 of 30 October 1970 (Accommodation of Crews Convention (Supplementary Provisions)). International Labour Office, Geneva. Available from www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C133
- 1976 ILO Convention 147 of 29 October 1976 (Merchant Shipping (Minimum Standards) Convention). International Labour Office, Geneva. Available from www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C147
- 1999a ILO Convention 182 of 17 June 1999 (Worst Forms of Child Labour Convention). International Labour Office, Geneva. Available from www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182

- 1999b ILO Recommendation No. 190 of 17 June 1999 (Recommendation concerning the prohibition and immediate action for the elimination of the worst forms of child labour). International Labour Office, Geneva. Available from www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R190
- 2006 Maritime Labour Convention of 23 February 2006. International Labour Office, Geneva. Available from www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_554767/lang--en/index.htm
- 2007 ILO Resolution 188 of 14 June 2007 (Work in Fishing Convention). International Labour Office, Geneva. Available from www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_208084.pdf
- 2009 Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention, 2006. International Labour Office, Geneva. Available from www.ilo.org/global/standards/maritime-labour-convention/WCMS_101787/lang--en/index.htm
- 2011 Guidelines for port State control officers carrying out inspections under the Work in Fishing Convention, 2007 (No. 188). International Labour Office, Geneva. Available from www.ilo.org/sector/Resources/codes-of-practice-and-guidelines/WCMS_177245/lang--en/index.htm
- 2013 *Caught at Sea: Forced Labour and Trafficking in Fisheries*. International Labour Office, Geneva, pp. 47–48.

International Maritime Organization (IMO)

- 1973 International Convention for the Prevention of Pollution from Ships of 17 February 1973, as modified by the Protocol of 1978 ("MARPOL 73/78"). IMO, London. Available from www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofMARPOL/Pages/default.aspx
- 1974 IMO Resolution MSC.153(78) of 1974 (International Convention for the Safety of Life at Sea (SOLAS)). IMO, London. Available from <https://treaties.un.org/doc/Publication/UNTS/Volume%201226/volume-1226-I-18961-English.pdf>
- 1977 1977 Torremolinos International Convention for the Safety of Fishing Vessels. IMO, London. Available from www.imo.org/en/About/Conventions/ListOfConventions/Pages/The-Torremolinos-International-Convention-for-the-Safety-of-Fishing-Vessels.aspx
- 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers of 7 July 1978 (STCW-S Convention). Available from www.imo.org/en/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx
- 1979 International Convention on Maritime Search and Rescue (SAR) of 27 April 1979 (as amended by Resolution MSC.155(78), adopted 20 May 2004). IMO, London. Available from <https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf>
- 1995 International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel of 7 July 1995 (STCW-F Convention). IMO, London. Available from www.imo.org/en/OurWork/HumanElement/Pages/STCW-F-Convention.aspx
- 2004 IMO Resolution MSC.167(78) of 10 May 2004 (Guidelines on the treatment of persons rescued at sea). IMO, London. Available from [www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf)

- 2009 Principles relating to administrative procedures for disembarking persons rescued at sea. Circular, IMO, London. Available from www.refworld.org/pdfid/524be8244.pdf
- 2016 Bay of Bengal and Andaman Sea Crisis Response. Situation report, IOM, Bangkok, 2016. IMO, London. Available from www.iom.int/sites/default/files/situation_reports/file/IOM-Bay-of-Bengal-and-Andaman-Sea-Crisis-Response-August-2016.pdf

International Organization for Migration (IOM)

- 2007 *The IOM Handbook on Direct Assistance for Victims of Trafficking*. IOM, Geneva. Available from <https://publications.iom.int/books/iom-handbook-direct-assistance-victims-trafficking-0>
- 2012 *Manual for the Coordinated Handling of People Smuggling: Interceptions, Investigations and Prosecutions in Indonesia*. IOM, Jakarta.
- 2016 *Fatal Journeys Volume 2: Identification and Tracing of Dead and Missing Migrants*. IOM, Geneva. Available from <https://publications.iom.int/books/fatal-journeys-volume-2-identification-and-tracing-dead-and-missing-migrants>
- 2018 "Mediterranean", Missing Migrants website, Regions section. Available from <https://missingmigrants.iom.int/mediterranean> (accessed 6 February 2018).

International Organization for Migration (IOM) and Coventry University

- 2016 *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry*. IOM, Geneva.

International Organization for Migration (IOM), London School of Hygiene and Tropical Medicine, and Anesvad Foundation

- 2014 *Health and Human Trafficking in the Greater Mekong Subregion: Findings from a Survey of Men, Women, and Children in Thailand, Cambodia and Viet Nam*. IOM, Geneva.

International Organization for Migration (IOM) Indonesia, Indonesian Ministry of Marine Affairs and Fisheries (KKP), Indonesia Presidential Task Force to Combat Illegal Fishing, and Coventry University

- 2016 *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry*. IOM, Jakarta.

International Transport Workers Federation (ITF)

- 2006 *Out of Sight, Out of Mind: Seafarers, Fishers and Human Rights*. ITF, London.

International Tribunal for the Law of the Sea (ITLOS)

- 1999 *The M/V "Saiga" (No. 2) Case (St Vincent and the Grenadines v. Guinea)* (Judgment), Case No. 2, 1 July.
- 2007 *The "Tomimaru" Case (Japan v. Russian Federation)* (Judgment), Case No. 15, 6 August.
- 2013 *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)* (Judgment), Case No. 18, 28 May.
- 2014a *The M/V "Virginia G" Case (Panama v. Guinea-Bissau)* (Judgment), Case No. 19, 14 April.
- 2014b *The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau)* (Judgment), Case No. 13, 14 April.

Jaensch, F.

- 2012 Migrants and refugees at sea. Master of laws thesis, Ghent University, Ghent, p. 8.

Jennings, R. and A. Watts (eds.)

- 1992 Peace. In: *Oppenheim's International Law: Volume 1*. Ninth edition, Longman, Burnt Mill, p. 546.

Jewish American Society for Historic Preservation (JASHP)

- n.d. ““Doing the Right Thing”: S.S. Exodus”, JASHP website, International Programs section. Available from www.jewish-american-society-for-historic-preservation.org/internationalprograms/exodusmemorialisrael.html

Khaliq, U.

- 2015 Jurisdiction, ships and human rights treaties. In: *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (H. Ringbom, ed.). Brill/Nijhoff, Leiden and Boston, p. 330.

Kim, S.

- 2017 Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context. *Leiden Journal of International Law*, 30(1):49–70.

Klein, N.

- 2011 *Maritime Security and the Law of the Sea*. Oxford University Press, Oxford.
- 2014 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*, 15(2):413–442.
- 2016 A maritime security framework for the legal dimensions of irregular migration by sea. In: *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (V. Moreno-Lax and E. Papastavridis, eds.). Brill/Nijhoff, Leiden and Boston.

Klug, A.

- 2014 Strengthening the protection of migrants and refugees in distress at sea through international cooperation and burden-sharing. *International Journal of Refugee Law*, 26(1):48–64.

Klug, A. and T. Howe

- 2010 The concept of State jurisdiction and the applicability of the non-refoulement principle to extraterritorial measures”. In: *Extraterritorial Immigration Control: Legal Challenges* (B. Ryan et al., eds.). Martinus Nijhoff, Leiden, p. 95.

Koh, H.H. and Wishnie, M.

- 2009 The story of *Sale v. Haitian Centers Council*: Guantánamo and refoulement. In: *Human Rights Advocacy Stories* (D. Hurwitz and M.L. Satterthwaite, eds.). Thomson Foundation Press, New York, pp. 385–432.

Lenhoff, A.

- 1964 International law and rules on international jurisdiction. *Cornell Law Review*, Vol. 50, Issue 1.

Little, A. and N. Vaughan-Williams

- 2016 Stopping boats, saving lives, securing subjects: Humanitarian borders in Europe and Australia. *European Journal of International Relations*, Vol. 23, Issue 3.

Mallia, P.

- 2009 *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Brill, Boston.
- 2014 The M/V *Salamis* and the state of disembarkation at international law: The undefinable goal. *ASIL Insights*, Vol. 18, Issue 11.

- Mann, I.**
2016 *Humanity at Sea: Maritime Migration and the Foundations of International Law*. Cambridge University Press, New York.
- McAdam, M.**
2011 Smuggling of migrants by sea. Issue paper, United Nations Office on Drugs and Crime, Vienna. Available from www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf
2015 What's in a name? Victim naming and blaming in rights-based distinctions between human trafficking and migrant smuggling. *International Human Rights Law Review*, 4(1):1–32.
- McDorman, T.**
1997 Port State enforcement: A comment on Article 218 of the 1982 Law of the Sea Convention. *Journal of Maritime Law & Commerce*, 28(2):305–322.
2000 Regional port State control agreements: Some issues of international law. *Ocean and Coastal Law Journal*, 5(2):207–225.
- Mills, A.**
2014 Rethinking jurisdiction in international law. In: *The British Yearbook of International Law*, pp. 1–53.
- Miltner, B.**
2006 Irregular maritime migration: Refugee protection issues in rescue and interception. *Fordham International Law Journal*, 30(1):75–125.
2015 The Mediterranean crises: A clash of Titans' obligations?" *Brown Journal of World Affairs*, Vol. 22, Issue 2.
- Molenaar, E.J.**
2007 Port State jurisdiction: Toward comprehensive, mandatory and global coverage. *Ocean Development and International Law*, 38(1):225–257.
- Moreno-Lax, V.**
2011 Seeking asylum in the Mediterranean: Against a fragmentary reading of EU Member States' Obligations Accruing at Sea. *International Journal of Refugee Law*, 23(2):174–220.
- Musarò, P.**
2017 Mare nostrum: The visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, 39(1):11–28.
- Nelson, D.**
2012 Maritime jurisdiction. In: *Max Planck Encyclopedia of Public International Law* (R. Wolfrum, ed.). Oxford University Press, Oxford.
- Nessel, L.A.**
2009 Externalised borders and the invisible refugees. *Columbia Human Rights Law Review*, 40(3):625–700.
- Noyes, J.E.**
2012 Distress. In: *Max Planck Encyclopedia of Public International Law* (R. Wolfrum, ed.). Oxford University Press, Oxford.
- Obokata, T.**
2010 The legal framework concerning the smuggling of migrants at sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air. In: *Extraterritorial Immigration Control* (B. Ryan and V. Mitsilegas, eds.), pp. 159–160.

Orakhelashvili, A.

- 2015 State jurisdiction in international law: Complexities of a basic concept. In: *Research Handbook on Jurisdiction and Immunities in International Law* (A. Orakhelashvili, ed.). Edward Elgar Publishing, Cheltenham.

Oral, N.

- 2009 The role for maritime zones in promoting effective governance for protection of the Mediterranean marine environment (Report of the Expert Group on Governance of the Mediterranean Sea). European Commission – Directorate-General for Maritime Affairs and Fisheries, Brussels, p. 24.

Papastavridis, E.

- 2010 'Fortress Europe' and FRONTEX: Within or Without International Law? *Nordic Journal of International Law*, 79(1):75–111.
- 2011 Rescuing migrants at sea: The responsibility of States under international law. *SSRN Electronic Journal*, 27 September, pp. 19–22. Available from <https://ssrn.com/abstract=1934352>
- 2013 *Combating Organized Crime Committed at Sea*. Issue paper, UNODC, Vienna, p. 23. Available from www.unodc.org/documents/organized-crime/GPTOC/Issue_Paper_-_TOC_at_Sea.pdf
- 2014 *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*. Hart Publishing, Oxford and Portland, Oregon.

Paris Memorandum of Understanding on Port State Control

- 1982 Paris Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment of 26 January 1982. Available from www.parismou.org/inspections-risk/library-faq/memorandum

Permanent Court of International Justice

- 1927 *The Case of the SS Lotus (France v. Turkey)* (Judgment), Series A No. 10, 7 September, Paragraph 65.

Pizor, Andrew G.,

- 1993 *Sale v. Haitian Centers Council: The return of Haitian refugees*. *Fordham International Law Journal*, 17(4):1062–1114.

Poulantzas, M.

- 2002 Chapter VI: The doctrine of constructive presence. In: *The Right of Hot Pursuit in International Law* (Second edition, Martinus Nijhoff, The Hague, 2002), pp. 243–251.

Revesz, R.

- 2017 Activist raises £50k in hours to stop far-right group's plans to 'chase down vessels' rescuing refugees". *Independent*, 4 June. Available from www.independent.co.uk/news/uk/home-news/activist-anti-refugee-gofundme-fundraising-far-right-rescue-boat-mission-a7772421.html

Ringbom, H. (ed)

- 2015 *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea*. Brill/Nijhoff, Leiden and Boston.

Robertson, P.

- 2011 *Trafficking of Fishermen in Thailand*. IOM, Bangkok.

Rothwell, D. and T. Stephens

2010 *The International Law of the Sea*. Hart Publishing, Oxford.

2016 *The International Law of the Sea*. Second edition, Hart Publishing, Oxford.

Ryan, B. and V. Mitsilegas

2010 *Extraterritorial Immigration Control Legal Challenges*. Martinus Nijhoff, Leiden.

Rygiel, K., F. Baba, and S. Ilcan

2006 The Syrian refugee crisis: The EU-Turkey 'deal' and temporary protection. *Global Social Policy*, 16(3):315–320.

Ryngaert, C.

2015 The concept of jurisdiction in international law. In: *Research Handbook on Jurisdiction and Immunities in International Law* (A. Orakhelashvili, ed.). Second edition, Edward Elgar Publishing, Cheltenham.

Scheinin, M.

2004 Extraterritorial effect of the International Covenant on Civil and Political Rights. In: *Extraterritorial Application of Human Rights Treaties* (F. Coomans and M.T. Kamminga, eds.). Hart Publishing, Oxford, pp. 73–81.

Schloenhardt, A. and C. Craig

2015 Turning back the boats: Australia's interdiction of irregular migrants at sea. *International Journal of Refugee Law*, 27(4):536–572.

Shearer, I.A.

1986 Problems of jurisdiction and law enforcement against delinquent vessels. *The International and Comparative Law Quarterly*, 35(2):320–343.

Sitaropoulos, N.

2014 Migrant 'push backs' at sea are prohibited 'collective expulsions'. Oxford Human Rights Hub website, Blog section, 8 February. Available from <http://ohrh.law.ox.ac.uk/migrant-push-backs-at-sea-are-prohibited-collective-expulsions>

Sunderland, J.

2012 Hidden emergency: Migrant deaths in the Mediterranean. *Human Rights in Europe* – August. Human Rights Watch, Washington, D.C. Available from www.hrw.org/sites/default/files/related_material/2012_EU_Hidden%20Emergency.pdf

Stephens, T.

2013 Law of the Sea Symposium: A comment on Seline Trevisanut's post. *Opinio Juris*, 28 May. Available from <http://opiniojuris.org/2013/05/28/law-of-the-sea-symposium-a-comment-on-seline-trevisanuts-post>

Styan, D.

2016 All at sea? Maritime dimensions of Europe's relations with Africa. *Insight on Africa*, 8(2):112–130.

Surtees, R.

2013a *Trafficked at Sea: The exploitation of Ukrainian Seafarers and Fishers*. IOM and Nexus Institute, Geneva and Washington, D.C.

2013b Trapped at sea: Using the legal and regulatory framework to prevent and combat the trafficking of seafarers and fishers. *Groningen Journal of International Law*, 1(2):91–153.

Swing, W.L., Director General of the International Organization for Migration

- 2015 Challenges and opportunities of migration management in Asia Pacific. Statement to the International Conference on Irregular Migration in the Indian Ocean, Thailand, 4 December. Available from www.iom.int/speeches-and-talks/statement-international-conference-irregular-migration-indian-ocean-challenges

Tanaka, Y.

- 2012 *The International Law of the Sea*. Cambridge University Press, Cambridge.
- 2015 Jurisdiction of states and the law of the sea. In: *Research Handbook on Jurisdiction and Immunities in International Law* (A. Orakhelashvili, ed.). Edward Elgar Publishing, Cheltenham.

Tauman, J.E.

- 2002 Rescued at sea, but nowhere to go: The cloudy legal waters of the Tampa Crisis. *Pacific Rim Law and Policy Journal*, 12(1):23–48.

TC Beirne School of Law

- n.d. Statistics relating to Migrant Smuggling in Australia”, University of Queensland website, TC Beirne School of Law: Research section. Available from www.law.uq.edu.au/migrantsmuggling-statistics

Tejera, A.D.

- 2011 The interception and rescue at sea of asylum seekers, refugees and irregular migrants. Report, Council of Europe Parliamentary Assembly, Strasbourg. Available from www.refworld.org/pdfid/4ee0d4ac2.pdf

Thailand, Government of

- 2015 Response from the Royal Thai Government to OHCHR Urgent Appeal UA THA 3/2015 of 21 May 2015 (No. 52101/339, 22 May B.E. 2558 (2015)).

Thailand, Ministry of Foreign Affairs

- 2015 Summary: Special Meeting on Irregular Migration in the Indian Ocean. Press release, Royal Thai Government, Bangkok. Available from mfa.go.th/main/en/media-center/14/56880-Summary-Special-Meeting-on-Irregular-Migration-in.html

Tolbanen, S.

- 2010 The inconvenient truth of Taiwan's flags of convenience. Report, Greenpeace, Taipei. Available from www.greenpeace.org/eastasia/publications/reports/oceans/2011/Taiwan-FOC-report/

Tondini, M.

- 2010 Fishers of men? The interception of migrants in the Mediterranean Sea and their forced return to Libya. INEX Research Paper, *SSRN Electronic Journal*, 30 October.
- 2012 The legality of intercepting boat people under search and rescue and border control operations, with reference to recent Italian interventions in the Mediterranean Sea and the ECtHR decision in the Hirsi case. *The Journal of International Maritime Law*, 18(1):59–74.

Townsend, M.

- 2017 Far right raises £50,000 to target boats on refugee rescue missions in Med. *The Guardian (International edition)*, 4 June. Available from www.theguardian.com/world/2017/jun/03/far-right-raises-50000-target-refugee-rescue-boats-med

Trevisanut, S.

- 2013 Law of the Sea Symposium: Search and rescue operations at sea – Who is in charge? Who is responsible?”, *Opinio Juris*, 28 May. Available from <http://opiniojuris.org/2013/05/28/law-of-the-sea-symposium-search-and-rescue-operations-at-sea-who-is-in-charge-who-is-responsible/>

United Nations

- 1948 United Nations General Assembly Resolution 217A of 10 December 1948 (Universal Declaration of Human Rights (UDHR)). United Nations, New York. Available from www.un.org/en/universal-declaration-human-rights
- 1952 United Nations Treaty 6332 of 10 May 1952 (International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or other Accidents of Navigation). United Nations, New York. Available from <http://123.30.50.199/medias/public/Archives//head/Cac%20DUQT/UBBG.DUDP04.pdf>
- 1958a Convention on the High Seas of 29 April 1958. United Nations, Geneva. Available from www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf
- 1958b Convention on the Territorial Sea and the Contiguous Zone of 29 April 1959. United Nations, Geneva. Available from www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf
- 1966a United Nations General Assembly Resolution 2106 (XX) of 7 March 1966 (International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)). United Nations, New York. Available from www.refworld.org/docid/3ae6b3940.html
- 1966b United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 (International Covenant on Civil and Political Rights (ICCPR)). Available from www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
- 1970 United Nations General Assembly Resolution 2625 of 24 October 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations). United Nations, New York. Available from www.un-documents.net/a25r2625.htm
- 1982 United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982. United Nations, Geneva. Available from www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
- 1989 United Nations General Assembly Resolution 44/25 of 20 November 1989 Convention on the Rights of the Child. United Nations, New York. Available from www.un.org/documents/ga/res/44/a44r025.htm
- 1990 United Nations General Assembly Resolution 45/158 of 18 December 1990 (International Convention on the Protection of the Rights of All Migrant Workers and their Families (ICRMW)). United Nations, New York. Available from www.un.org/documents/ga/res/45/a45r158.htm
- 2000a United Nations General Assembly Resolution 55/25 of 15 November 2000 (Convention against Transnational Organized Crime (UNTOC)). United Nations, New York. Available from www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html

- 2000b Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC) of 15 November 2000. United Nations, New York. Available from www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf
- 2011 *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. United Nations, New York.

United Nations Commission on Human Rights (UNCHR)

- 1999 Report on the Fifty-fifth Session (22 March – 10 April 1999), Supplement No. 3. United Nations, New York. Available from www.un.org/documents/ecosoc/docs/1999/e1999-23.pdf

United Nations Committee Against Torture (CAT)

- 2008 General Comment No. 2 of 24 January 2008. United Nations, Geneva. Available from www.refworld.org/docid/47ac78ce2.html

United Nations Committee on the Rights of the Child (CRC)

- 2005 General Comment No. 6 of 1 September 2005 (Treatment of unaccompanied and separated children outside their country of origin). United Nations, Geneva. Available from www2.ohchr.org/english/bodies/crc/docs/GC6.pdf

(Office of the) United Nations High Commissioner for Refugees (UNHCR)

- 2000 Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach. United Nations, Geneva. Available from www.unhcr.org/excom/standcom/3ae68d144/interception-asylum-seekers-refugees-international-framework-recommendations.html
- 2002 Background note on the Protection of asylum seekers and refugees rescued at sea (Final version, including annexes). UNHCR, Geneva. Available from www.refworld.org/docid/3cd14bc24.html
- 2003 Conclusion No. 97 of 10 October 2003 (Conclusion on Protection Safeguards in Interception Measures). United Nations, Geneva. Available from www.unhcr.org/excom/exconc/3f93b2894/conclusion-protection-safeguards-interception-measures.html
- 2009a Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV) – 2003. United Nations, Geneva. Available from www.refworld.org/docid/3f93b2894.html
- 2009b Conclusions adopted by the Executive Committee on the International Protection of Refugees: Conclusion No. 1 – 109. UNHCR, Geneva. Available from www.refworld.org/docid/4b28bf1f2.html
- 2010 Maritime interception operations and the processing of international protection claims: Legal standards and policy considerations with respect to extraterritorial processing. Policy paper, United Nations, Geneva, pp.18–22. Available from www.refworld.org/docid/4cd12d3a2.html
- 2014 Irregular maritime movements: South-East Asia (January – June 2014). Report, UNHCR, Geneva. Available from www.unhcr.org/protection/migration/554c6a746/irregular-maritime-movements-south-east-asia.html
- 2015a "Over one million sea arrivals reach Europe in 2015", United Nations Refugee Agency website, News section, 30 December 2015. United Nations, Geneva. Available from www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html

- 2015b Review of Region's response to Andaman Sea situation of May 2015. Report, UNHCR/ Bali Process Regional Support Office, Bangkok. Available from www.baliprocess.net/UserFiles/baliprocess/File/Review%20of%20Andaman%20Sea_Final_Bali%20Process%20AHG%20SOM_16%20Nov%202016.pdf
- n.d. Mediterranean situation. UNHCR Operation Portal, Situations section. Available from <http://data2.unhcr.org/en/situations/mediterranean>

(Office of the) United Nations High Commissioner for Human Rights (OHCHR)

- 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 15 November 2000. OHCHR, Geneva. Available from www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx
- 2014 Recommended principles and guidelines on human rights at international borders. OHCHR, Geneva. Available from www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf
- 2015a Urgent Appeal UA IDN 5/2015 of 21 May 2015. OHCHR, Geneva.
- 2015b Urgent Appeal JUA MYS 2/2015 of 21 May 2015. OHCHR, Geneva.
- 2015c Urgent Appeal UA THA 3/2015 of 21 May 2015. OHCHR, Geneva.
- 2017 Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations. OHCHR, Geneva. Available from <https://ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>

United Nations Human Rights Committee (HRC)

- 1981 *Lopez Burgos v. Uruguay* (Merits), Communication No. 52/1979, 29 July. HRC, Geneva.
- 1999a General Comment No. 27 of 2 November 1999 (Freedom of Movement). HRC, Geneva. Available from www.refworld.org/docid/45139c394.html
- 1999b Report of the Working Group on Arbitrary Detention: Civil and political rights, including questions of torture and detention. United Nations, New York. Available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/165/70/PDF/G9916570.pdf?OpenElement>
- 2004 General Comment No. 31 of 26 May 2004 (Nature of the General Legal Obligation Imposed on States Parties to the Covenant). HRC, Geneva. Available from www.refworld.org/docid/478b26ae2.html
- 2014 Report of the Working Group on Arbitrary Detention: A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. United Nations, New York. Available from <http://undocs.org/en/A/HRC/27/47>

United Nations Human Rights Council (UNHRC)

- 2010a Report of the Working Group on Arbitrary Detention at the Thirteenth Session of the Human Rights Council. United Nations, New York. Available from <https://undocs.org/A/HRC/13/30>
- 2010b Report of the Working Group on Arbitrary Detention at the Thirteenth Session of the Human Rights Council, Addendum 2: Mission to Malta (19 to 23 January 2003). United Nations, New York. Available from www.un.org/ga/search/view_doc.asp?symbol=A/HRC/13/30/Add.2

- 2013 UNHRC Special Procedures AL G/SO 214 (106-10) G/SO 214 (53–24) of 12 August 2013 (Mandates of the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment). Available from [https://spdb.ohchr.org/hrdb/24th/public_-_AL_Malta_12.08.13_\(1.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_Malta_12.08.13_(1.2013).pdf)
- 2015a Report of the Special Rapporteur on the human rights of migrants, François Crépeau – Addendum 2. United Nations, New York. Available from www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx
- 2015b Report of the Working Group on Arbitrary Detention: Basic principles and guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court. United Nations, New York. Available from www.ohchr.org/Documents/Issues/Detention/DraftPrinciplesAndGuidelinesRightCourtReview.pdf

United Nations Office on Drugs and Crime (UNODC)

- 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC) of 15 November 2000. UNODC, Vienna. Available from www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf
- 2004 *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, New York, 2004). Available from www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf
- 2010 *Model Law against the Smuggling of Migrants*. UNODC, Vienna.
- 2011 *International Framework for Action to Implement the Smuggling of Migrants Protocol*. UNODC, Vienna. Available from www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework_for_Action_Smuggling_of_Migrants.pdf
- 2013 Intelligence Unit opens in a key Cambodian seaport to combat migrant smuggling. Stories section, 3 June. UNODC, Vienna. Available from www.unodc.org/southeastasiaandpacific/en/cambodia/2013/06/migrant-smuggling/story.html
- 2015 Report on the meeting of the Working Group on Smuggling of Migrants held in Vienna from 18 to 20 November 2015, Recommendation 5, Section A. Available from www.unodc.org/unodc/en/treaties/CTOC/working-group-on-the-smuggling-of-migrants-2015.html
- 2016 *Transnational Organized Crime in the Pacific: A Threat Assessment*. UNODC, Vienna.
- n.d. Case n. 10341/15 R.N. G.I.P. – Glauco I (UNODC SHERLOC Case law database ID ITAh013). Available from www.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2014/case_n._1034115_r.n._g.i.p._-_glauco_i.html?lng=en&tmpl=sherloc
- n.d. Case n. 7472/15. R.N. G.I.P. – Glauco II (UNODC SHERLOC Case law database ID ITAh014). Available from www.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2015/case_n._747215_r.n._g.i.p._-_glauco_ii.html?lng=en&tmpl=sherloc

United Nations Office of Legal Affairs

- 2002 *The Law of the Sea: Enforcement by Port States Legislative History of Article 218 of the United Nations Convention on the Law of the Sea*. UN Office of Legal Affairs, Geneva.

United States of America, Committee Against Torture

2008 *J.H.A. v. Spain*, CAT/C/41/D/323/2007, 21 November.

United States of America, Court of Appeals (First Circuit)

2003 *Thames Shipyard and Repair Co. v. United States*, 350 F.3d 247, 26 November.

2008 *United States v. Hilario-Hilario*, 529 F.3d 65, 20 June.

United States of America, Supreme Court

1993 *Sale v. Haitian Centers Council, Inc.* (Judgment), Reference No. 509 US 155, 21 January.

Warner, R. and M. McAdam

2016 Transnational criminal law in Australia. In: *International Law in Australia* (D.R. Rothwell and E. Crawford, eds.). Third edition, Thomson Reuters, Pyrmont.

Weinzierl, R. and U. Lisson

2007 *Border Management and Human Rights: A Study of EU Law and Law of the Sea*. German Institute for Human Rights, Berlin.

Wolf, S.

2012 Territorial sea. In: *Max Planck Encyclopedia of Public International Law*. (R. Wolfrum, ed.). Oxford University Press, Oxford.

Yea, S. and S. Thio

2012 Troubled waters: Trafficking of Filipino men into the long-haul fishing industry through Singapore. Report, TVC2, Singapore. Available from http://twc2.org.sg/wp-content/uploads/2013/01/Troubled_waters_sallie_yea.pdf

Zamfir, I.

2015 Refugee and asylum policy in Australia: Between resettlement and deterrence. Briefing, European Parliamentary Research Service, Strasbourg. Available from [www.europarl.europa.eu/RegData/etudes/BRIE/2016/593517/EPRS_BRI\(2016\)593517_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593517/EPRS_BRI(2016)593517_EN.pdf)



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