

**Testing the waters: analysing flag duties in relation to refugees and migrants in distress at sea, focussing on NGO SAR vessels in the Mediterranean Sea.**

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## *Acknowledgements*

“To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by the prudential considerations as to injurious consequences which may result to a ship or cargo from the rendering of the needed aid”

- Cockburn CJ, *Scaramanga v Stamp* [1880] 5 CPD 295, 304 (UK).

This thesis is dedicated to every person who has been in need of rescue at sea and to all those who have rendered assistance in those circumstances.

Many thanks to my supervisor, Magne Frostad, for his understanding, calmness and cheerfulness

## *Abbreviations*

<b>Full name</b>	<b>Shortened version</b>
United Nations Department of Economic and Social Affairs	UNDESA
International Organization for Migration	IOM
Human Rights at Sea	HRAS
Central Mediterranean Sea	CMS
Law of the Sea Convention	LOSC
Search and Rescue	SAR
European Union	EU
Non-governmental organisations	NGOs
International Convention for the Safety of Life at Sea	SOLAS
International Maritime Organisation	IMO
International Law Commission	ILC
Geneva Convention on the High Seas 1958	HSC
European Convention on Human Rights	ECHR
Exclusive Economic zones	EEZ
Food and Agriculture Organization	FAO
UN Convention on Conditions for Registration of Ships	Registration Convention
Vienna Convention on the Law of Treaties Article	VCLT
Construction, design, equipment and manning	CDEM
European Court of Human Rights	ECtHR
International Law of the Sea Tribunal	ITLOS
Convention on the International Regulations for Preventing Collisions at Sea	COLREGs

International Convention for the Prevention of Pollution from Ships	MARPOL
Illegal Unreported Unregulated	IUU
Maritime Search and Rescue Convention	MSRC
Search and Rescue Regions	SRRs
Maritime Rescue Coordination Centre	MCCR
United Nations High Commissioner for Refugees	UNHCR
Gibraltar Maritime Authority	GMA
Panama Maritime Authority	PMA
International Human Rights Law	IHRL
Unification of Certain Rules of Law with respect to Collisions between Vessels	Collision Convention
Unification of Certain Rules of Law respecting Assistance and Salvage at Sea	Salvage Convention

## Chapter 1 Introductory Comments

### 1.1 Current situation and context

In recent years the economic, legal and political spheres have been caught up in the ‘Migrant Crisis’.<sup>1</sup> This refers to people from other countries arriving in mainly developed and western ones at a greater rate than ever before. It is important to highlight that migration and displaced people are a product not only of economic hardship and conflict but of climate change as well.<sup>2</sup> Predictions show that the number of people moving due to environmental reasons will be more than those fleeing war and economic/political instability. Environmental disasters will be three to ten times more likely to result in the creation of refugees and migrants.<sup>3</sup> Whatever the cause for their travel, all hope to reach a safer destination for themselves and their families.

The terms ‘migrant’ and ‘Migrant Crisis’ have been incorrectly used by several mainstream media outlets to include all people, whether refugees or migrants. In brief terms, a refugee is any person who is in fear of persecution, where staying in or returning to their state of nationality would result in such treatment. As a result, they are not willing to have, or no longer have, protection from their state of nationality and are forced to flee to another country.<sup>4</sup> There is no standard legal definition of a migrant in international law.<sup>5</sup> In 1998, the United Nations Department of Economic and Social Affairs (UNDESA) defined a migrant as any person who moves, temporarily or permanently, to a country different from the one in which they usually live, “irrespective of the reason for migration or legal status”.<sup>6</sup> More recently, the International Organization for Migration’s (IOM) definition of ‘migrant’ is “any person who is moving or has moved across an international border or within a State away from his/her habitual

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<sup>1</sup> “The EU and the Migrant Crisis” (July 2017)

<<http://publications.europa.eu/webpub/com/factsheets/migration-crisis/en/>> <date accessed 15.07.19>.

<sup>2</sup> Kamal, Baher, “Climate Migrants Might Reach One Billion by 2050” (21 August 2017, Rome) *Inter Press Service*.

<[http://www.ipsnews.net/2017/08/climate-migrants-might-reach-one-billion-by-2050/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=climate-migrants-might-reach-one-billion-by-2050](http://www.ipsnews.net/2017/08/climate-migrants-might-reach-one-billion-by-2050/?utm_source=rss&utm_medium=rss&utm_campaign=climate-migrants-might-reach-one-billion-by-2050)> <date accessed 29.07.19>.

<sup>3</sup> “Disaster and climate change” *Norwegian Refugee Council*.

<<https://www.nrc.no/what-we-do/speaking-up-for-rights/climate-change/>> <date accessed 29.07.19>.

<sup>4</sup> “As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Article 1 (A) (2) Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) UNTS vol 189, 137, in accordance with article 43.

<<https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>> <date accessed: 09.06.19>.

<sup>5</sup> UN Refugees and Migrants.

<<https://refugeesmigrants.un.org/definitions>> <date accessed: 09.06.19>.

<sup>6</sup> Please see the United Nations Department of Economic and Social Affairs, Recommendations on Statistics of International Migrants (Revision 1). Statistical Papers Series M No. 5 Rev 1.

<[https://unstats.un.org/unsd/publication/SeriesM/SeriesM\\_58rev1E.pdf](https://unstats.un.org/unsd/publication/SeriesM/SeriesM_58rev1E.pdf)> <date accessed: 09.06.19>.

place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is."<sup>7</sup> The divergence between the Refugee Convention's<sup>8</sup> and the latter UNDESA's and IOM's stances is that a migrant has, or retains the option to have, the protection of their state of nationality, whereas a refugee does not. These classifications, refugee or migrant, are important to determine what rights a person may have and the support they may be able to garner. But, it should not be forgotten that first and foremost the refugees and migrants are human beings. Therefore, they should, but not always do, have the fundamental rights and protection of international human rights law. In the words of David Hammond, founder of UK based charity *Human Rights at Sea (HRAS)*, "[t]he human rights obligations of States ought to apply in the maritime environment as equally as they do on land".<sup>9</sup> However, the application of human rights law is dependent on a state's own will to ratify international human rights treaties, enact national human rights legislation and, most importantly commit to abiding by them by exercising effective jurisdiction.

How does this fit within the law of the sea? One of the routes of choice migrants and refugees are using to get to other countries is the passage from Libya to southern Europe through the Central Mediterranean Sea (CMS). The CMS is where many of the migrant and refugee boats face difficulty due to unpredictable sea and weather conditions. The journey is just over 200 nautical miles (nm) from the Libyan coast to the nearest Italian island.<sup>10</sup> Further, the crossing is mainly conducted on the high seas portion of the CMS, with no coastal states nearby. The role of coastal/port states will be discussed below in 2.3.<sup>11</sup> Despite the dangerous conditions, ill-equipped boats are still navigating through these waters. Refugee and migrant boats are habitually nothing more than inflated dinghies or other such poorly constructed boats. Lifesaving equipment is required and regulated by law to ensure the safety for crew and passengers in the event of an emergency.<sup>12</sup> Also, vessels have to help and carry out certain

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<sup>7</sup> UN International Organization for Migration (IOM).

<<https://www.iom.int/who-is-a-migrant>> <date accessed: 09.06.19>.

<sup>8</sup> Cf. 4.

<sup>9</sup> Statement by David Hammond. Founder of the independent maritime human rights charity, *Human Rights at Sea* at the first London International Shipping Week September 2013 onboard HQS Wellington.

<[http://www.humanrightsatsea.org/wp-content/uploads/2018/07/HRAS\\_Bristol\\_University\\_First\\_Flag\\_State\\_Human\\_Rights\\_Report\\_July\\_20181.pdf](http://www.humanrightsatsea.org/wp-content/uploads/2018/07/HRAS_Bristol_University_First_Flag_State_Human_Rights_Report_July_20181.pdf)> <date accessed 29.07.19>.

<sup>10</sup> Kirkpatrick, David D., "Migrants face hellish limbo in Libya before journey towards Italy" (29 April 2015) *Irish Times*.

<<https://www.irishtimes.com/news/world/migrants-face-hellish-limbo-in-libya-before-journey-towards-italy-1.2194103>>

< date accessed 29.07.19>.

<sup>11</sup> "Note on maritime jurisdiction in the Mediterranean Sea – Annex 2". Food and Agriculture Organisation.

<<http://www.fao.org/3/y5880e/y5880e09.htm>> <date accessed 29.07.19>.

<sup>12</sup> Cf. p32. Chapter 3.

lifesaving actions for other vessels or people in danger.<sup>13</sup> Migrants and refugee boats do not, or rarely, hold such equipment and many casualties are sustained as a result. Yet, with the number of boats transporting refugees and migrants increasing, and proportionally the number of boats in distress, it seems flag and coastal/port states are not stepping up to assist these people facing disaster in the ocean. Is this because they are unwilling or even that they are not obliged?

Part VII of the Law of the Sea Convention (LOSC) contains all the provisions relating to the high seas freedoms and limitations.<sup>14</sup> Therefore, as underlined by Part VII, the duty to render assistance applies to all vessels in the high seas and elsewhere, which will be explored in *Chapters 2* and *3*.<sup>15</sup> The prevailing jurisdiction in the high seas belongs to a flag state.<sup>16</sup> A flag state is the state to which a vessel is registered.<sup>17</sup> The responsibility is in the hands of any flag state vessel “to render assistance to any person found at sea in danger of being lost”.<sup>18</sup> Subsequent chapters will discuss the interpretation and application of Article 98 in line with other rules and treaties. The LOSC also provides that coastal states should establish and coordinate search and rescue (SAR) plans with each other “on and over the sea”.<sup>19</sup> For the current crisis, this means mostly that states within the European Union (EU) are working with Libya to support maritime SAR operations, including to save life at sea and watch border crossing points.<sup>20</sup> Despite the LOSC instructing states to create SAR plans and cooperate with other states to render assistance and save life at sea, this is just not the case. The slack is picked up by non-governmental organisations (NGOs). Vessels are now being chartered by NGOs to save life at sea. Their progress is being hindered by coastal/port states refusal to allow SAR vessel to port or disembark rescued individuals. Under the International Convention for the Safety of Life at Sea (SOLAS), those who have been rescued have to be taken to “a place of

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<sup>13</sup> Ibid.

<sup>14</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994, in accordance with Article 308 (1))1833 UNTS 397.

<sup>15</sup> Ibid.

*Cf.* p7. *Chapter 2*.

*Cf.* p32. *Chapter 3*.

<sup>16</sup> *Cf.* 14. Article 92 LOSC.

<sup>17</sup> Ibid. Articles 91 (1), 92 (1) and 94 (2) (a) and (4) (a) LOSC.

<sup>18</sup> Ibid. Article 98 (1) LOSC.

<sup>19</sup> Ibid. Article 98 (2) LOSC.

<sup>20</sup> “EU Actions on Migration – Saving Lives at Sea and in the Desert.”

<[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171207\\_eu\\_action\\_in\\_libya\\_on\\_migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171207_eu_action_in_libya_on_migration_en.pdf)> <date accessed 14.08.19>.

safety”.<sup>21</sup> According to Vattel<sup>22</sup> and Barnes<sup>23</sup> rendering assistance is one of the most “ancient codes” to protect human life at sea. However, despite its antiquity, this ‘code’ is not necessarily being practically applied in the modern-day. Therefore, one question may be ‘is Article 98 being applied as it should be, and if not, what other factors may contribute how far its application reaches?’. This will be discussed in the next chapters.

## **1.2 Research Question and Thesis Scope**

The research question for this thesis is to analyse the duties of flags, coastal and port states concerning the duty to render assistance to any person in distress at sea and in danger of being lost. It will explore Articles 94 and Article 98 and draw conclusions about the suitability of these provisions in handling crises of this magnitude. The history of both Articles will be discussed and how they are now applied and meet the needs of the current situation. The question applies to NGO SAR vessels in the CMS since they are the ones treading the line between flag state responsibilities and jurisdiction with the duty to save life at sea. This thesis will attempt to determine how far the duty to render assistance reaches and if flag states are failing in this. It will also examine to what extent the duty to rescue is completed.

Some focus will be placed on coastal/port states with regards to safely landing refugees and migrants who have been rescued in the CMS since this impacts the ability of NGO SAR vessels to continue doing their work. If disembarkation proves difficult or impossible, this will limit the functionality of an NGO specifically funded and organised to conduct SAR for refugee and migrant boats in distress at sea. The scope of this thesis is to analyse Articles 94 and 98, within the context of flag state duties and NGO SAR vessels. It will examine the principles laid down in the LOSC and International Maritime Organisation (IMO) Regulations. It will also evaluate whether they are being followed by flag, coastal and port states.

The reasons why people move or flee are endless, and this paper will not delve into them, as the focus is to explain the legal instruments that govern flag states and their vessels when responding to people in distress at sea and search and rescue operations. The debate over whether migrants and refugees should have similar or different rights will not be discussed in

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<sup>21</sup> Regulation 33 International Convention for the Safety of Life at Sea (SOLAS) 1974 (adopted 1 November 1974, entry into force 25 May 1980).

<sup>22</sup> de Vattel, Emmerich “The Law of Nations” (J Chitty, trans) (London 1834), 170. Found in Barnes, Richard “Refugee Law at Sea” *International and Comparative Law Quarterly* 53 (2004) 47.

<sup>23</sup> Barnes, Richard “Refugee Law at Sea” *International and Comparative Law Quarterly Access* Vol 53, Issue 1 (Jan 2004) 47–77, 53.

this thesis. The non-refoulement tenet will also not be discussed in detail as this thesis is focused on the legal regimes surrounding the duty to render assistance and rescue at sea with flag state duties, with some attention on the role of coastal/port states. The tradition is to refer to states, vessels with feminine pronouns, but to masters and crew with masculine pronouns. This thesis will use refer neutral pronouns in light of a more inclusive approach to law of the sea issues.

### 1.3 Structure

*Chapter 1* has detailed the context and outlined the roadmap of this thesis. *Chapters 2* and *3* will describe and examine the relevant law of the sea provisions relating to flag states and NGO SAR vessels. They will both describe the history of and analyse Articles 94 and 98. *Chapter 2* will also provide a brief overview of NGO SAR vessels facing challenges in their work. *Chapter 3* will also evaluate whether there is a duty to render assistance and a right to be rescued. These chapters seek to emphasise the need to include human rights obligations in maritime issues, especially in the current context.

### 1.4 Sources and methodology

As identified in Article 38 of the International Court of Justice Statute, this thesis will use primary sources of law.<sup>24</sup> The main legal agreements discussed will be LOSC, IMO rules and standards.<sup>25</sup> Judgements of and international courts will be included, as will the work of legal scholars. Soft law instruments, such as reports from the EU, NGOs and maritime administrations, will also be used to explain the current thoughts and approaches to what is going on in the CMS. News articles will be used to illustrate facts about what is occurring in the CMS at the time of writing and comments from NGOs, political figures, as well as other national and international organisations.

The text of all conventions will be interpreted in the English language version as per Article 33 of the Vienna Convention on the Law of Treaties (VCLT).<sup>26</sup> Additionally, all conventions will be interpreted in line with Articles 31 and 32 VCLT.<sup>27</sup> This thesis will use the

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<sup>24</sup> Article 38 United Nations, *Statute of the International Court of Justice* (adopted 124 October 2945, entered into force 8 April 1946, San Francisco).

<<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20I/I-3.en.pdf>> <date accessed 20.08.19>.

<sup>25</sup> Cf. 14. IMO mentions only once in Article 2, Annex VIII LOSC.

<sup>26</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980, Vienne) UNTS vol.1155, p 331.

<<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>> <date accessed 28.08.19>.

<sup>27</sup> Ibid.

doctrinal and qualitative research method. It will evaluate existing problems using legal regimes and suggest an alternative solution in the final chapter.

## Chapter 2 Law Governing the Flag State and its Vessel

### 2.1 Introduction and historical context

This chapter will explain and analyse the rights and obligations of the flag state using the LOSC and other legal instruments, mainly from the IMO. It will also examine how a flag state applies these rules via state practice. The importance of this is to evaluate the extent of flag state control and jurisdiction. This will endeavour to clarify firstly, whether flag state jurisdiction ‘trumps’ other rights and duties in the LOSC, and subsequently in the next chapter, International Human Rights Law (IHRL). A vessel that has been de-registered is without a flag or is ‘deflagged’. Thus, it is not able to sail legally and is subject to enforcement jurisdiction. This means if one vessel suspects that the other is without a flag, ergo stateless, (not registered with a flag state) it has the right to inspect and board it. This is because the purpose of flag state jurisdiction is to eliminate lawlessness in the ocean and hold flag states accountable for the actions of their vessels. This thesis will refer to ‘stateless vessel’ as ‘flagless’, ‘without a flag’ or ‘deflagged’, depending on the sentence and context.

A few incidents have already occurred where flag states deregistered NGO SAR vessels and port/coastal states refused entry into their harbours.<sup>28</sup> So, it is a necessary step to evaluate the rights and duties of flag states. In addition, one must analyse what this means for NGO SAR vessels already registered or wishing to register. Are flag states and port states acting according to Article 94 by monitoring whether flagged vessels are compliant? Does preventing an otherwise compliant vessel from registering because the vessel in question is a dedicated NGO SAR vessel go against a flag state, and a general state, obligation to render assistance and save life at sea?

The history of flag states dates back to “ancient times” where flags or emblems were used to identify vessels.<sup>29</sup> Even as far back as Roman law, there is evidence that vessels were

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<sup>28</sup> McVeigh, Karen ‘Deflagging of refugee rescue ship a ‘dark moment’ for Europe’ (12 February 2019) *The Guardian*. <<https://www.theguardian.com/global-development/2019/feb/12/deflagging-refugee-rescue-ship-aquarius-a-dark-moment-for-europe>> <date accessed 02.08.19>.

“Rescue vessel stranded at sea after being denied entry to Italy” (2 August 2019) *Aljazeera*. <<https://www.aljazeera.com/news/2019/08/rescue-vessel-stranded-sea-denied-entry-italy-190802114339423.html>> <date accessed 02.08.19>.

<sup>29</sup> Barnes, Richard, Chapter 14

States” in Rothwell, Donald R., Oude Elferink, Alexander G., Scott, Karen N., and Stephens Tim (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 304–324, 304.

See also: Mansell, John N. K., *Flag State Responsibility. Historical Development and Contemporary Issues* (Springer Dordrecht 2009) 13–15.

issued papers to document and regulate them, especially in the event of claiming for property or damage against other vessels or individuals.<sup>30</sup> During the sixteenth century, the expansion of cross-border and distance trade by sea saw a need to create a common legal structure to govern these activities.<sup>31</sup> Progress in this capacity was made due to the rise in more modern approaches to government.<sup>32</sup> Building on this, in the seventeenth century, acceptance of high seas freedoms “as a legal principle” was achieved.<sup>33</sup> Thus, flag state jurisdiction was born.<sup>34</sup> The question of flag state duties in relation to rendering assistance should not be a difficult one to answer since both Articles 94 and 98 of the LOSC refer to duties to save life at sea and render assistance.<sup>35</sup> Of course, it is not simply the case that a written law immediately means that it is abided by. Whilst these principles are embedded in the LOSC (see below), a growing issue is what to do with rescued refugees and migrants. Therefore, coastal/port states, as well as flag states are also heavily involved in the controversy surrounding not only the status and purview of NGO SAR vessels, but also the extent refugees and migrants involved in the Migrant Crisis qualify as rescued. This is where not only the LOSC is relevant, but also national legislation/policies, as well as the European Convention on Human Rights (ECHR).<sup>36</sup> The status of rescued non-EU nationals when aboard NGO SAR vessels under European flags or sailing in waters where European jurisdiction applies. Disembarkation will be reviewed below in 2.4.

Historically, the wording of Article 94 came from the Geneva Convention on the High Seas 1958 (HSC). The last sentence of Article 5 (1) and Article 10 of the HSC contain the same instruction as Article 94 (1). This is that “[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”<sup>37</sup> Article 10 HSC’s wording was borrowed from Article 34 of the International Law Commission’s (ILC) Draft Articles on the law of the sea.<sup>38</sup> Subsequently, further flag state duties were included in

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<sup>30</sup> Coles, Richard, and Watt, Edwards, *Ship Registration: Law and Practice* (2nd edn Informa Law London 2013), 3.

<sup>31</sup> *Cf.* 29. Barnes *et al.* 304.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

See also the ‘Le Louis’ (1817) 2 Dods 210, 243 per Sir W Scott; *The Marianna Flora* (1826) 24 US 1, 42–3. Found in: Footnote 7, Barnes *et al.*, *The Oxford Handbook of the Law of the Sea*, 305.

<sup>35</sup> *Cf.* 14. Articles 94 (4) (c) and 98 (1) LOSC.

<sup>36</sup> The European Convention on Human Rights (as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16).

<[https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)> <date accessed 14.07.19>.

<sup>37</sup> Convention on the High Seas 1958 (adopted 29 April 1958, entered into force 30 September 1962) UNTS vol 450, 82–103. <<https://treaties.un.org/doc/Publication/UNTS/Volume%20450/v450.pdf>> <date accessed 14.07.19>.

<sup>38</sup> *Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea*, ILC. UN Doc. A/3159 (1956) GOAR 11<sup>th</sup> Sess. Suppl. 9, 12, 16–27.

<[http://legal.un.org/ilc/texts/instruments/english/commentaries/8\\_1\\_8\\_2\\_1956.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf)> <date accessed 09.07.19>.

1974 from a UN working paper proposed by a group of western European states.<sup>39</sup> This symbolises *lex ferenda*,<sup>40</sup> as the proposed flag state articles in this working paper became Article 94 paragraphs (2), (6), (7) and most importantly (4) of the LOSC eight years later.<sup>41</sup> Article 94 (4) (c) states: “that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.”<sup>42</sup> These were included to strengthen measures to deal with safety of the vessels in general and during collisions.<sup>43</sup> Now, these Articles have shaped the work of the IMO, the primary organisation dealing with shipping and navigations.<sup>44</sup> IMO regulations will be discussed below and in *Chapter 3*.

“In general, the flag [s]tate...has the exclusive right to exercise legislative and enforcement jurisdiction over its ships on the high seas”.<sup>45</sup> This means that flag states have full control, can enforce and prescribe laws, over their vessels wherever they are in the ocean.<sup>46</sup> Within the territorial, contiguous and Exclusive Economic zones (EEZ) there is “a more sophisticated combination of flag State and coastal State jurisdiction.”<sup>47</sup> This means that the vessel has to abide by the rules of both states, subject to what the coastal/port state decides.<sup>48</sup> Since it has sovereignty in the territorial sea and sovereign rights in the EEZ, the coastal/port state can invoke absolute policies or more relaxed ones.<sup>49</sup> Where the coastal state has jurisdiction over resources related matters up to 200 nm from the baseline, the flag state must abide by those rules. However, even through the EEZ into the high seas, the flag state retains jurisdiction over vessel operations in all the maritime zones.<sup>50</sup> If it violates coastal/port state

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<sup>39</sup> Nordquist, Myron H., Nandan, Satya N., and Rosenne, Shabtai (eds.) *United Nations Convention on the Law of the Sea 1982: A Commentary* vol III (Martinus Nijhoff Publisher (1995)), 138–143.

<sup>40</sup> Park, Ki-Gab (Professor, School of Law, Korea University) “Lex Ferenda in International Law” Member of the UN ILC (2012 – 2016, 2017–2021) (23 October 2018).

<[http://legal.un.org/avl/pdf/ls/park-kigab\\_presentation.pdf](http://legal.un.org/avl/pdf/ls/park-kigab_presentation.pdf)> <date accessed 26.08.19>.

<sup>41</sup> Cf. 39. Nordquist *et al*, 140.

<sup>42</sup> Cf. 14. Article 94 (4) (c) LOSC.

<sup>43</sup> Proelß, Alexander (ed) *United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck/Hart/Nomos, Munich, Oxford and Baden-Baden (2017)), 709.

<sup>44</sup> Cf. 39. Nordquist *et al*, 140.

<sup>45</sup> Churchill, Robin R., and Lowe, Alan V., *The Law of the Sea* (3rd ed., Manchester University Press, Manchester, 1988), 208–209. Exceptions discussed are treated as exceptions of enforcement and prescription, 209–212.

<sup>46</sup> Molenaar, Eric J., “Coastal State Jurisdiction over Vessel Source Pollution” (*Kluwer Law The Hague* 1998), 95.

<sup>47</sup> Cf. 29. Barnes *et al*, 304.

<sup>48</sup> “The creation of a legal right is an act of the law; and the law can act only in accordance with itself. The power of a sovereign [state], therefore, to affect legal rights depends upon the law; and upon the law must be based all sovereign jurisdiction,” Beale, Joseph H., ‘The Jurisdiction of a Sovereign State’ *Harvard Law Review* (1923) 36 241–262, 241.

<sup>49</sup> Cf. 45. Churchill *et al*, 92–100.

<sup>50</sup> Cf. 46. Molenaar, 95.

law, then it is either able to sanction the ship or notify the flag state to take action.<sup>51</sup> In addition, another state, other than the flag state, maintains jurisdiction over its nationals and flag states do not have enforcement jurisdiction in the territorial sea of third states, without their permission.<sup>52</sup> However, at the same time, those nationals have to ensure that they and the vessel are following flag state policies.<sup>53</sup> In normal circumstances, i.e. everyday shipping and navigation, following each layer of rules is not complicated for those onboard. Crews are trained in maritime rules and are well informed about practices that fall in and out of the flag, coastal and port state's jurisdiction.<sup>54</sup> As recent incidents have shown however these jurisdictional rules become problematic when the rescued boat is flagless and the people onboard are not ostensibly nationals of the state from where they started their journey, most commonly Libya.<sup>55</sup>

A vessel needs to be registered with a state's maritime authority/body,<sup>56</sup> which would then oversee its "administrative, technical and social matters".<sup>57</sup> A flag state has jurisdiction over all vessels registered under its nationality.<sup>58</sup> Nationality is determined by a 'genuine link' between the vessel and the state where it has registered.<sup>59</sup> There is no specified meaning to what a genuine link is and its link to nationality in the international community.<sup>60</sup> Case law exists to demonstrate that the genuine link criteria means that crew or passengers do not have to be of the same nationality as the flag to which the vessel is registered.<sup>61</sup> However, the nationality conditions of a genuine link has not been challenged since the *M/S 'Saiga' (No 2)* and *M/V 'Virginia G'* rulings. The genuine link is meant to cement the need for flag state control over vessels.<sup>62</sup> The registration and the nationality of ships is required under Article 91 (2). The fact

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<sup>51</sup> "Coastal states enjoy prescriptive and enforcement jurisdiction in internal and territorial waters, subject to the exception of ships in distress." Nelson, Dolliver "Maritime Jurisdiction" Encyclopaedia entries" (January 2010) *Max Planck Encyclopedia of Public International Law* [MPEPIL].

<<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1195>> <date accessed 30.08.19>.

<sup>52</sup> Cf. 50. Molenaar. 95.

<sup>53</sup> Cf. 43. Proelß Commentary, 709.

Cf. 45. Churchill *et al.* 92–100.

<sup>54</sup> Cf. 14. Article 94 (3) (b).

<sup>55</sup> Simanowitz, Stefan "Left Adrift in the Mediterranean" (9 August 2019) *Amnesty International*.

<<https://www.amnesty.org/en/latest/news/2019/08/left-adrift-in-the-mediterranean/>> <date accessed 30.08.19>.

<sup>56</sup> E.g. 'Bermuda Shipping and Maritime Authority' <<https://www.bermudashipping.bm/>> <date accessed 03.08.19>.

<sup>57</sup> Cf. 14. Article 94 (1) LOSC.

<sup>58</sup> Ibid. Articles 91, 92 and 94.

<sup>59</sup> Ibid. Article 91 LOSC.

<sup>60</sup> Cf. 43. Proelß Commentary, 699.

<sup>61</sup> "No distinction is made in these provisions between nationals and non-nationals of a flag State" *M/V "Saiga" (No. 2) Case (Saint Vincent v. Guinea)*, Judgment, International Tribunal for the Law of the Sea Year 1999 (1 July 1999), [105].

<[http://www.worldcourts.com/itlos/eng/decisions/1999.07.01\\_Saint\\_Vincent\\_v\\_Guinea.pdf](http://www.worldcourts.com/itlos/eng/decisions/1999.07.01_Saint_Vincent_v_Guinea.pdf)> <date accessed 30.08.19>.

<sup>62</sup> Ibid. [83].

*M/V 'Virginia G' (Panama v Guinea-Bissau)*, Judgment of the International Tribunal for the Law of the Sea (14 April 2014), [112–113].

there is a low threshold to fulfil the nationality and genuine link criteria should make it easy for NGO SAR vessels to register anywhere, yet as will be discussed below, there is a reason most of NGOs gravitate towards some flag states more than others. Thus, the genuine link and nationality provisions in the LOSC should be updated so that they are more in keeping with what flag states are doing today.

There was an attempt to regulate nationality of ships in 1986 to prevent the emergence of states that have ‘open’/‘flags of convenience’ registration.<sup>63</sup> The UN Convention on Conditions for Registration of Ships (Registration Convention)<sup>64</sup> contained registration guidance for the shipping industry, but remained “discretionary and open-ended”.<sup>65</sup> This, and the fact only fifteen states have ratified the Registration Convention, shows that states did not want to be bound by more stringent requirements and wanted to preserve “the exercise of sovereign powers.”<sup>66</sup> The Food and Agriculture Organization (FAO) and the IMO, whilst previously trying to ascertain what qualifies as a genuine link, were not able to reach an answer. The difficulty to define genuine link has led both organisations to consider that the jurisdictional control flag states have over vessels should be strengthened.<sup>67</sup> This shows that there is a difficulty in ensuring that flag states exercise their jurisdiction effectively, even though they have the responsibility to do so, since other states do not have the right to ignore the status a flag state has over its flagged vessel, unless in the most obvious cases and where there are “clear grounds” for another state’s involvement.<sup>68</sup> In addition, it is uncommon for other states to intervene in matters not concerning piracy etc., onboard a foreign vessel, flagged or not.<sup>69</sup> There seems to be no cases of a flag state prosecuting vessels flying their flag who have not rendered assistance in a situation where it would have been prudent and safe for masters to act.<sup>70</sup>

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<[https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.19/judgment\\_published/C19\\_judgment\\_140414.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment_published/C19_judgment_140414.pdf)> <date accessed 30.08.19>.

<sup>63</sup> Cf. 29. Barnes *et al*, 307.

<sup>64</sup> United Nations Convention on Conditions for Registration of Ships (adopted by the United Nations Conference on Conditions for Registration of Ships on 7 February 1986, Geneva).

<sup>65</sup> Cf. 29. Barnes *et al*, 307.

<sup>66</sup> Ibid.

Cf. 14. Article 94 (6) LOSC.

<sup>67</sup> Bantz-Coglianti, Vincent P., “Disentangling the Genuine Link: Enquiries in Sea, Air and Space Law” *Nordic Journal of International law* 79 (2010) 383, 403–410.

<sup>68</sup> Cf. 61. *M/V ‘Saiga’ (No 2)* [82].

<sup>69</sup> Yang, Haijiang, “Coastal State Jurisdiction over Foreign Merchant Ships in Internal Waters and the Territorial Sea” (Springer Berlin 2006), 90ff.

<sup>70</sup> After an extensive search, no cases were found where the flag state prosecuted its flagged vessel for not tendering assistance.



distress becomes perilous. Is it when the boat is spotted and in need of help, or when people are physically on the NGO SAR vessel? The Court decided that jurisdictional responsibilities begin onboard, as per the *Hirsi* case, at least in cases of a military ship intercepting such a boat. It is unclear whether it will set a precedent of jurisdiction stemming from the point of rescue, or even when the rescue has been contemplated for other types of vessels, particularly NGO SAR vessels. This would perhaps cause too much legal uncertainty and ambiguity in an already tense situation regarding the actions and duties of all states in the CMS. Below will address the interpretation of Article 94 and the exclusive jurisdiction of the flag state enjoyed through Article 92.<sup>82</sup>

## 2.2 Analysing Article 94

Part VII of the LOSC amongst other issues outlines what the ‘flag state’ is and how it shall operate.<sup>83</sup> The high seas are the part of the ocean where coastal state maritime zones do not extend and therefore there is no coastal state to exercise enforcement jurisdiction beyond where they enjoy such authority beyond 200 nm.<sup>84</sup> To avoid this area becoming a place of disorder and illicit activity, the LOSC sets out the responsibilities of flag states.<sup>85</sup> The prevailing jurisdiction is held by the flag state according to Articles 94 to 111, specifically on the high seas, but beyond the territorial sea of a foreign state under Article 58 (2).<sup>86</sup> A flag state is also eligible to exercise enforcement jurisdiction, before other states, against vessels that violate Articles under the LOSC.<sup>87</sup>

Flag states hold numerous jurisdictional duties. These comprise of multiple elements ranging from minimising marine pollution to complying with ship construction guidelines.<sup>88</sup> In layman terms, a vessel has to follow the rules enshrined in the LOSC and the rules of the state whose flag it is flying. Article 92 (1) enshrines that “[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its *exclusive* jurisdiction on the high seas” (emphasis added).<sup>89</sup>

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<sup>82</sup> “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.” *Cf.* 14. Articles 91 and 94 LOSC.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* The continental shelf regime can extend beyond 200nm and a coastal state may enjoy (some) rights within and beyond 200 nm. See Part VI LOSC.

<sup>85</sup> So that the high seas do not become a ‘jurisdictional vacuum’. O’Connell, Daniel P., “The International Law of the Sea” vol II (Clarendon Press 1984), 972 and 796.

<sup>86</sup> *Cf.* 14. Article 58 (2) and (6) LOSC.

<sup>87</sup> *Ibid.* Article 94 (5) and (6) LOSC.

<sup>88</sup> *Ibid.* Article 92 LOSC.

<sup>89</sup> *Ibid.* Article 92 (1) LOSC.

A flag state can be subject to the jurisdiction of other states, where if the vessel is flagless or is engaging/suspected of engaging in slavery, piracy, unauthorised broadcasting.<sup>90</sup>

Article 94 (1) determines that flag states have effective jurisdiction over vessels, meaning that administrative, technical and social matters would be dealt with by the flag state.<sup>91</sup> There is no definition of what these matters might entail. Article 94 (2) also states that the flag state should “maintain a register of ships” and “assume jurisdiction under internal law” over matters listed in Article 94 (1). Proelß interprets this as an open-ended list,<sup>92</sup> as the International Law of the Sea Tribunal (ITLOS) has also advised.<sup>93</sup> Therefore, it may be the case that not rendering assistance could come under the social, technical and/or administrative responsibilities of the flag state. Of course, it has yet to be tried and tested, however, if the *Advisory Opinion* is an indication that flag state responsibilities can be broadened. Regulation 34–1 SOLAS (as amended) indicates that the master’s decision should not be influenced by others, who in turn “shall not prevent or restrict” the master from their decision.<sup>94</sup> The “discretion” extends to executing any decisions which, in the master’s professional judgment,<sup>95</sup> is necessary for the safety of life at sea and protection of the marine environment. ITLOS clarified that for conservation management, the master should according to the flag state’s responsibilities under the LOSC.<sup>96</sup> This could mean that the master should also do that same with rendering assistance according to flag state duties.

Articles 94 (1) and (2) relate to Article 94 (3), which states that a flag state has to ensure that equipment, manning and safety of ships is regulated.<sup>97</sup> Proelß states that the interpretation of exclusive jurisdiction should extend to “criminal jurisdiction generally”, so that masters and crew can be prosecuted if found wanting of their obligations under Article 94.<sup>98</sup> In addition, under Article 97 (1), the master or crew can be charged by the flag state for “collision or any

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<sup>90</sup> Ibid. Article 110 (1) (a – e).

<sup>91</sup> Ibid. Article 94 (1) LOSC.

<sup>92</sup> Cf. 43. Proelß Commentary, 710–711.

<sup>93</sup> ITLOS *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion (2 April 2015) [119].

<<https://www.itlos.org/cases/list-of-cases/case-no-21/>> <date accessed 14.08.19>.

<sup>94</sup> Cf. 21. SOLAS 1974.

Resolution MSC.153(78) (adopted 20 May 2004) MSC.78/26/Add. 1, Annex 3, 4.

<[http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20MSC.153\(78\)-MSC%2078.pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20MSC.153(78)-MSC%2078.pdf)> <date accessed 14.08.19>.

<sup>95</sup> Cf. 39. Nordquist *et al.*, 175.

<sup>96</sup> Cf. 93. ITLOS *Sub-Regional Fisheries Commission Advisory Opinion*.

<sup>97</sup> Cf. 14. Article 94 (3) LOSC.

<sup>98</sup> Cf. 43. Proelß Commentary, 710.

other incident of navigation”.<sup>99</sup> The latter part of that phrase could be read to include an incident where people are in distress at sea and need of assistance. So, in theory, there is a way for flagged vessels to be held accountable under national law, as well as international law, for non-compliance. For example, in Germany<sup>100</sup> and France<sup>101</sup>, Person A can be tried criminally for not rescuing Person B. Person A can be sued if their inaction caused harm to Person B. As a flagged vessel is under the same law of the state on the sea as it is on land, the master and/or crew could be criminally tried for not rescuing. The laws from these two states also have the same caveat as Article 98, that the rescuer should not unreasonably put themselves in danger when a distressed person requires help.<sup>102</sup> If the rescuer is in a position to help and omits to do so, they can be liable if the victim suffers.<sup>103</sup>

Considering this, the recent arrest and acquittal of Carola Rackete, a German national and captain of an NGO SAR vessel, *M/V Sea-Watch 3*, operated by *Sea-Watch*, raises some questions.<sup>104</sup> Rackete had already rescued refugees and migrants in distress and was denied port. She forced her way passed Italian port closures after the situation onboard became dire. Had she not acted, could she have been held liable under German law for not rescuing? It is unclear what position a flag state would take in a scenario where it is flagged vessel or one of its nationals onboard a vessel, failed to act in an emergency. It would need to ascertain whether the master’s/captain’s decision not to act, as entered in the log-book,<sup>105</sup> was a reasonable decision, and thus there is still much subjectivity in making that decision and reviewing it.<sup>106</sup> Even with the possible application of Regulation 34–1 and the ITLOS Advisory Opinion about flag state responsibilities, there is no certainty as to how a scenario like this would unfold. It is

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<sup>99</sup> Cf. 14. Article 97 (1) LOSC.

<sup>100</sup> German Criminal Code (“Strafgesetzbuch”), General Part, Chapter One, Criminal Law §323c – Omission to effect an easy rescue. “Whosoever does not render assistance during accidents or a common danger or emergency although it is necessary and can be expected of him under the circumstances, particularly if it is possible without substantial danger to himself and without violation of other important duties shall be liable to imprisonment not exceeding one year or a fine.” <[https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html)> <date accessed 14.08.19>.

<sup>101</sup> French Penal Code Articles 111-1 to 727-2, Article 223–6: “(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002) Anyone who, being able to prevent by immediate action a felony or a misdemeanour against the bodily integrity of a person, without risk to himself or to third parties, wilfully abstains from doing so, is punished by five years’ imprisonment and a fine of €75,000. The same penalties apply to anyone who wilfully fails to offer assistance to a person in danger which he could himself provide without risk to himself or to third parties, or by initiating rescue operations.”

<[https://www.legislationline.org/download/action/download/id/3316/file/France\\_Criminal%20Code%20updated%20on%2012-10-2005.pdf](https://www.legislationline.org/download/action/download/id/3316/file/France_Criminal%20Code%20updated%20on%2012-10-2005.pdf)> <date accessed 14.08.19>.

<sup>102</sup> Cf. 100 and 101.

<sup>103</sup> Ibid.

<sup>104</sup> “*Sea Watch* captain Carola Rackete released, but controversy rages on” (3 July 2019) *Euronews*.

<<https://www.euronews.com/2019/07/03/sea-watch-captain-carola-rackete-released-but-controversy-rages-on>> <date accessed 12.07.19>.

<sup>105</sup> Cf. 21. Regulation 33 (1) SOLAS 1974.

<sup>106</sup> Ibid. The master has the discretion to act or not, but there are no accounts of masters being held accountable in a situation where to rescue was deemed unreasonable, but it was not.

unlikely that, given that there is no record of prosecutions for not rendering assistance at sea, a flag state would prosecute its vessel or third state nationals onboard for not acting in a way required by them under national law.

The decision in the *Lotus Case* reinforces the idea that the vessel is under the sole authority of the flag state, which makes it harder for other states to exercise their jurisdiction in the high seas and in the territorial sea and EEZ, where coastal states enjoy some rights, but not exclusive jurisdiction over flagged vessels.<sup>107</sup> The court reiterated that the flag state's legal system will be used for those suspected of crime onboard, including collisions.<sup>108</sup> However, this decision is now no longer applicable for safety of navigation incidents, including collisions, so the exclusive jurisdiction is limited for flag states.<sup>109</sup> Expanding on collisions, it could be argued that the duty to render assistance falls under the safety of navigation. This could hold flag states accountable by allowing other states to prosecute inaction. On the other hand, some argue that further restrictions to flag state jurisdiction have not been developed because there is no justification to change an otherwise suitable legal regime.<sup>110</sup> The *Lotus* case judgment stated that restrictions to exclusive flag state jurisdiction would be "questionable".<sup>111</sup> This is despite evidence of the success in tackling IUU fishing and marine pollution by allowing more port state control.<sup>112</sup> The reluctance of the international shipping community to impose some qualification on the exclusive jurisdiction of flag state vessels is echoed again by their reluctance to be bound by the Registration Convention, which would have given greater oversight to the shipping industry and its practices. Given the focus SOLAS has on training to ensure that vessels navigate safely,<sup>113</sup> preventing and responding to people in distress directly

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<sup>107</sup> *S.S. Lotus Case (France v. Turkey)*, (Ser. A) No. 10, at p. 22 (PCIJ, 1927), [25].

<sup>108</sup> *Ibid.* [26]–[27] and [28]–[30].

<sup>109</sup> *Cf.* 14. Article 97 LOSC.

*Cf.* 37. Article 11 HSC 1958.

International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation (Brussels, 10 May 1952, in force 20 November 1955) 439 UNTS 233.

<sup>110</sup> Akehurst, Michael B., "Jurisdiction in International Law" *British Year Book of International Law* 46 (1972) 145–257, 187–188.

<sup>111</sup> *Cf.* 107. *Lotus Case*. [30]–[31].

Honniball, Arron N., "The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?" *The International Journal of Marine and Coastal Law* 31 (2016) 499–530, 512.

<sup>112</sup> *Cf.* 14. Articles 218 – 220 LOSC, ports are subject to coastal state jurisdiction.

Articles 5(2) and (3) and 6(2)–(5) International Convention for the Prevention of Pollution from Ships (MARPOL) (adopted: 2<sup>nd</sup> November 1973 (Convention), 1978 (1978 Protocol), 1997 (Protocol - Annex VI), (entered into force: 2 October 1983) (Annexes I and II). As modified by the Protocol of 1978 that also states that port states have some part in inspection, reporting and prosecuting marine pollution.

Port state measures/controls with regards to marine pollution and IUU fishing have led to greater improvement in tackling flag state violations. This example will be discussed in *Chapter 3* to highlight the importance of Memoranda of Understanding (MoUs) and strengthening port and coastal state jurisdiction.

Tokyo MoU <<http://www.tokyo-mou.org/>> <date accessed 24.08.19>.

Paris MoU <<https://www.parismou.org/>> <date accessed 26.08.19>.

<sup>113</sup> *Cf.* 21. See generally Chapter V SOLAS 1974.

improves the safety of navigation for all vessels in the sea since obstructions and dangerous situations affect the ability to sail. NGO SAR vessels are fulfilling their obligations under SOLAS and the LOSC by helping boats that cannot navigate safely, which could cause collisions or other dangerous situations to other vessels as well as their own. The NGO SAR vessels are abiding by their duties as flagged vessels imposed by Article 94 and the rest of Part VII of the LOSC. The issues they are facing relate to not only the problems caused by choosing a suitable flag state, one that would engage stronger human rights protection, but also finding states willing to be “a place of safety” and allow these NGO SAR vessels and rescued people to port.<sup>114</sup> This will be discussed in 2.3.

Article 94 (3) provides that measure should be taken to ensure “safety at sea” requiring adequate equipment for communication, signalling and the seaworthiness of vessels in case of emergencies.<sup>115</sup> This is in line with “applicable international instruments”<sup>116</sup> to navigate safely and prevent collisions, for example, COLREGS.<sup>117</sup> According to Rothwell and Stevens, these are specific requirements that states have to consider.<sup>118</sup> This is supported by Article 94 (5), that paragraphs (3) and (4) should maintain vessels through laws that “conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance”.<sup>119</sup> Under Article (94) crew training and watchkeeping is detailed and developed in a separate agreement containing duties of flag states and vessels regarding the safety of navigation.<sup>120</sup> Focussing on improving and monitoring the expertise of crew is a necessary step to safeguard their lives and those of others. Flag state responsibilities are therefore not only covered by the LOSC but several key IMO Conventions. This binds them to act in certain circumstances, particularly concerning the safety of navigation, whilst still leaving exclusive jurisdiction to be applicable the rest of the time.

In addition, Article 94 (4) (c) states that “[s]uch measures shall include those necessary to ensure: that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of

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<sup>114</sup> Ibid.

<sup>115</sup> Cf. 14. Article 94 (3) LOSC.

<sup>116</sup> Ibid.

<sup>117</sup> Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) (adopted 20 October 1972, entered into force 15 July 1977).

<<http://www.admiraltylawguide.com/conven/collisions1910.html>> <date accessed 14.07.19>.

<sup>118</sup> Rothwell, Donald R. and Stephens, Tim “The International Law of the Sea” (2<sup>nd</sup> edn. 2016, Hart Publishing) 388–390.

<sup>119</sup> Cf. 14. Article 94 (5) LOSC.

<sup>120</sup> International Convention on Standards of Training, Certification and Watchkeeping 1978 (adopted 7 July 1978, entered into force: 28 April 1984; major revisions in 1995 and 2010).

life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.<sup>121</sup> Proelß interprets Article 94 paragraphs (3–5) as binding on flag states to many other international treaties as parties to the LOSC.<sup>122</sup> This means that vessels have an obligation to fulfil the provisions under SOLAS and SAR Conventions. Flagged vessels should not only be conversant in the appropriate regulations and react to them in situations concerning safety of life at sea. In the CMS, this is not occurring, although there are plenty of crews capable of responding to situations. A reason for this may be because “tak[ing] measures” is not the same as adopting them through domestic policy or international ratification.<sup>123</sup> There is also no threshold for when “generally accepted international regulations” become generally accepted.<sup>124</sup> Although these terms lack clarity, some authors argue that world shipping tonnage representation by states is a good indicator of whether something is generally accepted or not.<sup>125</sup> SOLAS, COLREGS, MARPOL and other international conventions relating to shipping and navigation are ratified by between 95–99% of the world’s shipping tonnage.<sup>126</sup> Therefore, it can be assumed all flag states are bound by measures relating to the safety of navigation and all that this entails.

According to Proelß,<sup>127</sup> Article 94 (6) is supposed to place greater emphasis on flag state responsibilities to exercise jurisdiction over their vessels.<sup>128</sup> If a flag state has received notification from another state about the absence of “proper jurisdiction and control”,<sup>129</sup> it has to investigate and resolve the issue if there is one, due to the word “shall”.<sup>130</sup> He is sceptical over how much flag state control this provides, given that there are no “powers of arrest or corrective detention in...the EEZ<sup>131</sup>...or for the prevention of marine pollution”<sup>132</sup> for flagged

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<sup>121</sup> Cf. 14. Article 94 (4) (c) LOSC.

<sup>122</sup> Cf. 43. Proelß Commentary, 712.

<sup>123</sup> Oxman, Bernard H. “The Duty to Respect Generally Accepted International Standards” *New York University Journal of International Law and Politics* 24 (1991–1992), 109.

<sup>124</sup> *Ibid.* 129.

<sup>125</sup> Cf. 43. Proelß Commentary, 713.

Cf. p32. *Chapter 3.*

<sup>126</sup> Harrison, James, “Making the Law of the Sea: A Study in the Development of International Law” (2011, Cambridge University Press), 171–172.

Cf. 45. Churchill *et al*, 265–272. Cf. 118. Rothwell *et al*, 359–362

Cf. 39. Norquist *et al*, 148–149.

<sup>127</sup> Cf. 43. Proelß Commentary, 713.

<sup>128</sup> Cf. 14. Article 94 (6) LOSC.

<sup>129</sup> Cf. 14. Article 94 (6) LOSC. Cf. 43. Proelß Commentary, 713.

<sup>130</sup> Cf. 14. Article 94 (6) LOSC. Cf. 43. Proelß Commentary, 713.

<sup>131</sup> Cf. 43. Proelß Commentary, 713.

Corrective detention. Cf. 14. Article 73 (4) LOSC.

<sup>132</sup> Cf. 43. Proelß Commentary, 713.

Marine pollution Cf. 14. Article 217 (6) LOSC.

vessels in violation.<sup>133</sup> He calls it “a relatively weak system of oversight”,<sup>134</sup> which is possibly due to the lack of state motivation to increase flag state obligations to enforce their responsibilities on vessels. Although, there are some changes, at least in Illegal Unreported Unregulated (IUU) fishing. Flag states have taken remedial steps over vessels engaging in such activities after other states have reported it.<sup>135</sup> It might be wishful to expect this to progress to be made for vessels that do not render assistance. The inclusion of Article 94 (7) addresses the issue of flag states exercising control over vessels found in violation of the LOSC and other international treaties. Flag states are required to have an “inquiry...into every marine casualty or incident of navigation on the high seas” (emphasis added).<sup>136</sup> According to Norquist *et al* “marine casualty” can be read the same as “maritime casualty” under Article 221,<sup>137</sup> as anything that is, or potentially, damaging to vessels/cargo.<sup>138</sup> Proelß and others read this Article concerning two vessels involved, either in the collision or other incident causing marine casualties.<sup>139</sup> This reading references properly vessels manned and equipped colliding or running into difficulty and one needs the help of the other. In the case of NGO SAR vessels, it is one vessel identifying another in danger or immediate need of help. Whether situations of refugee and migrant boats fall under incidents of marine casualties is unclear, since the wording and *opinio juris* implies there would be two vessels that are flagged, yet these boats are flagless.<sup>140</sup>

It would be the flag state of the NGO SAR vessel inquiring into such an incident given that an investigation has to be made when there is “loss of life or serious injury to nationals of another State”.<sup>141</sup> This part is interesting if applied with Article 97 (1), where a flag state can charge a master under national law for failing to act.<sup>142</sup> If refugees and migrants suffer as a result, in theory, it seems not to be an issue if the boat itself was not flagged, there is a requirement to look into the loss of life or injury at sea no matter who is on the boat. Article 94 (7) also accounts for third states being able to institute proceedings against the flag state(s) for “serious marine casualties”.<sup>143</sup> In this case, both states have to “co-operate in the inquiry”, but

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<sup>133</sup> Cf. 43. Proelß Commentary, 713.

<sup>134</sup> Cf. 43. Proelß Commentary, 713.

<sup>135</sup> E.g. between the North-East Atlantic Fisheries Commission and Belize.

See Guilfoyle, Douglas, “Shipping Interdiction and the Law of the Sea (2009, Cambridge University Press), 133.

<sup>136</sup> Cf. 14. Article 94 (7) LOSC.

<sup>137</sup> Ibid. Article 221 LOSC.

<sup>138</sup> Cf. 39. Norquist *et al*, 141. Cf. 14. Articles 217 (7) and 290 (1) LOSC.

<sup>139</sup> Cf. 43 Proelß Commentary, 714. Cf. 39. Norquist *et al*, 141.

<sup>140</sup> Cf. 43. Proelß Commentary, 714.

<sup>141</sup> Cf. 14. Article 94 (7) LOSC.

<sup>142</sup> Ibid. Article 97 (1) LOSC.

<sup>143</sup> Cf. 43. Proelß Commentary, 714.

how this would be concluded is not apparent in the LOSC,<sup>144</sup> leaving it up to states to settle on a method. There seems to be little consistency in the methods used by states to examine and report cases of marine casualties.<sup>145</sup> This may cause problems of transparency for other states and vessels, plus negates effective exercise of jurisdiction over vessels who have been negligent by causing or failing to help in an emergency.

A state, for example, a state whose national was aboard a vessel involved in an incident, could ask the flag state to start an inquiry if it has not begun an investigation in accordance with Article 94 (6).<sup>146</sup> For NGO SAR vessels navigating their obligations under the LOSC and the ones controlled by the flag state can be difficult. In normal circumstances, vessels/crew that are known to have violated the LOSC or national legislation face sanctions and are often deflagged until they can prove they are compliant again. This has worked with regards to fishing violations where states have taken action to ensure that vessels are operating within fishing or marine pollution guidelines.<sup>147</sup> Perhaps these sorts of non-compliance measures can be implemented within national jurisdictions for vessels who are not rendering assistance under Article 98 or operating as responsible flag state vessels under Article 94 to ensure the safety of navigation. In the case of NGO SAR vessels, they are prevented from making port due to national policies and pressure regarding rescued migrants and refugees or interpretation for not returning them to their “country[/place] of origin”.<sup>148</sup> This is highlighted by the controversy caused by the infamous “*M/V Tampa (Tampa)* affair”<sup>149</sup> and *Aquarius* discussed below in 2.3 and 2.4. Although the former situation did not occur in the CMS, whereas the latter did, the plight of refugees and migrants, as well as the flagged vessels who rescue them is apparent in both.

### 2.3 To disembark or not to disembark?

In 2001, the Norwegian flagged cargo ship, *Tampa*, rendered assistance to an Indonesian boat with more than 430 asylum seekers from Afghanistan aboard an Indonesian vessel in distress.<sup>150</sup> The *Tampa* answered a distress call from the Australian Maritime Rescue

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<sup>144</sup> Ibid.

<sup>145</sup> Cf. 29. Mansell, 150–160.

<sup>146</sup> Cf. 39. Norquist *et al*, 170.

<sup>147</sup> Swan, Judith, “Belize, Malta and Vanuatu have legislative provisions regarding the deregistration of vessels for non-compliance.” See (2.1) Chapter V Fishing Vessels Operating under Open Registers and the Exercise of Flag State Responsibilities - Information and Options (Rome 2002) FAO Fisheries Circular No. 980 FIPP/C980.

<<http://www.fao.org/3/y3824e/y3824e07.htm>> <date accessed 14.08.19>.

<sup>148</sup> Key Terms – IOM.

<<https://www.iom.int/key-migration-terms>> <date accessed 14.08.19>.

<sup>149</sup> Frenzen, Niels, “10<sup>th</sup> Anniversary of Australia’s Tampa Affair” (26 August 2011) *Migrants at Sea*.

<<https://migrantsatsea.org/tag/mv-tampa/>> <date accessed 14.08.19>.

<sup>150</sup> Ibid.

Coordination Centre (MRCC(s))<sup>151</sup> and was able to save everyone onboard the boat sailing in the Indian Ocean. Australia facilitated the rescue by providing a plane to guide the *Tampa* towards the people and boat in distress.<sup>152</sup> However, when it came to landing the rescued individuals, Australia denied permission for them to land on Christmas Island, the nearest place of safety.<sup>153</sup> Not only that, but Indonesia and Singapore also denied entry of the *Tampa* into their ports.<sup>154</sup> This situation was repeated in 2004<sup>155</sup> and 2006,<sup>156</sup> with state denying entry into their European ports. This shows that more than fifteen years on there is a problem for SAR operations when dealing with the Migrant Crisis. In all these events, disembarkation was only allowed after multilateral treaties were agreed, and “no obligation to allow disembarkation was conceded.”<sup>157</sup> Proelß states that this demonstrates “clear State Practice and *opinio juris* that States” do not feel they are legally bound to disembark rescued people.<sup>158</sup> There is debate on what constitutes a ‘completed’ rescue. As will be seen below, SOLAS and the Maritime Search and Rescue Convention 1979 (MSRC)<sup>159</sup> state that SAR operations are completed when persons onboard reach a place of safety, which is interpreted by NGO SAR vessels as making port in Europe, and thus trying to engage jurisdictional responsibility of the port/coastal state and the ECHR.<sup>160</sup> Yet, countries like Italy and Malta interpret this as when the rescued people are returned to their country or place of origin.<sup>161</sup>

The question of what coastal and port states should do to help flag states with their duty to render assistance is not considered until Article 98 (2).<sup>162</sup> Where coastal states “shall promote the establishment, operation and maintenance of an adequate and effective search and rescue” and “cooperate” with other states.<sup>163</sup> This can be done via Search and Rescue Regions (SRRs)<sup>164</sup>

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<sup>151</sup> Maritime Rescue Co-ordination Centres (MCCR) *Immarsat*.

<<https://www.inmarsat.com/services/safety/maritime-rescue-co-ordination-centres/>> <date accessed 14.08.19>.

<sup>152</sup> Cf. 149. Frenzen.

<sup>153</sup> Ibid.

<sup>154</sup> Cf. 43. Proelß Commentary, 728. Cf. 135. Guilfoyle, 198–204.

<sup>155</sup> Pagonis, Jennifer, summary of spokesperson, “Malta: Spanish trawler waits offshore, UNHCR calls for EU burden-sharing” (18 July 2006) *UNHCR*. <<https://www.unhcr.org/uk/news/briefing/2006/7/44bcbaec16/malta-spanish-trawler-waits-offshore-unhcr-calls-eu-burden-sharing.html>> <date accessed 14.08.19>.

<sup>156</sup> Cf. 43. Proelß Commentary, 728.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Chapter 2, International Convention on Maritime Search and Rescue (MSRC) 1979 (adopted 27 April 1979, entered into force 22 June 1985).

<sup>160</sup> Stone, Joe “Refugee rescue boats to defy 'criminal' EU policy and return to Mediterranean” (22 July 2019) *Independent*. <<https://www.independent.co.uk/news/world/europe/refugee-rescue-boats-msf-eu-policy-mediterranean-north-africa-italy-salvini-a9015691.html>> <date accessed 14.08.19>.

<sup>161</sup> Ibid.

<sup>162</sup> Cf. 14. Article 98 (2) LOSC.

<sup>163</sup> Ibid.

<sup>164</sup> SAR example website

<[https://sarcontacts.info/srrs/tr\\_med/](https://sarcontacts.info/srrs/tr_med/)> <date accessed 14.08.19>.

and MRCCs.<sup>165</sup> It should be noted that “shall promote” signifies an obligation, but it is a very vague and undefined term. Promotion is not as strong as ‘shall take measures to’. But many countries have implemented their own SRRs and MCCRs to fulfil the criteria laid down in the LOSC, but also SOLAS 1978,<sup>166</sup> MSRC<sup>167</sup> and the Salvage Convention.<sup>168</sup> Article 98 (2) emerged from the drafting stages HSC 1958,<sup>169</sup> which originated in SOLAS 1948.<sup>170</sup> The “establishment, operation and maintenance” in Article 98 (2) of the LOSC is taken from SOLAS 1978.<sup>171</sup> All of these treaties perpetuate the idea that coastal/port states have some responsibility to conduct SAR, but they do not go into much detail about what to do with people who have been rescued beyond disembarking them to a place of safety.

The prevailing text relied upon by NGO SAR vessels is SOLAS<sup>172</sup> and the MSRC.<sup>173</sup> Both mention a “place of safety”, which the NGO SAR vessels interpret as not somewhere the refugees and migrant came from or began their voyage.<sup>174</sup> As will also be discussed in the next chapter, there is no stipulation on nationality or otherwise as a qualification for who should or should not be rescued.<sup>175</sup> Amendments in SOLAS<sup>176</sup> and the MSRC<sup>177</sup> go further than Article 98 (2) of the LOSC by instructing states to help masters with the disembarkation of rescued people.<sup>178</sup> These amendments show that those rescued should be disembarked “within a reasonable time” and that “[t]he responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered.”<sup>179</sup> However, despite these adoptions following the *Tampa* saga,

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<sup>165</sup> Cf. 151. MCCRs.

<sup>166</sup> Cf. 21. Chapter V SOLAS 1978.

<sup>167</sup> Cf. 159. MSRC.

<sup>168</sup> International Convention on Salvage 1989 (adopted 28 April 1989, entry into force 14 July 1996) UNTS 1953, 16. <<http://www.admiraltylawguide.com/conven/salvage1910.html>> <date accessed 14.07.19>.

<sup>169</sup> Cf. 39. Nordquist *et al*, 172.

<sup>170</sup> Annexed Regulations, Chapter V, International Convention for the Safety of Life at Sea 1948 (adopted in London 10<sup>th</sup> June 1948) UNTS No. 1 (1953).

<<http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Documents/SOLAS%201948%20UK%20Treaty%20Series.pdf>> <date accessed 14.07.19>.

<sup>171</sup> Cf. 21. Regulation 15, Chapter V, Annex, SOLAS 1978.

<sup>172</sup> Ibid. Regulation 33 (1).

<sup>173</sup> Cf. 159. MSRC.

<sup>174</sup> Cf. 160. Stone, *Independent*.

<sup>175</sup> Cf. p42. *Chapter 3, 3.4*, ‘The right to be rescued’.

Cf. 21. Regulation 33 SOLAS 1978.

<sup>176</sup> Ibid. Regulation 33 (1) SOLAS 1978.

<sup>177</sup> Cf. 159. Regulation 3 (1) (9), Annex, MSRC.

<sup>178</sup> (2.4) Annex 34 Guidelines on the Treatment of Persons Rescued at Sea, IMO Resolution MSC.167(78) (adopted 20 May 2004) at Sea, 4.

<[http://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)> <date accessed 14.08.19>.

<sup>179</sup> Ibid, 4.

it seems that governments do not view them as an obligation to disembark or engage with rescued people onboard vessels.<sup>180</sup>

Previously, SOLAS and the MSRC did not define what constituted “a place of safety”.<sup>181</sup> It has since been clarified by the IMO after the encounters between vessels and states in the early 2000s,<sup>182</sup> yet it is the opinion that there are gaps and unresolved issues.<sup>183</sup> This means there is no consistency in the interpretation and application, making it very contentious when states have to deal with NGO SAR vessels.<sup>184</sup> According to the IMO, a rescue “is...considered to terminate” once the rescued people have reached a place of safety, this could be on land or a properly equipped vessel until disembarkation can be made at the next destination.<sup>185</sup> It goes on to describe what a place of safety is.<sup>186</sup> The position of the EU seems to go against Points 6.16 and 6.17, that “[g]overnments should co-operate with each other”<sup>187</sup> by avoiding disembarkation in unsafe areas or where abuses could occur and find “suitable places of safety” for everyone rescued.<sup>188</sup> This refers back to Point 6.12, where a place of safety is “where... basic human needs (such as food, shelter and medical needs) can be met.”<sup>189</sup>

Evidence suggests refugees and migrants returned to Libya are put in detention centres where conditions far from meet “basic human needs”.<sup>190</sup> This has caused the United Nations High Commissioner for Refugees (UNHCR) to condemn forcibly returning people who escape Libya or start their journeys from there, since returning anyone means exposing them to deplorable conditions.<sup>191</sup> Although, the aforementioned EU policy is to intercept migrant and refugee boats and hand them over to Libya. Point 6.15 states that “[e]ach case is unique, and selection of a place of safety may need to account for a variety of important factors” including

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<sup>180</sup> Cf. 23. Barnes, “Refugee Law at Sea” 49 and 67.

<sup>181</sup> Ratcovich, Martin, “The Concept of ‘Place of Safety’: Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?” (2015) *Australian Year Book of International Law* vol 33; Faculty of Law, Stockholm University Research Paper No 34, 2.  
<<https://su.diva-portal.org/smash/get/diva2:1152692/FULLTEXT01.pdf>> <date accessed 30.08.19>.

<sup>182</sup> Cf. 178. IMO Resolution MSC.167(78).

<sup>183</sup> Cf. 181. Ratcovich. 2.

<sup>184</sup> Ibid.

Cf. 43. Proelß Commentary, 728.

<sup>185</sup> Cf. 178. Point 6.14 IMO Resolution MSC.167(78), 8.

<sup>186</sup> Ibid. Point 6.12, 8.

<sup>187</sup> Ibid. Points 6.16 and 6.17, 8.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid. Point 6.12, 8.

<sup>190</sup> “European Union/Libya: Act Now to Save Lives” (12 July 2019) *Human Rights Watch*.

<<https://www.hrw.org/news/2019/07/12/european-union/libya-act-now-save-lives>> <date accessed 14.08.19>.

<sup>191</sup> UN High Commissioner for Refugees “Position on Returns to Libya - Update II” (September 2018).

<<https://reliefweb.int/sites/reliefweb.int/files/resources/5b8d02314.pdf>> <date accessed 14.08.19>.

medical needs and the state of the vessel.”<sup>192</sup> Therefore, when Rackete decided to reach port due to the deteriorating conditions of those onboard she was adhering to the requirement under Point 6.15. Once it was apparent that other vessels, nor other states were not coming to her aid after more than two weeks,<sup>193</sup> she had to consider what was best for the safety of crew and passengers. In most cases, the nearest place of safety is the port of Lampedusa,<sup>194</sup> and vessels are required to seek out the closest safe port with “minimum deviation” from its normal sailing coordinates.”<sup>195</sup> The coastal/port state operating the SRR or MRCC is supposed to help find a place of safety to disembark the rescued. Like Australia in the *Tampa* case, the European states in the SRRs or part of the MRCCs are not willing to fulfil this “responsibility” outlined in the MSRC.<sup>196</sup> This is perhaps a reflection of wider policy decisions, rather than more ungenerous reasons. However, it does indicate that state practice is shying away from states doing all that they can to ensure they uphold their obligations under these safety of life at sea international law regimes.

Proelß states that there is no duty to take anyone to a place of safety,<sup>197</sup> similar to the argument made above that state practice and *opinio juris* does not bind states to accept the rescued. He argues that the wording of the MSRC refers to “assistance” and not “rescue”,<sup>198</sup> so “avoids incorporating the place of safety criterion...[and] obliges States parties only to “take urgent steps to ensure that the necessary *assistance* is provided” (emphasis added).<sup>199</sup> This interpretation seems to go against the IMO Guidelines,<sup>200</sup> which were introduced to support and clarify obligations that already exist in the MSRC.<sup>201</sup> Indeed, Ratcovich disagrees with Proelß analysis because the difference in language and where these terms are found does not negate the duty provided in Point 3.1.9 of the MSRC.<sup>202</sup> Therefore, he says that it can be assumed that

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<sup>192</sup> Cf. 178. Point 6.15 IMO Resolution MSC.167(78), 8.

<sup>193</sup> Bathke, Benjamin “German rescue ship *Alan Kurdi* takes 65 migrants aboard off Libya” (05.07.19) *InfoMigrants*. <<https://www.infomigrants.net/en/post/17989/german-rescue-ship-alan-kurdi-takes-65-migrants-aboard-off-libya>> <date accessed 14.08.19>.

<sup>194</sup> Stephen, Chris “Italy bars two more refugee ships from ports” (16 June 2018) *The Guardian*. <<https://www.theguardian.com/world/2018/jun/16/italy-bars-two-more-refugee-ships-from-ports>> <date accessed 14.08.19>.

<sup>195</sup> Cf. 159. Point 3.1.9 MSRC.

<sup>196</sup> Ibid. Points 3.1.4 and 4.8.5 MSRC.

<sup>197</sup> Proelss, Alexander ‘Rescue at Sea Revisited: What Obligations Exist Towards Refugees?’ (2008) *Scandinavian Institute of Maritime Law Yearbook* 1, 14–21.

<sup>198</sup> Cf. 159. MSRC Annex, 1.3.2 (‘terms and definitions’).

<sup>199</sup> Cf. 197. Proelß (2008), 17.

<sup>200</sup> Cf. 178. Points 1.2 and 6.15 IMO Resolution MSC.167(78).

<sup>201</sup> Cf. 159. “the intent of paragraph 3.1.9 ... is to ensure that in every case a place of safety is provided within a reasonable time”. *Preamble* para 8, Resolution MSC.155(78) (adopted 20 May 2004). Amendments to MSRC 1979, as amended.

<[http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-\(MSC\)/Documents/MSC.155\(78\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-(MSC)/Documents/MSC.155(78).pdf)> <date accessed 14.08.19>.

<sup>202</sup> Cf. 181. Ratcovich, 13–14.

both the MSRC and SOLAS contain a “duty to deliver survivors to a place of safety”.<sup>203</sup> He adds that disembarkation is not the same as delivering rescued people to a place of safety.<sup>204</sup> This is supported by the multilateral agreements made before those rescued onboard the *Tampa* could leave. Agreements were made for disembarkation formally, rather than a state automatically assuming the responsibility of being a place of safety.<sup>205</sup> Therefore, to disembark or not is not the point of SAR operations and the place of safety is. For NGO SAR vessels, this is a favourable interpretation, since they are not looking to disembark refugees and migrants, but to end the rescue mission in a place of safety as per the wording in SOLAS and the MSRC.

The situation now is that more NGO SAR vessels are undertaking rescues to fill the gap and are responding to more distress calls, rather than ordinary ships. The main difference is that the purpose of these vessels is to render assistance and rescue, rather than occurrences involving other types of ships being called into action. NGO SAR vessels have been deflagged and denied port, meaning they are not able to meet their requirements under Article 94 as flag state to act in accordance with “generally accepted international standards, regulations, procedures and practices”,<sup>206</sup> under which SOLAS and the MSRC operate.<sup>207</sup>

#### 2.4 How does this manifest for NGO SAR vessels?

Since NGO SAR vessels are caught in the middle of their own goals and those of coastal/port states, it is important to see what these vessels can do to avoid being deflagged or denied port. The *Aquarius* was deflagged by Gibraltar Maritime Authority (GMA) and refused registration by the Panama Maritime Authority (PMA).<sup>208</sup> The *HRAS* has compiled two reports

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<sup>203</sup> Ibid. Ratcovich, 14.

<sup>204</sup> Ibid. Ratcovich, 14, see his footnote 69.

<sup>205</sup> Cf. 43. Proelß Commentary, 728.

<sup>206</sup> Cf. 14. Article 94 (5) LOSC.

<sup>207</sup> IMO given mandate as a competent international organisation. Proelß, Alexander, Workshop “The IMO and Implementation” (6 September 2018, Tromsø), 7–12.

<<https://en.uit.no/Content/598099/cache=20191104150141/Proelss%20Implementation%20and%20LoS.pdf>> <date accessed 14.08.19>.

<sup>208</sup> *Aquarius* had the Gibraltar flag, then almost the Panamanian flag.

*HRAS* Review – Human Rights and International Rule of Law Ramifications of the De-flagging of *M/V Aquarius Dignitas* (February 2019).

<[https://www.humanrightsatsea.org/wp-content/uploads/2019/02/HRAS\\_Aquarius\\_Review\\_and\\_Commentary\\_2019\\_SECURED.pdf](https://www.humanrightsatsea.org/wp-content/uploads/2019/02/HRAS_Aquarius_Review_and_Commentary_2019_SECURED.pdf)> <date accessed 14.08.19>.

It now has the Liberian flag.

Marine Traffic.

<<https://www.marinetraffic.com/en/ais/details/ships/shipid:5699357/mmsi:636092838/vessel:AQUARIUS%20DIGNITUS>> <date accessed 14.08.19>.

for flag states<sup>209</sup> in light of the deflagged vessel *Aquarius*.<sup>210</sup> It analysed flag states practices and how they observed their “domestic and international human rights obligations aboard vessels registered under their flags”.<sup>211</sup> Its position is that IHRL should apply on the sea in the same way they do on land.<sup>212</sup> The reality is that this is often not the case, because, as was discussed above, flag states enjoy exclusive jurisdiction over their vessels. The flag state can choose which conventions it ratifies and therefore, it would be up to them to ensure vessels were abiding by their laws, as well as the LOSC. NGO SAR vessels have a wide range of states to choose from to register their rescue ships but want to affiliate themselves with states that would offer greater human rights protection. Hence why Gibraltar<sup>213</sup> and Germany,<sup>214</sup> for example, have been chosen as the registration states for NGO SAR vessels as the vessel and those onboard would be bound by national human rights law, as well as the ECHR.<sup>215</sup> This is highlighted by the recent situation, Italy refused port for a Spanish flagged NGO SAR vessel, *Open Arms*, at the nearest port, again Lampedusa.<sup>216</sup> Spain, as the flag state, offered to take the rescued refugees and migrants by allowing them to port.<sup>217</sup> State practice like this is good because it shows the flag state taking action over its vessel and ensuring that it was acting in accordance with the LOSC<sup>218</sup> and IMO Regulations.<sup>219</sup> Unfortunately, *Open Arms* could not sail for six days to reach the port of Algeciras, due to the health of those onboard.<sup>220</sup> The NGO

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<sup>209</sup> “Flag States and Human Rights – A Study on Flag State Practice in Monitoring, Reporting and Enforcing Human Rights Obligations On Board Vessels” (17.07.18) The University of Bristol Human Rights Implementation Centre and The University of Bristol Human Rights Law Clinic in partnership with *Human Rights at Sea*.  
<<https://www.humanrightsatsea.org/wp-content/uploads/2018/07/HRAS-BRISTOL-UNI-FLAG-STATES-REPORT-2018.pdf>> <date accessed 14.08.19>.

<sup>210</sup> “Flag States & Human Rights Report 2019 – Protecting Human Rights at Sea: An Evaluation of Flag State Practice in Monitoring, Reporting and Enforcing Human Rights Obligations on Board Vessels” (17.07.18).  
<[https://www.humanrightsatsea.org/wp-content/uploads/2019/06/HRAS\\_BRISTOL\\_HRIC\\_YEAR2\\_FLAG\\_STATES\\_REPORT\\_JUNE\\_2019\\_SP\\_LOCKED1.pdf](https://www.humanrightsatsea.org/wp-content/uploads/2019/06/HRAS_BRISTOL_HRIC_YEAR2_FLAG_STATES_REPORT_JUNE_2019_SP_LOCKED1.pdf)> <date accessed 14.08.19>.

<sup>211</sup> Cf. 209. *HRAS* Flag State Report I (2018), 5.

<sup>212</sup> Cf. 9. Hammond.

<sup>213</sup> Cf. 208. *HRAS – Aquarius* Review.

<sup>214</sup> Alan Kurdi has the German flag. Marine Traffic website.

<[https://www.marinetraffic.com/en/ais/details/ships/shipid:130686/mmsi:211215130/imo:5285667/vessel:ALAN\\_KURDI](https://www.marinetraffic.com/en/ais/details/ships/shipid:130686/mmsi:211215130/imo:5285667/vessel:ALAN_KURDI)> <date accessed 14.08.19>.

<sup>215</sup> Cf. 209. *HRAS – Flag State Report I* (2018), 9.

<sup>216</sup> Bredemeier, Ken, “Charity Rejects Spanish Offer to Take in African Migrants that Italy Rejected” (18 August 2019) *Voice of America*.

<<https://www.voanews.com/europe/charity-rejects-spanish-offer-take-african-migrants-italy-rejected>> <date accessed 14.08.19>.

<sup>217</sup> *Ibid*.

<sup>218</sup> Spain ratified on 15 Jan 1997.

<[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en)> <date accessed 14.08.19>.

<sup>219</sup> Ratifications by State – IMO.

<<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/status-x.xlsx>> <date accessed 14.08.19>.

<sup>220</sup> Kassam, Ashifa and Mangiapane, Guglielmo “*Open Arms* suggests Italy take rescue ship migrants to Spain” (19 August 2019) *Reuters*.

<<https://www.reuters.com/article/us-europe-migrants-italy-spain/open-arms-suggests-italy-takes-rescued-migrants-to-spain-idUSKCN1V90P5?il=0>> <date accessed 20/08/19>.

SAR vessel has to consider the needs of those aboard under the duty to take rescued people to a place of safety.<sup>221</sup> The decision to refuse to sail to Spain was criticised,<sup>222</sup> but the vessel followed the provisions in SOLAS and the MSRC outlined above and made sure that the refugees and migrants were taken care of and made it to port when their health deteriorated.

The *HRAS* reports examined three ‘open’ and ‘closed’ registration states: the UK, the Marshall Islands and Saint Kitts and Nevis, because of the disparity in the three states’ record over which IMO and IHRL they have ratified.<sup>223</sup> This also indicates whether states are on the ‘white’, ‘grey’ and ‘black’ lists.<sup>224</sup> The level of a flag state’s adherence to IMO guideline is important in identifying the same for IHRL obligations.<sup>225</sup> It is especially interesting to note that the *Aquarius* was flagged under Gibraltar, a territory of the UK, but it is now flagged under Liberia, now the second-largest ‘white’ list<sup>226</sup> flag state.<sup>227</sup> Liberia’s track record with ratifying human right obligations seems to be on par with other African States and it is on the white list so might not cause future problems for the *Aquarius* recommencing SAR operations.<sup>228</sup> For now, as an EU Member State, the UK has to abide by the ECHR. The *Aquarius* choosing the flag of the UK initially is significant because it enables the vessel to apply extra-territorial jurisdiction to this onboard, as the *Hirsi* case highlights.<sup>229</sup> There is an obligation to apply the ECHR to every person anywhere, subject to some jurisdictional constraints.<sup>230</sup> Despite this guidance from the ECtHR and the ECHR, Gibraltar deflagged the *Aquarius*.<sup>231</sup> The reason given by the GMA to revoke its flag was because the *Aquarius* was not complying with instructions and was not certified under the MSCR and SOLAS to undertake such operations. The SAR vessel and continued to operate in the CMS even after being informed the status of the vessel had changed.<sup>232</sup> The Italian MCCR notified the GMA that it would not serve as a

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<sup>221</sup> Cf. 178. Point 6.15 15 IMO Resolution MSC.167(78), 8.

<sup>222</sup> Cf. 216. Bredemeier.

<sup>223</sup> Cf. 209. *HRAS* – Flag State Report I (2018), 5.

<sup>224</sup> *Ibid.* 4.

<sup>225</sup> *Ibid.*

<sup>226</sup> STCW Online.

<<http://www.stcwonline.com/stcw/stcw-the-white-list%20>> <date accessed 26.08.19>.

<sup>227</sup> “Liberia Confirmed as Second-Largest Ship Registry in the World” (29 January 2019) *World Maritime News*.

<<https://worldmaritimeweb.com/archives/270036/liberia-confirmed-as-second-largest-ship-registry-in-the-world/>> <date accessed 26.08.19>.

<sup>228</sup> “Claiming Human Rights – in Liberia” Guide to International Procedures Available in Cases of Human Rights Violations in Africa.

<<http://www.claiminghumanrights.org/liberia.html>> <date accessed 26.08.19>.

<sup>229</sup> Cf. 76. *Hirsi* case

Cf. 77. *Hirsi* case.

<sup>230</sup> Cf. 36. ECHR.

<sup>231</sup> Cf. 209. *HRAS* – Flag State Report I (2018), 4.

<sup>232</sup> *Ibid.* 3.

place of safety anymore and did not classify the *Aquarius* as an NGO SAR vessel.<sup>233</sup> In light of this, the GMA informed *Aquarius* of this and advised to return to its previous registration as a survey ship.<sup>234</sup> The GMA also stated if it did not do so the *Aquarius* would be “terminated” from the GMA register.<sup>235</sup> This is despite *Aquarius* having no “deficiencies” in its two-year service.<sup>236</sup> The GMA responded by stating the decision to deflag was not a politically motivated act, but a technical one.<sup>237</sup>

The *Aquarius* reflagged under the Panamanian flag, but later this was revoked too just as it was ready to leave port in Marseille.<sup>238</sup> The PMA stated clearly that the second deflagging was a result of the *Aquarius* “refus[ing] to return the migrants and refugees assisted to their place of origin.”<sup>239</sup> As discussed before, Article 98 (2) provides “[e]very coastal State” work together to “promote the establishment” of SAR and cooperate with “neighbouring States for this purpose.”<sup>240</sup> For the crisis in the Mediterranean, this cooperation has been stalled by the unwillingness of some coastal/port states to help. Yet as Proelß states, Article 98 (2) “does not, on the literal wording of [the LOSC], directly bind states,” and is supported by the fallout for the *Tampa* rescue.<sup>241</sup> Italy seems to be following the same line as Australia by refusing its ports as places of safety for refugees and migrants. The position of *HRAS* is that both Gibraltar and Panama faced pressure from Italy to deflag the *Aquarius* and put an end to its SAR operations in the CMS.<sup>242</sup> It is not the purpose of this thesis to delve into the political realm or individual state motivations for their actions concerning the Migrant Crisis. However, it is important to note that the problems in the CMS will not only be resolved through legal avenues, but social, economic and political ones as well.

It seems that coastal/port and some flag states are making life hard for NGO SAR vessels wishing to operate as such. The trouble the *Aquarius* has faced is hopefully a rarity since there

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<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

See also: “Statement: SOS Mediterranee denounces political manoeuvre of Government of Gibraltar aimed at impeding its Search and Rescue operations” (13 August 2018) *SOS Mediterranee*. <<https://sosmediterranee.com/press/sos-mediterranee-denounces-political-manoevre-of-government-of-gibraltar-aimed-at-impeding-its-search-and-rescue-operations/>> <date accessed 14.08.19>.

<sup>237</sup> Gibraltar Government news website.

<<https://www.gibraltar.gov.gi/new/sites/default/files/press/2018/Press%2520Releases/469-2018.pdf>> <date accessed 14.08.19>.

<sup>238</sup> Live updates. “On board SOS Mediterranee” <<https://onboard-aquarius.org/>> <date accessed 14.08.19>.

<sup>239</sup> Cf. 209. *HRAS* – Flag State Report I (2018), 4.

<sup>240</sup> Cf. 14. Article 98 (2) LOSC.

<sup>241</sup> Cf. 43. Proelß, 728.

<sup>242</sup> Cf. 209. *HRAS* – Flag State Report I (2018), 4.

are countless other states with whom a vessel could register. As a matter of course, the prospective NGO must weigh the level of control and protection flag state would have on an SAR vessel. But there is hope that despite the uncertain situation of NGO SAR vessels and their ability to register and operate as planned. Norway as a flag state and Norwegian vessel owners have come forward to aid the work of NGO SAR vessels in the CMS.<sup>243</sup> The *Ocean Viking* will work with *SOS Mediterranee* and *Médecins sans Frontiers* by “supporting and upholding lawful rescue at sea which falls under the larger umbrella of protecting human rights at sea...in territorial and international waters around the globe.”<sup>244</sup> From the NGOs’ standpoint, the duty to render assistance is in line with IHRL and the ECHR.<sup>245</sup> This can be seen from the increase in 2017 of “civil society vessels deployed with a humanitarian mandate to reduce fatalities and bring rescued migrants to safety”.<sup>246</sup> Whereas, state practice and *opinio juris* are not united, given the differing actions of Spain and Norway against Italy and Gibraltar, and Proelß’s opinions against Ratcovich’s. This can also be shown in the number NGO SAR vessels that are facing criminal action, detention and other challenges in continuing to operate.<sup>247</sup> However, what could be deduced is the rise of NGO SAR vessels does indicate that the application of the law by flag, coastal and port states is not sufficiently meeting the needs of the crisis in the CMS.

## 2.5 Conclusion

This chapter looked into flag state duties under the LOSC, particularly in relation to rescue at sea and NGO SAR vessels. The LOSC ideal to safeguard the peace and security of the ocean has also led to the introduction coastal and port state jurisdiction to better regulate, amongst other concerns, monitoring IUU fishing, vessels safety and illicit goods.<sup>248</sup> This has been seen by some as an erosion of flag state jurisdiction. This is because one of the defining reasons the LOSC was agreed as a “package deal” was to codify existing norms and freedoms.<sup>249</sup> Whilst it is rare for coastal states to involve itself in internal criminal matters occurring on the flagged vessel,<sup>250</sup> flag states are not acting fast enough in their SAR

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<sup>243</sup> “Norwegian Flag and owners step up to support new humanitarian rescue vessel in Mediterranean” (22 July 2019) *Human Rights at Sea*.

<<https://www.humanrightsatsea.org/2019/07/22/norwegian-flag-and-owners-step-up-to-support-new-humanitarian-rescue-vessel-in-mediterranean/>> <date accessed 24.08.19>.

<sup>244</sup> *Ibid*.

<sup>245</sup> *Cf.* 209. *HRAS* – Flag State Report I (2018), 3.

<sup>246</sup> “2019 update - NGO ships involved in search and rescue in the Mediterranean and criminal investigations”

<<https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities>> <date accessed: 24.08.19>.

<sup>247</sup> *Ibid*.

<sup>248</sup> *Cf.* 113. MoUs

<sup>249</sup> See generally Caminos, Hugo and Molitor, Michael R., “Progressive Development of International Law and the Package Deal” *The American Journal of International Law* vol 79, No. 4 (October 1985), 871–890.

<sup>250</sup> *Cf.* Yang, 90ff.

responsibilities. One author has said that the reality of flag state enforcement is not standing up to what it should be.<sup>251</sup> This is highlighted by the number of vessels crossing the CMS and not rendering assistance to refugees and migrant boats. The LOSC provides that flag states have primary jurisdiction to prosecute the vessel and/or its crew.<sup>252</sup> It is also in the interest of flag states to show that they make an effort to comply with the IMO Regulations.

Flag states are not prosecuting their vessels for failing to act and instead masters of ships are being arrested for adhering to the provisions under SOLAS and the MSRC. Another issue is that once an NGO SAR vessel or ordinary vessel has rescued refugees and migrants when no coastal/port states answer its call to arrange a place of safety there is little it can do to allow disembarkation. This is highlighted by the Tampa case, and even more recently the Sea-Watch vessel, *Alan Kurdi*.<sup>253</sup> The SAR vessel called MRCCs so that refugees and migrants could be landed at a place of safety and only Libya answered.<sup>254</sup> Again, due to the prospects of refugees and migrants being held in inadequate detention centres that are frequently bombed, Alan Kurdi did not want to release the rescued into the Libyan Coastguard's care.<sup>255</sup> After fourteen days at sea, six states opened their ports to land the rescued.<sup>256</sup> The added expense of caring for crew and passengers and arranging fuel and supplies means that few NGOs would be able to sustain operations without the support of MRCCs and open ports.<sup>257</sup> A worrying subject that this thesis was not able to touch upon due to scope and limits is the consequences faced, if any, by MRCCs that do not answer distress calls because the refugees and migrants were rescued in a different SRR.<sup>258</sup> In cases like this, it seems the only way to reach a solution is for the UNHCR<sup>259</sup> to negotiate a deal between coastal/port states and the NGO SAR vessels.<sup>260</sup>

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<sup>251</sup> Rajadurai, Ambrose "Regulation of Shipping: The Vital Role of Port State Control" (2004) 18 *Australian and New Zealand Maritime Law Journal* 83, 84.

<sup>252</sup> Cf. 14. Article 94 (1) (b) LOSC.

<sup>253</sup> "Stranded migrants at sea an 'unacceptable situation' says rescuer" (28.08.19) *Capital News*.

<<https://www.capitalfm.co.ke/news/2019/08/stranded-migrants-at-sea-an-unacceptable-situation-says-rescuer/>> <date accessed 30.08.19>.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> "Having rescued 51 persons within Libya's SAR zone, the Spanish fishing trawler was prevented from entering Maltese waters. See Press release "Malta: Spanish trawler waits offshore, UNHCR calls for EU burden-sharing" (18 July 2006) *UNHCR* <[www.unhcr.org/44bcbaec16.html](http://www.unhcr.org/44bcbaec16.html)> <date accessed 24.08.19>. Found in footnotes 10 and 70, Díaz Tejera, Arcadio (Refugees and Population Rapporteur) "The interception and rescue at sea of asylum seekers, refugees and irregular migrants" (1 June 2011) Doc. 12628 Report, Committee on Migration, para, 53, 17. <<https://www.refworld.org/pdfid/4ee0d4ac2.pdf>> <date accessed 24.08.19>.

<sup>259</sup> The UN Refugee Agency <<https://www.unhcr.org/>> <date accessed 24.08.19>.

<sup>260</sup> *Ibid.*

The conclusion of this chapter raises more questions than it answers. There is no neat answer to whether flag state duties are bound to act with regards to rescue and rendering assistance at sea. Article 94 prescribes vessels to act in accordance with the LOSC and under the national law of their flag state. But very little can be done to enforce this. The exclusivity of flag state jurisdiction proves an obstacle to hold flagged vessels accountable for not rendering assistance to or rescuing people in distress at sea. State practice is also not following the object and purpose of the LOSC – to ensure that law and order are maintained on the seas. This does not mean flag, coastal and port states are contravening the law, they are merely interpreting it differently and applying it to different circumstances. However, if one is to read the LOSC and IMO Regulations in line with the VCLT, there is no reason why flag, coastal and port states should be neglecting their duties to help refugees and migrants in distress at sea. NGO SAR vessels emerged to deal with the crisis in the CMS due to flag state apathy and are attempting to apply IMO Regulations within the LOSC in order to safely rescue and land refugee and migrant boats. This is the letter of the law. The point is not to forgo obligations, in this case, unresponsive flag states and MCCRs, but to work together to save life at sea. Flag state duties, alongside coastal and port states ones, need to be strengthened in order to meet the demand. The next chapter will focus on whether there is a duty to render assistance and the right to be rescued at sea.

## Chapter 3 Article 98 and the Right of Rescue at Sea

### 3.1 Introduction

This chapter will explore the relationship between Article 98 and the duty of flag states, as the latter dictates how flagged vessels should operate in the high seas.<sup>261</sup> It is understood that the duty to render assistance also exists in other maritime zones, like the EEZ via Article 58 (2). The LOSC provides that “Articles 88–115 ...apply...in so far as they are not incompatible with [Part V]”.<sup>262</sup> Since the duty to render assistance is not incompatible with the other provisions, it can apply in the EEZ. As mentioned in the Introductory Chapter, Article 98 is an old norm, part of the unwritten rules governing people and vessels at sea well before international law as seen today existed.<sup>263</sup> According to Nordquist *et al*, “the rendering of assistance to persons...in distress at sea” is part of “general tradition and practice and [one of the] elementary considerations of humanity”.<sup>264</sup> Indeed, Papanicolopulu expands this by stating that “[t]here is no doubt that the duty to rescue is one of the best-established principles of the international law of the sea, maritime law and international humanitarian law”.<sup>265</sup> This is also supported by Vattel and Barnes.<sup>266</sup> Vattel even furthers this by referencing that the duty to save lives at sea is “well-established” and has been for centuries.<sup>267</sup> The responsibilities of the state are not lost at sea, so flagged vessels and flag states have to abide by international law as well as domestic law on the water, as they are supposed to do on land.

However, Proelss states that *opinio juris* and state practice imply otherwise.<sup>268</sup> Little evidence supports that there is a positive legal duty to render assistance before the twentieth century.<sup>269</sup> Other law of the sea rules have more weight as customary international law because there is evidence dating back centuries and current state practice follow these rules.<sup>270</sup>

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<sup>261</sup> Cf. 14. Part VII LOSC.

<sup>262</sup> Ibid. Article 58 (2) LOSC.

Cf. 181. Ratcovich, 4.

<sup>263</sup> Berkman1, Paul Arthur and Young, Oran R., “Governance and Environmental Change in the Arctic Ocean” *Science* (17 Apr 2009) vol. 324, Issue 5925, 339–340.

<<https://science.sciencemag.org/content/324/5925/339/tab-pdf>> <date accessed 30.08.19>.

<sup>264</sup> Cf. 39. Nordquist *et al*, 171.

<sup>265</sup> Papanicolopulu, Irini “The duty to rescue at sea, in peacetime and in war: A general overview” (2016) *International Review of the Red Cross* 98 (2) 491–514, 492.

<[https://www.icrc.org/en/download/file/56144/irc98\\_7.pdf](https://www.icrc.org/en/download/file/56144/irc98_7.pdf)> <date accessed 30.08.19>.

<sup>266</sup> Cf. 22. Vattel, 170.

Cf. 23 Barnes, 53.

<sup>267</sup> Cf. 22. de Vattel, 170.

<sup>268</sup> Cf. 43. Proelß Commentary, 728.

<sup>269</sup> Ibid. 726.

Cf. 22. Echoed by Vattel, 170.

<sup>270</sup> Cf. 43. Proelß Commentary, 726.

Moreover, since Article 98 does not detail to what extent assistance should be rendered, nor what should happen to rescued individuals,<sup>271</sup> it leaves the application of it open to interpretation. It has been suggested that in the past the duty to render assistance applied to qualified seafarers in a situation where they would know whether the vessel would be in distress at sea, and signal for help.<sup>272</sup> Article 98 does not successfully solve the complications arising from refugee and migrant boats after assistance was rendered. It was simply not created to do so, yet it is being used in conjunction with other laws<sup>273</sup> and regulations.<sup>274</sup> This will be discussed below by attempting to reconcile the differences between the LOSC and other treaties and their ability to effectively, collectively or separately, deal with these types of incidents. Therefore, there is contention whether the duty to render assistance is customary international law.

The LOSC and the provisions under it are legally binding, yet there is variance in how states observe the duty to render assistance and rescue. Due to the inconsistency in state practice and *opinio juris* expressed through government policies, legal scholars etc.,<sup>275</sup> how far does is the duty to render assistance reach? Can states rely and follow their own interpretations and rules, or does the duty to render assistance/rescue prevail over them? Does the origin of Article 98 preclude NGO SAR vessels using it and other treaties to rescue, and in some cases, pre-rescue, refugee and migrants in distress at sea?

### 3.2 History of the duty to render assistance

Article 98 has seen little variance from its original wording since 1956. Before the 1958 Geneva Conventions on the Law of the Sea were established, the ILC wrote draft articles. These encompassed the main principles and practices that were being followed on the seas. In the

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<sup>271</sup> Ibid, 728.

<sup>272</sup> Ibid. 728

<sup>273</sup> Cf. 21. SOLAS 1978.

<sup>274</sup> FRONTEX Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ 189/93.

<<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0656&from=EN>> <date accessed:14.08.19>.

<sup>275</sup> “See the debate between Mediterranean states (namely, Italy, Malta and Spain) within the IMO: IMO, “Measures to protect the safety of persons rescued at sea. Compulsory guideline for the treatment of persons rescued at sea.” Submitted by Spain and Italy, FSI 17/15/1, 13 February 2009; IMO, ‘Measures to protect the safety of persons rescued at sea, Comments on document FSI 17/15/1,’ Submitted by Malta, FSI 17/15/2, 27 February 2009. All IMO documents are available at <<http://docs.imo.org>>.

For a comment, Trevisanut, Seline, “Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?”, (2010) 25 *International Journal of Marine and Coastal Law*, 523. Found in: Trevisanut, Seline “The Latest (and hopefully last) Boat Tragedy - Is there a right to be rescued at sea? A constructive view” (23 June 2014).

<<http://www.qil-qdi.org/is-there-a-right-to-be-rescued-at-sea-a-constructive-view/>> <date accessed 24.08.19>.

draft articles, Article 36 was deemed to reflect “existing international law”, twenty-six years before UNCLOS III finalised the LOSC.<sup>276</sup> In the accompanying commentary, the ILC stated that they “borrowed...terms” from pre-existing and much older conventions, which have been amended. These were: Article XI of the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea (Salvage Convention),<sup>277</sup> Article 8 of Unification of Certain Rules of Law with respect to Collisions between Vessels (Collision Convention),<sup>278</sup> and Regulation 10 of Chapter V of the Regulations annexed to SOLAS.<sup>279</sup> Proelß suggests that the ILC came to the decision that the duty to render assistance was customary international law due to the body of law already relaying similar intentions.<sup>280</sup> This establishes the history of the duty to render assistance as customary international law, the meaning of which is still the same then as it is today. This is the tenet of helping those found in distress at sea no matter the circumstances.

The *North Sea Continental Shelf Cases* also established that an Article is able to be “norm-creating” if it had entered “the general *corpus* of international law”.<sup>281</sup> However, as the ILC report has surmised, there is little consensus between numerous international authorities, including itself, for the status of customary international law.<sup>282</sup> The ILC published draft conclusions to help determine the nature of customary international law.<sup>283</sup> Conclusions 2–8 outline the factors of qualifying *opinio juris* and state practice,<sup>284</sup> most importantly that they should be valued separately.<sup>285</sup> The divergence in both elements of customary international law creates difficulties. Do the (in)actions and solutions applied by states form part of a new customary international law interpretation of the LOSC provisions or are they simply not following the letter of the law by not rescuing or rendering assistance? Judgments from the

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<sup>276</sup> Cf. 38. Article 36, ILC Commentaries, UN Doc A/3159 (1956), 281.

<sup>277</sup> Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea (Brussels, 23 September 1910).

Cf. 168. Article 10 - ‘Duty to render assistance’ Salvage Convention 1989.

<sup>278</sup> Regulation 10, Chapter V, Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels, 23 September 1910).

Cf. 117. Now COLREGS.

<sup>279</sup> Cf. 169. SOLAS 1948.

<sup>280</sup> Cf. 43. Proelß Commentary, 727.

<sup>281</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands/Denmark)* ICJ Judgment 20 February 1969 ICJ Reports (1969) 3 [71].

<sup>282</sup> Wood, Michael “First report on formation and evidence of customary international law” International Law Commission Sixty-fifth session) 6 May–7 June and 8 July–9 August 2013 Geneva) A/CN.4/663.

<<http://legal.un.org/docs/index.asp?symbol=A/CN.4/663&referer=http://legal.un.org/cod/&Lang=E>> <date accessed 26.08.19>.

<sup>283</sup> International Law Commission Seventieth Session New York, 30 April–1 June and Geneva, 2 July–10 August 2018 A/CN.4/L.908 (17 May 2018).

<[http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/1\\_13\\_2018.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf)> <date accessed 26.08.19>.

<sup>284</sup> Ibid.

<sup>285</sup> Ibid. Conclusion 3 (2), 2.

International Court of Justice (ICJ) are often relied upon to shed light on the relevance of *opinio juris* and state practice when determining whether something is customary international law or not. One ILC Rapporteur has stated that in some cases the ICJ decides when something is customary international law without additional analysis.<sup>286</sup> Other times, it does go into detail.<sup>287</sup> Inconsistency in how the Court interprets customary international law does make it difficult to predict or judge whether a provision in LOSC also falls under custom, much would depend on the outcome of a case that may never be brought before the Court.

Many states had also subscribed to these three conventions well before the LOSC. Therefore, they have chosen to abide by these treaty obligations whether they agree or not on the *opinio juris* or customary international law status of Article 98. However, it can be concluded that the duty to render assistance is now, a part of customary international law.<sup>288</sup> The fact that there is almost one hundred percent ratification of IMO Regulation today reflects the same notion:<sup>289</sup> that the vast majority of states consider the duty to render assistance and saving lives at sea fundamental tenets of international law and international law of the sea, similar to tackling slavery or piracy. Whilst, it is evident that the laws existed and bound states, it is the more recent state practice and *opinio juris* that is not matching up to past state practice and *opinio juris*. NGO SAR vessels interpret the duty to render assistance as not only ensuring the vessel's passengers are rescued but also taking them to a place/port of safety.<sup>290</sup> This means that the historical base and now Article 98, plus the supporting conventions, may not be enough to meet broader challenges involving migrant and refugee boats in distress or the NGO SAR vessels working to help them.

The phrase, the master "is bound", appears in all three of these conventions when referring to the master of the ship. SOLAS goes even further by calling it an "obligation" that the master is only "released from" if they are certain other vessels are already acting.<sup>291</sup> The master also has to log the reason why their vessel did not go to the other's aid. For example, if they were sure another vessel had already signalled it would do so or that it would endanger

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<sup>286</sup> Cf. 282. [62]. See also *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, [37].

<sup>287</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, [55].

<sup>288</sup> Cf. 283. See generally ILC Report.

<sup>289</sup> SOLAS '74-64 states, 99.18% world tonnage; COLEGS '72 - 159 states, 91% world tonnage. Parlov, Iva, Lecture on 'Arctic Shipping' (15.03.19) JUR-503 University of Tromsø, Norway.

<<https://uit.instructure.com/courses/11762/files/folder/Educational%20material?preview=475065>> <date accessed 14.08.19>.

<sup>290</sup> Cf. 160. This in accordance Section 1.3.2 MSRC.

<sup>291</sup> Cf. 169. Regulation 10 (a) SOLAS 1948.

Cf. 21. Regulation 33 SOLAS 1974.

the master's vessel and crew to assist the people in distress.<sup>292</sup> This suggests that there was a stronger, a more morally tied, duty to act. The wording was lost in the ILC's version, the HSC and finally the LOSC. Article 98 reads "[e]very State *shall* require the master" (emphasis added), whereas Regulation 33 SOLAS (1974 (as amended)) is the same as the 1948 edition.<sup>293</sup> The implication is that under SOLAS there was a legal obligation for the master and the vessel to help other people and boats in peril.

Colombos describes "seafaring men...dealing with collisions and salvage" abided by "common law of the sea [that is] binding...because it had been generally accepted as a rule of conduct".<sup>294</sup> This supports the idea that the duty to render assistance and to rescue were prominent and adhered to international standards. All competent people on the sea were expected to do their part in times of emergency and distress. Therefore, if 'ordinary' flagged vessels are not acting in line within this rule, NGO SAR vessels picking up the slack should not be penalised by being deflagged, denied port and criminally charged. The LOSC does not contain the same binding wording, perhaps because earlier conventions had already covered that. They were ratified and served the international community satisfactorily before in 1982 and so it did not seem necessary in addition to using the word "duty" to qualify the obligation under the LOSC, IMO Regulations and customary international law.

Article 36 of the ICL draft articles became Article 12 (1) HSC 1958.<sup>295</sup> Subsequently, after only changing "a ship sailing under its flag" in the drafting stages to "a ship flying its flag" in the final stage,<sup>296</sup> Article 98 entered into force with the rest of the LOSC Articles. There were few contentions or revisions to the duty to render assistance, demonstrating again that the majority of, if not all, states understood that Article 98 to be part of customary international law and now binding in treaty form.

### 3.3 Interpretation of Article 98

Having considered the origins of the duty to render assistance, it is also necessary to look at the wording of the article. According to the Article 31 (1) VCLT, "good faith" and reading texts within their "ordinary meaning" are instrumental when determining the "object

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<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

<sup>294</sup> Colombos, John C., "The International Law of the Sea" (Longmans Green & Co. Ltd. 6<sup>th</sup> edn. 1967), 333.

<sup>295</sup> Cf. 37. HSC 1958.

<sup>296</sup> Cf. 43. Proelß Commentary, 726.

and purpose” of an article.<sup>297</sup> The ordinary meaning of “duty” and “render assistance” will be assumed to be the same in all language version of the LOSC.<sup>298</sup> It is apparent, from past sources, that the object and purpose was to safeguard life at sea and ensure that vessels were manned and equipped properly to avoid disaster. Therefore, the ordinary meaning should stand as rendering assistance that ensures rescued people are left at a point where they are no longer in distress. So, in the *Hirsi* case, the Italian authority said that the rescue occurred in the high seas did not evoke other rights and protections beyond Article 98, which is incorrect. As seen above, masters have an obligation to take individuals to a place of safety and once onboard have to abide by their national law and jurisdiction. The ICJ judgment and the ECHR provide more context to the “ordinary meaning” condition in the VCLT. However, given the lack of consensus on how Article 98 is applied to the rescue of refugees and migrants, as well as the NGO SAR vessels, it suggests that there is ambiguity.

Articles steeped in tradition can lead to unforeseen issues when used in the future. Lawmakers could not very well anticipate that the need to rescue individuals at sea would involve refugees and migrants who are not experienced sailors or in seaworthy vessels. The Article begins by stating that “any person found at sea in danger of being lost” should be rescued.<sup>299</sup> Following the VCLT, Article 98 does not include any discriminatory terms excluding asylum seekers, migrant or refugees. The use of “*any* persons” (emphasis added) demonstrates there is no discrimination as to who may qualify for Article 98 to apply. It also states “[e]very State shall require the master of a ship flying its flag” to render assistance as far it is possible to do so. To read Article 98 according to Article 31 of the VCLT, there is no differentiation between the types of vessels or people that are deserving of rescue.<sup>300</sup> The responsibility is in the hands of any flag state vessel “to render assistance to any person found at sea in danger of being lost”.<sup>301</sup> The wording, despite several proposals to add coastal salvage rights, remained unchanged from the Informal Composite Negotiating Text/Revision 2.<sup>302</sup>

The words “duty” and “shall render” are used to signify an explicit action on behalf of flagged vessels and masters. This would be in accordance with the “ordinary meaning” under

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<sup>297</sup> Cf. 26. Articles 31 and 32 VCLT.

<sup>298</sup> Ibid. Article 33 VCLT.

Cf. 14. Article 320 LOSC.

<sup>299</sup> Cf. 14. Article 98 (1) LOSC.

<sup>300</sup> Cf. 43. Proelß Commentary, 728–729.

<sup>301</sup> Cf. 14. Article 98 (1) LOSC.

<sup>302</sup> Cf. 39. Nordquist *et al*, 174.

the VCLT.<sup>303</sup> Yet, Article 98 also includes subjective language and is not without qualifications under national law.<sup>304</sup> Firstly, the master must not endanger the crew or the vessel in the act of rendering assistance.<sup>305</sup> It may be common sense to ensure that when helping someone else, one does not make matters worse by also needing to be rescued. Following the ordinary meaning of the text of the article, “without serious danger” would not result in a rescue that could put the vessel and crew in a position where they would sink. However, whilst one master may deem something as “serious”, another may not. The threshold for seriousness is not defined. Moreover, it makes ascertaining whether the master acted inside or outside of the scope of Article 98 (1) (b) difficult. Secondly, the master should “proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action *may reasonably be expected of him*” (emphasis added).<sup>306</sup> Again, no parameters are set to guide what is or is not expected of the master. Indeed, the master is required to decide if, when, and how to act, whilst taking into account the situation before them.<sup>307</sup> In some cases, rescues need to be carried out immediately, but of course, it can be very tough to make decisions and react sensibly at urgent times. Although, since SOLAS states that the master must enter in the vessel logbook the reasons why they did not rescue, the threshold may still be quite high. Unless it is obvious that rendering assistance would be dangerous, the flag state would find it onerous trying to establish the accountability of the master.

Another weakness of Article 98 is that there is no definition of “persons in distress”.<sup>308</sup> This may be an oversight under the LOSC. Through the VCLT a “good faith” and “ordinary meaning” application means that there are a few ways “persons in distress” can be misinterpreted by the wording of the LOSC.<sup>309</sup> Although, more recently the EU “FRONTEX Regulation” 2014 provides an inexhaustible list of criteria to establish whether a boat is in distress or not.<sup>310</sup> Border agents are instructed to look out for amongst other things, overcrowding, persons in need of medical attention, deceased persons, pregnant women and children.<sup>311</sup> First, more often than not cases of refugee and migrant boats in distress tend to end in loss of life at sea.<sup>312</sup> To

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<sup>303</sup> Cf. 26. Article 31 VCLT.

<sup>304</sup> Cf. 43. Proelß Commentary, 726.

<sup>305</sup> Cf. 14. Article 98 (1) LOSC.

<sup>306</sup> Ibid. Article 98 (1) (b) LOSC.

<sup>307</sup> Cf. 39. Nordquist *et al*, 175.

<sup>308</sup> Cf. 14. Article 98 (1) (b) LOSC.

<sup>309</sup> Cf. 26. Article 31 VCLT.

<sup>310</sup> Cf. 274. FRONTEX.

<sup>311</sup> Ibid. Article 9 (2) (f) FRONTEX.

<sup>312</sup> FRONTEX Regulation “2019 update - NGO ships involved in search and rescue in the Mediterranean and criminal investigations” <<https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities>> <date accessed 22.07.19>.

compare, 25 deaths occurred from 1,500 cargo ship accidents in 2017.<sup>313</sup> In the same year, there were 3,116 reported refugee and migrant deaths in the Mediterranean Sea.<sup>314</sup> Despite there being significantly more seagoing cargo ships than refugee and migrant boats, the statistics do not correlate between the ship numbers and loss of life. The stark contrast between ‘normal’ commercial vessels and refugee and migrant boats relates to the fact the latter are not prepared at all for their voyage. Most cannot swim, have never been on the high seas and are trapped on floating dinghies without life vests, lifeboats or trained crew. In addition, the lack of radio or signalling equipment on board to call for help is in part due to the secrecy of the endeavour and the other part they added expense. Cargo ships, merchant ships in general, and official vessels all abide by, for example, COLREGs Annex I and IV.<sup>315</sup> Through the ‘rules of reference’,<sup>316</sup> the safety of navigation regimes ascribed under the LOSC is met by a number of conventions. As seen in the previous chapter, all flag states have an obligation to ensure that vessels flying their flag conform to construction, design, equipment and manning (CDEM) and marine pollution/discharge and safety equipment/training guidelines.<sup>317</sup> This accounts for the minimal fatalities for other vessels when compared with refugee and migrant ones.

Second, NGOs conducting SAR in the CMS have deduced that in order to prevent already risky situations turning into major catastrophes, SAR vessels are intercepting the refugees and migrants before they become “persons in distress”.<sup>318</sup> The reason for this pre-emptive action is to reduce drowning and panic at the point when it becomes critical to saving all those on board the sinking boat. This may not be a strict application under Article 98, but the additional list provided by FRONTEX suggests that boats do not need to be in fatal danger in order to qualify as being in distress, at least in the way the duty to render assistance was applied in the past. The crisis in the CMS is not something the delegates of the UNCLOS III conference anticipated and so pre-rescuing is not something that is covered in Article 98. Intervention of this nature, whilst necessary, may not fit comfortably with the “object and

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<sup>313</sup> EMSA: Overview of maritime casualties in 2017. *Safety4Seas*. “In 2017 More than 1500 cargo ships were involved in accidents that resulted in 25 fatalities in 2017, the lowest number since the EU legislation is in place.”

<<https://safety4sea.com/emsa-overview-of-maritime-casualties-in-2017/>> <date accessed 16.07.19>.

<sup>314</sup> “Mediterranean Migrant Arrivals Reached 171,635 in 2017; Deaths Reach 3,116” (01.05.18).

<<https://www.iom.int/news/mediterranean-migrant-arrivals-reached-171635-2017-deaths-reach-3116>>  
<date accessed 20.14.19>.

<sup>315</sup> Cf. 117. COLREGs Annex I - Positioning and technical details of lights and shapes and Annex IV - Distress signals, which lists the signals indicating distress and need of assistance.

<sup>316</sup> Cf. 207. Proelß Workshop.

<sup>317</sup> Cf. 14. Articles 21, 22, 39, 42, 24 and most importantly 94 LOSC.

<sup>318</sup> Stone, Mark “Europe’s Migration Tragedy: Life and death in the Mediterranean” *Sky News* (2 Oct 2016). Video highlighting the difference between a ‘good’ and ‘bad’ rescue. 09:50-20:00 minutes.

<<https://www.youtube.com/watch?v=u8cg5hhHJIA>> <date accessed 22.07.19>.

purpose” of Article 98. It was introduced to manage emergencies of a very different kind, ones dealing with trained seafarers or the now very rare cases of commercial/civilian maritime casualties. Refugees and migrants are already in distress without becoming victims of capsizing etc., and this is another type of distress situation. This would still come under Articles 31 and 32 of the VCLT since distress in the ordinary meaning and good faith reading does not entail limits on the type of distress needed before Article 98 can be applied. Perhaps the lack of definition of “persons in distress” could work in the favour of NGOs and the individuals they are rescuing. The LOSC does not make it clear and neither do the other safety of life and rescue at sea treaties list the scenarios that qualify as distressing and in need of assistance/rescue. Such ambiguity is triggering a Catch 22 between NGOs and governments’ policies as they take different approaches to fill the gap. The former follow Regulation 33 and disembark individuals “to a place of safety”, mainly in Southern Europe. Whereas the latter choose to work with coastal/port states to try and turn boats around or return people to Libya.<sup>319</sup>

According to Proelß, following a customary international law interpretation, a vessel in distress is determined by someone with maritime expertise, i.e. the master or first officer.<sup>320</sup> Returning to the “object and purpose” of Article 98 as a whole, it may be that the intention was to use the duty to render assistance to vessels in the most extreme cases. It was assumed that competent seafarers would be able to handle themselves at sea in ordinary or extraordinary circumstances. In the event of a collision or *force majeure*, the proper cause of action would be to signal for help that would hopefully not be too far off. However, history has proven that this is not always the case, and worst-case scenario planning has to be undertaken. Thus, the most influential safety of life at sea law came into force after *RMS Titanic*, proving that even a ship designed to be ‘unsinkable’ should not be deficient in the lifeboats.<sup>321</sup> In the wake of the *RMS Titanic*, it was established that lifeboat quotas were not adequate for such large passenger cruise ships. However, it is still expected that the vessel was the “first line of defence”,<sup>322</sup> hence the emphasis on safe navigation and mandatory safety equipment/training. With this in mind, it is no wonder that there are twelve key conventions relating to the safety of navigation and life at sea, highlighted in Article 94 (3).<sup>323</sup>

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<sup>319</sup> Nielsen, Nikolaj “EU dismisses UN call to stop migrant returns to Libya” (4 July 2019) *EU Observer*. <<https://euobserver.com/migration/145369>> <date accessed 24.07.19>.

<sup>320</sup> Cf. 43. Proelß Commentary, 728.

<sup>321</sup> Text of the Convention for the Safety of Life at Sea 1914 (signed 20 January 1914, London) <<http://www.archive.org/stream/textofconvention00inte#page/n5/mode/2up>> <date accessed 14.08.19>.

<sup>322</sup> Cf. 294. Colombos. 368.

<sup>323</sup> List of IMO Conventions - Related Protocols are referred to under the main Convention.

<<http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Default.aspx>> <date accessed 14.07.19>.

With thousands of vessels out on the ocean in precarious climate conditions at any given moment, it is a triumph that so few maritime accidents or fatalities occur. However, for the refugees and migrants lost at sea, these regulations are not having any effect on their survival. One solution is to better train crews to deal with rescues like these. *Preamble (5)*, Article 4 paragraphs (3) and (8) FRONTEX highlight that border guards should be trained in refugee rights, international SAR regimes and IHRL.<sup>324</sup> This is a step in the right direction, yet it is doubtful whether this training is happening in practice. It may also be asking too much of border guards to know how to handle a group made up of men, women and children, all of whom have suffered trauma on and off the sea. The teaching of law and policy, whilst important, does not get to the root of the issue. That, despite the number of vessels in the CMS, people are still drowning. Every vessel has a duty to act when coming across these boats. But, it is up to states to implement and enforce international law against vessels flying under their flag if they are found to be breaching international law and international law of the sea, as seen in *Chapter 2*.

Lastly, looking outside of Part VII and the high seas, the language, object and purpose of Article 98 can be found in the Territorial Sea and Exclusive Economic Zone. A vessel is permitted to interrupt its innocent passage through the territorial sea in the event of another vessel needing assistance or people in distress.<sup>325</sup> This is significant because the exclusive flag state jurisdiction lessens as the vessel sails within the limits of other maritime zones. Within internal and territorial waters the flag state, whilst still having jurisdiction over its vessel, has to abide by the coastal state's laws.<sup>326</sup> The vessel is also subject to port and/or coastal jurisdiction.<sup>327</sup> Article 39 (1) (c) echoes the fact that passage should be "continuous and expeditious transit unless rendered necessary...by distress" and it can be construed that another vessel can suspend its transit passage without consequences if it is helping another vessel. This may be taken to enforce the argument that these parts of Articles 18, 39 and 98 are customary international law, given the references in past conventions and the comments made by the ILC. Therefore, it cannot be disputed that the duty to render assistance is present throughout the ocean as customary international law, as well as in the form of various international treaties. What is questionable is the current reach of Article 98 when considering the incidents in the CMS. The LOSC and the IMO Regulations convey a clear message about the safety of life and sea. Therefore, there is an obligation to render assistance and to rescue under the IMO

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<sup>324</sup> Cf. 274. FRONTEX.

<sup>325</sup> Cf. 14. Article 18 (2) LOSC.

<sup>326</sup> Ibid. Article 58 (2) LOSC.

<sup>327</sup> Ibid. Article.

Regulations. NGOs wish to extend the reach of Article 98 to include rendering assistance to save life at sea before a precarious situation becomes fatally distressing for refugees and migrants in boats.

### 3.4 The right to be rescued

This section will focus on “the right to life”<sup>328</sup> to determine whether there is a right, duty or obligation to be rescued by NGO SAR vessels and flag/coastal/port states. There may be the potential to read human rights law and principles when applying the LOSC, especially when there are lives at stake and there is a focus on saving life at sea. It has been discussed which law of the sea instruments invoke rescue and rendering assistance to people in distress at sea. So, it seems that there are principles in place to support the notion that seafarers should act in situations where they are able to help those in need. It is worth exploring if there persons in distress at sea have the right to be rescued, rather than just relying on the duty to rescue and render assistance.

As of the time of writing, between 34,196–44,236 refugees and migrants have arrived in Europe by sea.<sup>329</sup> Six hundred and sixty-nine people are thought to have drowned already in the first half of this year.<sup>330</sup> It has been shown that 2015/2016 saw one million refugees and migrants arriving in Europe, the highest since WWII.<sup>331</sup> In the years following the 2016 statistics there has been a steady movement of people, but an overall decline from three years ago.<sup>332</sup> As the year-end data for 2019 is not yet available, Figure 1 below helpfully picturises facts for 2017/2018.<sup>333</sup>

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<sup>328</sup> Cf. 36. Article 2 ECHR.

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

Article 3 – “Everyone has the right to life, liberty and security of person”. Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<[http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)> <date accessed 29.07.19>.

<sup>329</sup> “Europe situation” UNCHR – The UN Refugee Agency.

<<https://www.unhcr.org/europe-emergency.html>> <date accessed 29.07.19>.

Live update figures of 29 July 2019. Operation Data Portal for UNHCR – The UN Refugee Agency

<<https://data2.unhcr.org/en/situations/mediterranean>> <date accessed 29.07.19>.

<sup>330</sup> Ibid. “Europe situation” UNCHR – The UN Refugee Agency.

<sup>331</sup> “Fewer migrants and refugees crossing the Mediterranean in 2018: UNHCR report” (last updated 31.01.2019) *Euronews*.

<<https://www.euronews.com/2019/01/30/less-migrants-and-refugees-crossing-the-mediterranean-in-2018-unhcr-report>>

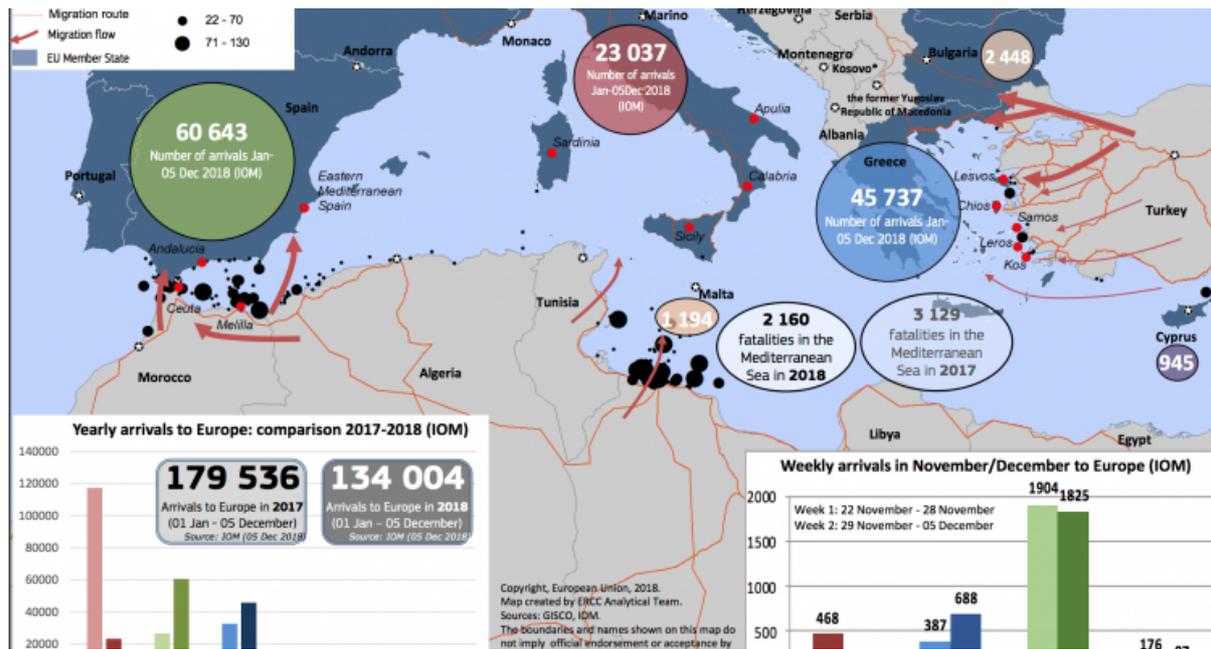
<date accessed 15.07.19>.

<sup>332</sup> “Although the figures for 2018 are half of what they were in 2015 and 2016, they are still much higher than the pre-2015 norm.” *Norwegian Refugee Council*.

<<https://www.nrc.no/shorthand/fr/hour-of-reckoning-for-european-refugee-policy/index.html>> <date accessed 15.07.19>.

<sup>333</sup> Image Source: UN Dispatch <<https://www.undispatch.com/un-content/uploads/2018/12/Screen-Shot-2018-12-11-at-2.40.13-PM-750x400.png>> <date accessed 15.07.19>.

Figure 1:



The infographic above shows the routes from the Middle East, through Turkey, and from North Africa to Europe taken by individuals trying to reach a better life. Over 5,000 people lost their lives at sea when undertaking the journey between 2017 and 2018.<sup>334</sup> People are overwhelmingly arriving in Southern European states. The most vocally against arrivals landing or being landed by SAR vessels has been Italy.<sup>335</sup> Recently, the Italian government won a vote to fine “charity ships” €1 million and arrest captains if they are found in Italian waters without permission.<sup>336</sup> This came days after *Rackete* was detained and subsequently released for entering a blocked port.<sup>337</sup> *Rackete* and her crew had rescued a dingy of refugees and migrants. After two weeks floating around in the Mediterranean high seas, she took the decision to enter an Italian port without permission because the health of those on board had deteriorated.<sup>338</sup> Italy’s position is that rescued people should be returned to their point of origin. This is predominantly Libya, even if those rescued are not Libyan nationals.<sup>339</sup> The EU has been assisting the Libyan Coastguard to intercept these boats and have a policy in place stating they

<sup>334</sup> Ibid.

<sup>335</sup> “Italy’s government wins confidence vote on decree targeting migrant rescue ships” (24 July 2019) *Reuters*. <<https://www.reuters.com/article/us-italy-politics-migrants/italys-government-wins-confidence-vote-on-decree-targeting-migrant-rescue-ships-idUSKCN1UJ2E4>> <date accessed 28.07.19>.

<sup>336</sup> Ibid.

<sup>337</sup> Hughes, Roland “Carola *Rackete*: How a ship captain took on Italy’s Salvini” (6 July 2019) *BBC News*. <<https://www.bbc.com/news/world-europe-48853050>> <date accessed 28.07.19>.

<sup>338</sup> Ibid.

<sup>339</sup> “Refugees returned to overcrowded Libyan detention centres” (23 January 2019) *Médecins Sans Frontières*. <<https://www.msf.org/migrants-and-refugees-returned-overcrowded-libyan-detention-centres-libya>> <date accessed: 29.07.19>.

prefer returning people than allow them to reach Europe.<sup>340</sup> Once this occurs, people are transferred to and held in detention centres.<sup>341</sup> The plight of refugees and migrants does not end when they are rescued at sea. But as the analysis of the LOSC and IMO Regulations show, there is no consensus about there being a duty to render assistance or to rescue. So, does the right to be rescued exist in international law?

The word rescue is not mentioned in the LOSC, but it is in the IMO Regulations and UNHCR.<sup>342</sup> Through the rules of reference<sup>343</sup> and Articles 31 and 32 of the VCLT,<sup>344</sup> other hard and soft sources of law can be explored to help to determine whether there is a right to be rescued. State practice may vary, but as stated above, the wording and intention of the law do not seem to create any constraints that allow states to not render assistance or rescue refugees and migrants anywhere in the ocean, not just in the CMS. Given Proelß's assessment of the duty to render assistance and the absences of the word rescue in the LOSC does not provide a concrete obligation for flagged vessels to act or coastal/port states to act,<sup>345</sup> there seems to be scholarly weight to suggest rescuing is not an obligation and therefore no-one has the right to be rescued. This is despite the LOSC clearly stating that assistance should be rendered to "any person" and "persons in distress at sea".<sup>346</sup> Proelß highlights that there is no discriminatory language in the LOSC provision.<sup>347</sup> However, he, along with Nordquist *et al*, also agree that there is no uniform state practice when dealing with asylum seekers,<sup>348</sup> or other people with 'questionable' or 'undetermined' status undertaking boat crossings. In this section the status of asylum seekers will be reconciled with refugees and migrants, as the classification of people in the boats at the time of needing to be rescued is not important, as well as the non-discriminatory nature of Article 98, SOLAS and the MSRC. This shows there is a discrepancy between how states interpret and apply the LOSC. In 1985, an attempt was made between the IMO and the

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<sup>340</sup> "No Escape from Hell – EU Policies Contribute to Abuse of Migrants in Libya – EU Policies Contribute to Abuse of Migrants in Libya" (21 January 2019) *Human Rights Watch*.  
<<https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>> <date accessed: 29.07.19>.

<sup>341</sup> *Ibid*.

<sup>342</sup> E.g. *Cf.* 21. SOLAS 1974.

No. 38 (XXXVI) RESCUE OF ASYLUM-SEEKERS IN DISTRESS AT SEA\* (1985)  
<<https://www.unhcr.org/en-my/578371524.pdf>> <date accessed 30.08.19>.

for example.

<sup>343</sup> *Cf.* 207. Proelß Workshop.

<sup>344</sup> *Cf.* 26. VLCT.

<sup>345</sup> *Cf.* 197. Proelß (2008).

*Cf.* 159. MSRC.

<sup>346</sup> *Cf.* 14. Article 98 LOSC.

<sup>347</sup> *Cf.* 43. Proelß Commentary 728.

<sup>348</sup> *Ibid.* 728.

*Cf.* 135. See generally Guilfoyle, 187–226.

Executive Committee of the UNHCR to iterate that there is a duty to rescue asylum seekers at sea.<sup>349</sup> Yet, as Proelß reiterates the lack of discernible state practice and challenges to implementation means there is little evidence to suggest rescuing and rendering assistance are recognised as duties by states.<sup>350</sup>

Almost twenty years later, the European Parliament passed Regulation 2013/0106,<sup>351</sup> which sets out human rights obligations that apply under FRONTEX.<sup>352</sup> But does not include the way each EU state carries out its own maritime border controls or SAR operations, specifically for refugee and migrant boats.<sup>353</sup> Therefore, it shows that only FRONTEX<sup>354</sup> coordinates and supports SAR operations without interfering in EU states' separate to maritime rescues/interceptions.<sup>355</sup> This can be seen in the way Italy reallocated its activities as an MCCR to the Libyan Coastguard.<sup>356</sup> Italy changed its SRR around Lampedusa, where the Libyan Coastguard is now tasked with responding to distress situations concerning refugee and migrant boats.<sup>357</sup> Therefore, despite attempts to bring human rights duties within maritime SAR obligations, attempts have so far not been successful.<sup>358</sup> It seems that because different bodies govern each legal regime – the IMO mostly governs maritime issues<sup>359</sup> and human rights are overseen by various bodies.<sup>360</sup> It is difficult to reach conclusions about which rights should take precedent and states may be using this to their advantage to reduce their responsibilities to act when refugees and migrants are in distress at sea.

Klein attributes this lack of “harmonization”<sup>361</sup> between maritime and human rights law because the former deals with “specific rules” for “search and rescue obligations”, whereas the latter deals with “general rules”.<sup>362</sup> This might provide some insight as to why there has been

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<sup>349</sup> Cf. 39. Nordquist *et al*, 175.

<sup>350</sup> Cf. 43. Proelß, Commentary, 728.

<sup>351</sup> 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, 2013/0106 (COD) (21 May 2014) <[https://parltrack.org/dossier/2013/0106\(COD\)](https://parltrack.org/dossier/2013/0106(COD))> <date accessed: 30.08.19>.

<sup>352</sup> Klein, Natalie “A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants” (2014) *International and Comparative Law Quarterly*, 63(4), 787–814, 814.

<sup>353</sup> *Ibid*, 814.

<sup>354</sup> “How do Search and Rescue (SAR) operations work and what is the role of Frontex in it?” <<https://frontex.europa.eu/faq/frontex-operations/>> <date accessed 30.08.19>.

<sup>355</sup> Cf. 352. Klein, 814.

<sup>356</sup> Liss, Dr Carolin “Turning a Blind Eye? // The rescue of migrants in the Mediterranean”, 2. <[www.hsfk.de/spotlight0319-lit](http://www.hsfk.de/spotlight0319-lit)> <date accessed 30.08.19>.

<sup>357</sup> *Ibid*.

<sup>358</sup> See FRONTEX and IMO and UNHCR Executive Committee documents.

<sup>359</sup> Cf. 207. Proelß Workshop. Through the rules of reference.

<sup>360</sup> Human Rights Bodies

<<https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>> <date accessed 30.08.19>.

<sup>361</sup> Cf. 352. Klein, 803 and 814.

<sup>362</sup> *Ibid*. 814.

more state resistance towards rendering assistance and rescue at sea in relation to refugees and migrants, rather than arguments against the application of IHRL. It might be easier for states to justify why SAR obligations fall outside particular instances than trying to argue that a right to life does not apply in this context towards refugees and migrants in distress at sea. This is especially because the UNHCR has said “there may be asylum-seekers and refugees among those who take to the sea”, which is why it has chosen to involve itself in problems associated with SAR operations.<sup>363</sup> Klein also states that “[o]n the high seas maritime interdiction regimes and [SAR] obligations fail to take full (or some would suggest any) account of obligations arising under refugee law and international human rights law”.<sup>364</sup> Furthermore, Moreno-Lax has evaluated that under FRONTEX “[SAR] obligations are understood as operating independent[ly] from other international obligations arising from refugee law and human rights, the observance of which is rendered uncertain”.<sup>365</sup> If this is the case, it is worrying for the status of refugees and migrants in distress at sea. The evaluations of both Klein and Moreno-Lax seem to recognise that in the high seas, SAR operations do not consider the implications of human rights obligations when dealing with migrant and refugee boats. NGO SAR vessels are putting in more emphasis on their human rights obligations whilst fulfilling their duties under SOLAS, MSRC and the LOSC.<sup>366</sup>

Rescue could also be interpreted as a form of interception. The UNHCR has classified it as “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.”<sup>367</sup> The rescue/interception of migrants by state or NGO SAR vessels means that they fall under the protection of the ICCPR,<sup>368</sup> whereas asylum seekers and refugees have these rights, as well as those in other conventions.<sup>369</sup> Recently, the right to life has been adopted into the ICCPR by

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<sup>363</sup> Informal Consultative Meeting “Proposals for an Executive Committee Conclusion on Rescue at Sea” (16 January 2007) Division of International Protection Services UNHCR, 2.

<<https://www.unhcr.org/en-us/45a752d12.pdf>> <date accessed: 30.08.19>.

<sup>364</sup> Cf. 352. Klein, 803.

<sup>365</sup> Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23 *International Journal of Refugee Law [IJRL]* 174, 177.

<sup>366</sup> “NGOs back at sea to defend human rights” (26 November 2018) *InfoMigrants*.

<<https://www.infomigrants.net/en/post/13559/ngos-back-at-sea-to-defend-human-rights?>> <date accessed: 30.08.19>.

<sup>367</sup> The UNHCR Executive Committee of the High Commissioner’s Program, Interception of Asylum Seekers and Refugees, “International Framework and Recommendations for a Comprehensive Approach” (18<sup>th</sup> Meeting) Doc. EC/50/SC/CRP.17 (9 June 2000), para 10.

<<https://www.unhcr.org/4aa660c69.pdf>> <date accessed: 24.08.19>.

<sup>368</sup> Cf. 326. Article 6 ICCPR.

<sup>369</sup> See the UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, UNTS, vol 189, p13.

<<https://www.unhcr.org/uk/3b66c2aa10>> <date accessed 24.08.19>.

virtue of the Human Rights Committee General Comment 36.<sup>370</sup> This includes the mandate that states are also responsible for the right to life of people who are “outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.”<sup>371</sup>

This perhaps provides a more established answer on the extraterritorial application of human rights in international law and the actions of states. The new ICCPR adoption reinforces the case of the *Hirsi* ruling, that even if an action, in this case, rescue, falls outside the territory of a state, that state still has an obligation to ensure that it meets its obligations under human rights law – the right to life. Therefore, it could mean that if states do not effectively maintain SRRs and MCCRs, the ICCPR application of the right to life would include refugees and migrants who were in distress and not rescued at sea. SRRs and MCCRs may be interpreted as “other activities” that, if not conducted, would “impact[...]...direct[ly] and reasonably foreseeable manner.”<sup>372</sup> This interpretation allows for the right to life to fall within the duty to rescue or render assistance because not doing so would be a violation, especially if states and/or vessels of any kind are in a position to help. In addition, the ICCPR also warrants protection from being returned to Libya, or anywhere else, because the right of non-refoulement extends to “individuals” at risk of “torture or cruel, inhuman or degrading punishment”<sup>373</sup>. However, there is contention as to whether refusals to enter port amount to refoulement since sovereignty permits states to dictate who may or may not enter its territory.<sup>374</sup> Therefore, it may be a weak argument to assume non-refoulement also falls under the ICCR’s “right to life” adoption. Although, Barnes’ interpretation predates the new adoption, so there is a possibility to stretch the right to life principle to include the right to be rescued up until a place of safety is reached and thereby fulfilling the principle of non-refoulement. Therefore, NGO SAR vessels would be following this law by ensuring that rescued people are landed in places where they would not suffer such treatment and the current stance of most EU states is going against this.

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<sup>370</sup> “General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life\*” (30 October 2018) CPR/C/GC/36.

<[https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf)> <date accessed: 30.08.19>.

<sup>371</sup> *Ibid.* para 63.

<sup>372</sup> *Ibid.*

<sup>373</sup> *Cf.* 352. Klein, 800.

Article 7 ICCPR has also been interpreted to similar effect. UN Human Rights Committee, “General Comment No. 20, Article 7”, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), para 9.

<<http://hrlibrary.umn.edu/gencomm/hrcom20.htm>> <date accessed: 30.08.19>.

<sup>374</sup> *Cf.* 23. Barnes, 64.

*Cf.* 76. *Hirsi*, [73].

Combined with the ICCPR, Article 98 may be able to make a case for the right to life to be read under the LOSC, even if it is not directly a human rights treaty. This is supported the case of *Medvedyev and Others v France*,<sup>375</sup> which stated that “the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction”.<sup>376</sup> The ruling focused on the legality of the detention of a Cambodian vessel intercepted by French authorities. The ECtHR ruled that escorting a vessel, even with the flag state’s consent, constituted the detained vessel and crew coming under the protection of the ECHR.<sup>377</sup> This means that the human rights obligations of states would not only apply onboard their own vessels, but on others that they exercise control over.

However, Papastavridis has a different view of the extra-territorial application of human rights law. He states the duty of flag states to follow human rights law at sea stems from their duty uphold “the legal order of the oceans...because they have to abide by their separate obligations under” national human rights law.<sup>378</sup> The law of the sea and human rights law propose separate and different obligations and applications, and both Barnes and Papastavridis believe that reading one within the other “stands on tenuous legal grounds”.<sup>379</sup> This is because it is unclear when jurisdictional responsibilities begin for private vessels when human rights law is used within the context of SAR operations under the LOSC, as it seems that this is not difficult to ascertain this for the SAR operations undertaken by the flag state and its vessel.<sup>380</sup> For NGO SAR vessels there is some evidence to suggest that their interpretation of jurisdictional responsibilities under the flag states begin at the point a refugee/migrant boat is spotted or a distress call is received, hence why most are flagged and registered under EU states since they tend to have stronger adherence to the ECHR and ICCPR, amongst other human

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<sup>375</sup> *Medvedyev and Others v France* [Grand Chamber] App no 3394/03 (ECtHR, 29 March 2010).

<sup>376</sup> *Ibid.* [81].

<sup>377</sup> *Ibid.* [67].

<sup>378</sup> Papastavridis, Efthymios, “The Latest (and hopefully last) Boat Tragedy. Is There a Right to be Rescued at Sea? – A Skeptical View” (23 June 2014).

<<http://www.qil-qdi.org/is-there-a-right-to-be-rescued-at-sea-a-skeptical-view/>> <date accessed 30.08.19>.

See also Papastavridis, Efthymios “European Convention of Human Rights and the Law of the Sea: the Strasbourg Court in Unchartered Waters?”, in Fitzmaurice, Malgosia, Merkouris, Panos (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff 2013) 117, 119–121.

<sup>379</sup> Barnes, Richard, “The International Law of the Sea and Migration Control”, in Mitsilegas, Valsamis and Ryan, Bernard (eds), *Extraterritorial Immigration Control* (Brill 2010) 103, 112.

Wouters, Karel and den Heijer, Marteen, “The *Marine I* Case: A Comment” (2010) 22 *International Journal of Refugee Law* 1, 6.

All found in: Papastavridis, Efthymios (23 June 2014) <<http://www.qil-qdi.org/is-there-a-right-to-be-rescued-at-sea-a-skeptical-view/>> <date accessed 30.08.19>.

<sup>380</sup> *Cf.* 378. Papastavridis.

rights law treaties.<sup>381</sup> However, there is no firm answer in case law or state practice, in the context of private or other types of vessels, given the lack of both sources of law having little to no consistency or examples to show how far SAR jurisdictional responsibilities would reach. But, Papastavridis does concede that “that human rights law applies, at least in principle, to the rescue of such persons on the high seas. Nevertheless, it is not so evident when these treaties start applying.”<sup>382</sup> This seems to hold, the LOSC, SOLAS and the MSRC show there is a duty to rescue and render assistance, states and NGOs have different interpretations on how they apply.

Trevisanut uses ECtHR case law to analyse that there is a “positive obligation”<sup>383</sup> for states to rescue and uphold the right to life in emergencies, including SAR activities.<sup>384</sup> She argues that states have the obligation to preserve life, as well as to ensure that they do not cause the loss of life accidentally or deliberately.<sup>385</sup> She uses two cases to show that the ECtHR imposes a positive obligation for states to act in situations that are known to them. This was shown in the *Furdik v Slovakia* case, “where it ha[d] been brought to the notice of the authorities that the life or health of an individual [was] at risk on account of injuries sustained as a result of an accident”.<sup>386</sup> In a similar case, *Kemaloglu v Turkey*, the ECtHR ruled that the state was responsible for the life of a child who froze to death because the school district failed to pick the child up and they had to walk home.<sup>387</sup> Trevisanut concludes that the right to life is invoked and creates a “jurisdictional link” at the point a person becomes in distress or “a third party who notices the distress situation launches a distress call”.<sup>388</sup> This interpretation appeals to the same language as in SOLAS: the “master of a ship...on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance...” (emphasis added).<sup>389</sup> For the current crisis in the CMS, the authorities would be MRCCs, NGO SAR and flag state vessels, as well as coastal and port states, all of whom are aware of the risk refugee and migrant boats face. However, as explained above, a drawback to Trevisanut’s analysis is that the duties to render assistance and rescue at sea were not intended to deal with the ongoing

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<sup>381</sup> Cf. p24 2.4 and p35 3.3.

<sup>382</sup> Cf. 378. Papastavridis.

<sup>383</sup> See *Osman v the United Kingdom*, 28 October 1998, [115], *Reports of Judgments and Decisions* 1998 VIII.

<sup>384</sup> Cf. 275. Trevisanut.

<sup>385</sup> *L.C.B. v the United Kingdom*, Application no. 14/1997/798/1001 (ECtHR, 9 June 1998), [36], *Reports of Judgments and Decisions* 1998 III.

Cf. 275. Trevisanut.

<sup>386</sup> b) The Court’s assessment (ii) The principles relevant to the instant case. *Milan Furdik v Slovakia*, (Admissibility decision) Application no. 42994/05 (ECtHR, 2 December 2008).

<sup>387</sup> See generally *Kemaloglu v Turkey*, Application no. 19986/06 (ECtHR, 10 April 2012).

<sup>388</sup> Cf. 275. Trevisanut.

<sup>389</sup> Cf. 21. Regulation 33 (1) SOLAS 1974.

crisis. The two ECtHR judgements deal with emergencies that had discernible ends, whereas the crisis in the CMS seems to only increase and worsen.

### 3.5 Conclusion

From the analysis of Article 98, there is evidently a legal basis for flagged vessels to render assistance and to rescue at sea. SOLAS and the MSRC go further than the LOSC by stating that a master is “*bound*” (emphasis added) to render assistance<sup>390</sup> and take people to “a place of safety”.<sup>391</sup> There is, however, scholarly disagreement as to the existence and scope of an obligation to rescue/be rescued.<sup>392</sup> SAR NGOs vessels align themselves more closely with human rights obligations. The right to life can be interpreted with the principles enshrined under SOLAS and MSRC, to save life at sea. States seem less willing to read human rights obligations within the context of their maritime duties. This may be due to reluctance to allow vessels with refugees and migrants to port. Article 98 not only focuses on the responsibilities of flag state vessels,<sup>393</sup> but also those of coastal states.<sup>394</sup> There is no list detailing who may or may not qualify for rescue or assistance, which supports the notion that flag, coastal and port states have a duty to undertake SAR operations and facilitate those who have been rescued by landing them at places of safety. The ECtHR rulings also support the application of a positive legal obligation on the right to be rescued at sea. This follows the right to life principle outlined in Article 6 ICCPR and Article 2 ECHR. The ECtHR demonstrates that human rights obligations do apply when jurisdictional control has been established. This could inform state practice in the future. Flag, coastal and port states may challenge or follow the ECtHR. This may eventually answer the reach of the right to be rescued or the duty to render assistance will reach. For now, it seems that legal instruments and case law are at odds with current practices in the CMS, at least in terms of non-NGO SAR vessels.

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<sup>390</sup> *Ibid.*

<sup>391</sup> *Cf.* 159. Points 2.1.10 & 1.3.2 MSRC.

<sup>392</sup> *Cf.* The opinions above of Proelß, Barnes, Ratcovich etc.

<sup>393</sup> *Cf.* 14. Article 98 (1) LOSC.

<sup>394</sup> *Cf.* 14. Article 98 (2) LOSC.

## Chapter 4 Final Remarks

### 4.1 Final Remarks

This thesis has highlighted the current laws relating to flag state responsibilities and their duties to render assistance/rescue at sea. It applied these laws to the refugee and migrant situations in the CMS and the NGO SAR vessels helping them. It has also examined the scope of extra-territorial and positive obligations for states to apply the right to life to law the LOSC. The final remarks chapter will summarise and conclude the analysis of Articles 94 and 98, as well as the application of human rights law to maritime law.

From the analysis of Article 94, using scholarly opinion, it can be concluded that flag states' have an obligation to render assistance and save life at sea.<sup>395</sup> This can be seen in the ordinary meaning and object and purpose of the VCLT<sup>396</sup> being applied to the LOSC and IMO Regulations. The duty to rescue is clarified in SOLAS,<sup>397</sup> the MSRC<sup>398</sup> and the Salvage Convention.<sup>399</sup> The fact that there is an increase in the number of refugee and migrant casualties is not a reason for flag states to not act in accordance with their duties to navigate safely, avoid collisions and save life at sea.<sup>400</sup> The difficulty arises, not in establishing the duties of flag states and their vessels to rescue and render assistance, but ensuring that proper jurisdictional control is exercised. It has been shown that there is a lack of enforcement jurisdiction from flag states to hold their vessels to account when they do not render assistance to/rescue people in distress at sea.<sup>401</sup>

A way to resolve this issue may be to implement similar port state controls used to tackle IUU fishing.<sup>402</sup> Port states, within an SRR or that are an MRCC, would be in a position to know the number of flagged vessels within these areas. They may also receive distress calls from NGO SAR vessels or some refugee and migrant boats with radio phones or signalling equipment. Therefore, if these refugee and migrant boats or NGO SAR vessels are not rescued

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<sup>395</sup> Cf. 265. Papanicolopulu, 494.

Cf. 22. de Vattel, 170.

<sup>396</sup> Cf. 26. Article 31 and 32 VCLT.

<sup>397</sup> Cf. 21. SOLAS 1974.

<sup>398</sup> Cf. 159. MSRC.

<sup>399</sup> Cf. 168 Salvage Convention.

Cf. 265. Papanicolopulu, 493–494

<sup>400</sup> Ibid. Three Conventions above.

<sup>401</sup> Cf. 265. Papanicolopulu, 514.

<sup>402</sup> Cf. 113.

or assisted, the port state could notify the flag state. Any vessel that had failed to act could be sanctioned if the flag state enforces its jurisdiction in a timely manner, or by the port state if it does not. In this way, the unwillingness of flag states to target and prosecute their vessels that do not act in accordance with Articles 94 and 98 could potentially be resolved.<sup>403</sup> This is because when vessels are looking to register with a flag state they take into account inspections, hindrances and detentions a flag state has and its list classification.<sup>404</sup> A high number of these may dissuade vessels from registering because port state measure would prove cumbersome to effective and efficient maritime activities, which could affect profit.<sup>405</sup>

Another way to help ensure flag states and vessels act in accordance with their duties under the above-mentioned maritime treaties could be to create annexes or amendments to them to include training for masters and crew in how to handle refugee and migrants found at sea and endanger of being lost. If the aftermath of the *Titanic* incident is anything to go by a lot of issues in the CMS could be resolved by better procedures on what to do when encountering refugee and migrant boats in distress at sea. The current FRONTEX Guidelines do not bind EU states. This means that they only apply when SAR plans are conducted under FRONTEX, but not for individual EU states when they are acting as SRRs or MCCRs.<sup>406</sup> There needs to be wider application for these guidelines and the IMO should release some rules for flag state vessels to follow. This would also be helpful to strengthen the position of NGO SAR vessels that face hostility when trying to make port with rescued refugees and migrants onboard. The news of arrests and detentions of NGO SAR vessels that are operating in the CMS are possibly dissuading other type of vessels from rendering assistance or rescuing, for fear they would be subject to prosecution and criminal punishment, not to mention losing their jobs. The introduction of standards detailing the responsibilities of port states to allow refugees and migrants to disembark would make this easier.

However, this is unlikely to be within the remit of the IMO, since national law govern how port states operate. The *Preamble* of the *Protocol Against the Smuggling of Migrants by Land, Sea and Air* emphasises the need for states to tackle the reasons why refugees and

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<sup>403</sup> Davies, Martin “Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea” *Pacific Rim Law & Policy Journal*, vol 12, no 1, 2003, 125–126.

<sup>404</sup> Paris MoU Current Detentions.

[www.parismou.org/detentions-banning/current-detentions](http://www.parismou.org/detentions-banning/current-detentions) <date accessed: 30.08.19>.

<sup>405</sup> *Deutsche Flagge – Federal Ministry of Transport and Digital Infrastructure*.

<https://www.deutsche-flagge.de/en/pscen/ranking/ranking#Implications%20of%20rankings> <date accessed 30.08.19>.

<sup>406</sup> Cf. 312. FRONTEX 2019 Update.

migrants move.<sup>407</sup> This may mean that the EU needs to reach a consensus not only on the issue of landing refugee and migrant boats, but also on how best to redistribute and manage people once on land, whilst maintaining the appropriate protection under the ICCPR and ECHR.

The analysis of Article 98 shows that whilst there is no doubt that the duty to render assistance is part of international law and creates a legal obligation for vessels to act when they are in a position to do so. However, current state application of it leaves a lot to be desired. The *Tampa*, *Alan Kurdi* and *Aquarius* cases all show different elements and problems in the rendering assistance and rescuing process. *Aquarius* shows what happens when NGO SAR vessels fall foul of flag state registries and port state actions. *Alan Kurdi* highlights the problems vessel masters face when trying to deliver refugees and migrants to a place of safety. *Tampa* emphasises that when even commercial ships do the right thing and fulfil their Article 98 obligations they are unable to continue on their voyage because states are reluctant to allow refugees and migrants on their territory. Although, one thing that was not dwelt on, due to length limits, is that states should also play a part in controlling and suppressing human trafficking and smuggling rings.<sup>408</sup> Yet, if migrant and refugees boats are suspected of such behaviour,<sup>409</sup> they may face difficulties continuing their journey.<sup>410</sup> There have also been instances of NGOs being accused of and arrested for smuggling and trafficking by rescuing refugees and migrants.<sup>411</sup> This double application of the law seems to go against the object and purpose of Article 98 for the latter case. Refugees and migrants are the victims of crime and the NGOs that help them are not perpetuating the problem. Even the IMO has acknowledged that refugees and migrants have no other choice but to use the services of human traffickers and

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<sup>407</sup> *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (2000).

<[https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM\\_Protocol\\_English.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf)> <date accessed 30/08/19>.

<sup>408</sup> *Ibid.* Article 8.

<sup>409</sup> *Ibid.* Article 8 (2).

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<<http://www.imo.org/en/OurWork/Facilitation/personsrescued/Pages/Default.aspx>> <date accessed 30.08.19>.

<sup>410</sup> Travis, Alan, “UK warship will be used to ‘board, seize and divert’ refugee boats” (16 September 2016) *The Guardian*. <<https://www.theguardian.com/world/2015/sep/16/royal-navy-warship-could-target-people-smugglers-in-mediterranean>> <date accessed 30.08.19>.

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<[https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/smuggling\\_and\\_trafficking\\_rights\\_and\\_intersections\\_1.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/smuggling_and_trafficking_rights_and_intersections_1.pdf)> <date accessed 30.08.19>.

<sup>411</sup> French, Piper “Rescue a Refugee: Get Charged With Trafficking?” (5 March 2019) (5 March 2019) *The New Republic*. <<https://newrepublic.com/article/153216/rescue-refugee-get-charged-trafficking>> <date accessed 30.08.19>.

smugglers because there are no legal channels available to them and their situations are urgent.<sup>412</sup>

The ECtHR has ruled that states have a positive obligation to protect the right to life of people in situations where it can be shown they have or should have some knowledge of the situation<sup>413</sup> or exercise some jurisdictional control.<sup>414</sup> Even though the LOSC is not an IHRL treaty, the inclusion of Article 98 represents the principles of saving life at sea. This has been shown to exist in ancient maritime law, customary international law and legal instruments. It recognises that facing peril at sea during peacetime, as well as wartime, calls for those in a position to help to do so.<sup>415</sup> This signifies that the LOSC encompasses the the right to life principle. This is because numerous regulations and guidelines have been created to implement the object and purpose of the LOSC. Therefore, it can be concluded that there is a positive legal obligation<sup>416</sup> to rescue and be rescued and the current actions of most flag, coastal and port states are not meeting these responsibilities. Finally, as Papanicolopulu eloquently puts it: [i]t is therefore still necessary to uphold the universal character of [the] duty [to render assistance] and its applicability to all vessels who navigate at sea, and to all coastal States, independently of a vessel's flag or the legal condition or circumstances of the persons involved."<sup>417</sup> Therefore, despite the challenges of flag, coastal and port states, no matter what, the duty to render assistance and to rescue should be upheld not only under the LOSC, but also as a manifestation of the right to life – saving life at sea.

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<sup>412</sup> 'The lack of legal routes leaves no choice for many men, women and children but to turn to smugglers, at enormous cost and danger to their lives.' "The sea route to Europe: Mediterranean passage in the age of refugees" UN Refugee Agency (1 July 2015)

<[http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/UNHCR\\_The%20sea%20route%20to%20Europe\\_The%20Mediterranean%20pasage%20in%20the%20age%20of%20refugees.pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/UNHCR_The%20sea%20route%20to%20Europe_The%20Mediterranean%20pasage%20in%20the%20age%20of%20refugees.pdf)> <date accessed 30.08.19>.

<sup>413</sup> Cf. 388. *Kemaloglu* case.

Cf. 383. *Osman* case.

<sup>414</sup> Cf. 76. *Hirsi* case.

<sup>415</sup> Cf. 265. See generally Papanicolopulu.

<sup>416</sup> Cf. 352. It "has enshrined in Article 98 the fundamental obligation to render assistance to those in distress at sea." Klein, 796.

<sup>417</sup> Cf. 265. Papanicolopulu, 513–514.

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## *Appendix*

Law of the Sea Convention 1982

a)

*Article 91*

*Nationality of ships*

1. Every 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.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

b)

*Article 94*

*Duties of the flag State*

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. In particular every State shall:
  - (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
  - (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
  - (a) the construction, equipment and seaworthiness of ships;
  - (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
  - (c) the use of signals, the maintenance of communications and the prevention of collisions.
4. Such measures shall include those necessary to ensure:
  - (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
  - (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is

appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

c)

#### *Article 98*

##### *Duty to render assistance*

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

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

## SOLAS 1948

d)

### *Regulation 10*

#### Distress Messages - Procedure

(a) The master of a ship at sea, on receiving a signal from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress.

(b) The master of a ship in distress, after consultation, so far as may be possible, with the masters of the ships which answer his call for assistance, has the right to requisition such one or more of those ships as he considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress.

(c) The master of a ship shall be released from the obligation imposed by paragraph (a) of this Regulation when he learns that one or more ships other than his own have been requisitioned and are complying with the requisition.

(d) The master of a ship shall be released from the obligation imposed by paragraph (a) of this Regulation, and, if his ship has been requisitioned, from the obligation imposed by paragraph (b) of this Regulation, if he is informed by the persons in distress or by the master of another ship which has reached such persons that assistance is no longer necessary.

(e) The provisions of this Regulation do not prejudice the International Convention for the unification of certain rules with regard to Assistance and Salvage at Sea, signed at Brussels on the 23<sup>rd</sup> September 1910,<sup>(5)</sup> particularly the obligation to render assistance imposed by Article 11 of that Convention.

e)

## SOLAS 1974

### Regulation 29 - Life-saving signals to be used by ships, aircraft or persons in distress

An illustrated table describing the life-saving signals\* shall be readily available to the officer of the watch of every ship to which this chapter applies. The signals shall be used by ships or persons in distress when communicating with lifesaving stations, maritime rescue units and aircraft engaged in search and rescue operations. \* Such life-saving signals are described in the International

Aeronautical and Maritime Search and Rescue Manual (IAMSAR) Vol.III, Mobile Facilities and illustrated in the International Code of Signals, as amended pursuant to resolution A.80(IV).

f)

Regulation 33 - Distress messages: Obligations and procedures

- 1) The master of a ship at sea which is in a position to be able to provide assistance on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization, to inform the appropriate search and rescue service accordingly.
- 2) The master of a ship in distress or the search and rescue service concerned, after consultation, so far as may be possible, with the masters of ships which answer the distress alert, has the right to requisition one or more of those ships as the master of the ship in distress or the search and rescue service considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress.
- 3) Masters of ships shall be released from the obligation imposed by paragraph 1 on learning that their ships have not been requisitioned and that one or more other ships have been requisitioned and are complying with the requisition. This decision shall, if possible be communicated to the other requisitioned ships and to the search and rescue service.
- 4) The master of a ship shall be released from the obligation imposed by paragraph 1 and, if his ship has been requisitioned, from the obligation imposed by paragraph 2 on being informed by the persons in distress or by the search and rescue service or by the master of another ship which has reached such persons that assistance is no longer necessary.
- 5) The provisions of this regulation do not prejudice the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by article 11 of that Convention.\* \* International Convention on Salvage 1989 done at London on 28 April 1989 entered into force on 14 July 1996.